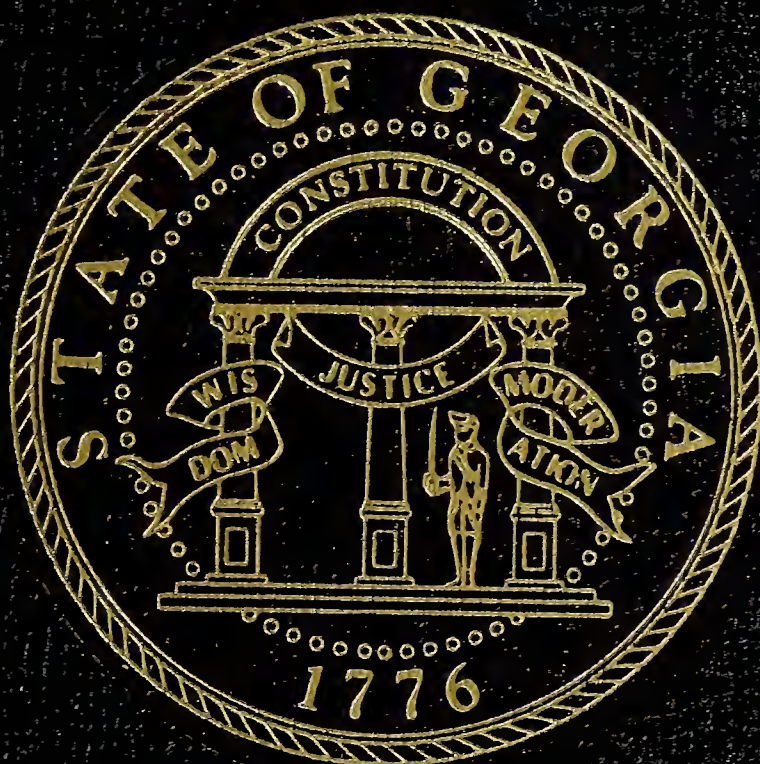


**OFFICIAL CODE
OF
GEORGIA**

ANNOTATED



VOLUME 16

Title 18. Debtor and Creditor
Title 19. Domestic Relations

2015 Edition



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With Provision for Subsequent Pocket Parts

Prepared by

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and
The Editorial Staff of LexisNexis®



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Volume 16 **2015 Edition**

Title 18. Debtor and Creditor

Title 19. Domestic Relations

Including Acts of the 2015 Session of the General Assembly of Georgia
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and the Georgia Appeals Reports

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Charlottesville, Virginia

2015

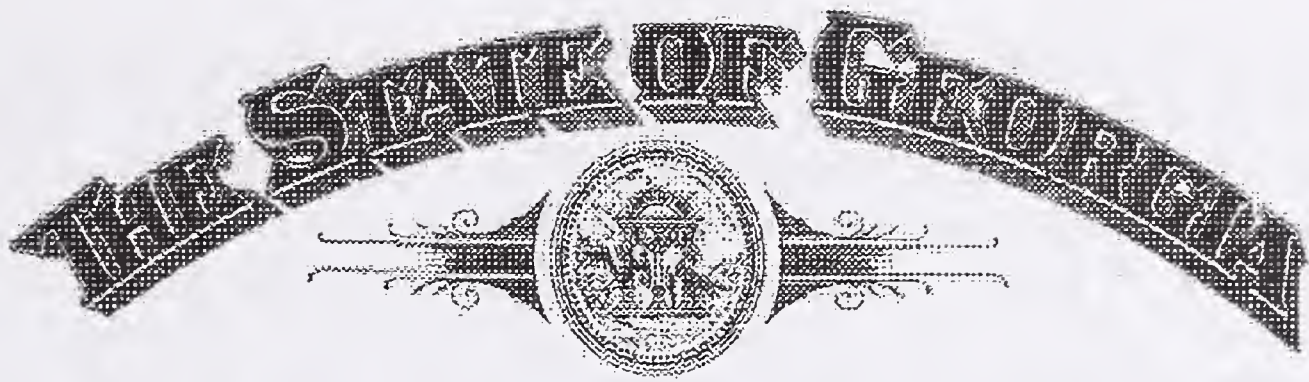
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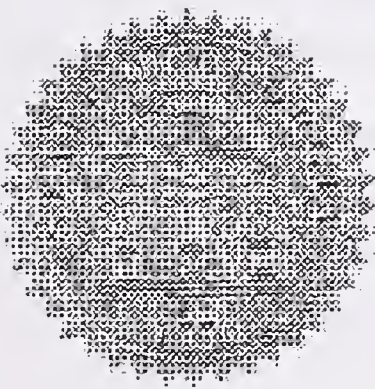


OFFICE OF SECRETARY OF STATE

**I, Brian P. Kemp, Secretary of State of the
State of Georgia, do hereby certify that**

the statutory portion of the Official Code of Georgia Annotated contained
in this volume is a true and correct copy of such material as enacted by
the General Assembly of Georgia; all as same appear of file and record in
this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed
the seal of my office, at the Capitol, in the City of Atlanta, this
10th day of July, in the year of our Lord Two Thousand and
Fifteen and of the Independence of the United States of
America the Two Hundred and Fortieth.



B. P. Kemp

Brian P. Kemp, Secretary of State

Preface

This volume cumulates and replaces the 2010 edition of Volume 16 of the Official Code of Georgia Annotated, as supplemented by the 2014 Cumulative Supplement. The 2010 Volume 16 and its 2014 Supplement may be recycled or, if so desired, retained for historical purposes. This volume contains all laws specifically codified in Titles 18 and 19 by the General Assembly through the 2015 Session. This volume also contains case annotations reflecting decisions posted to LexisNexis® through April 3, 2015. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LexisNexis® citations will be made.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; John Marshall Law Review; Mercer Law Review; Georgia State Bar Journal; American Law Reports; American Jurisprudence 2d; American Jurisprudence Pleading and Practice; American Jurisprudence Proof of Facts; American Jurisprudence Trials; Corpus Juris Secundum; and Uniform Laws Annotated. Also included, where appropriate, are cross references to the Official Code of Georgia Annotated.

This volume retains amendment notes and effective date notes for Acts passed during the 2013, 2014, and 2015 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2013 Session of the General Assembly, the user should consult the Georgia Laws.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.

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Rights as between creditors of fraudulent grantor, where one or more of them, in payment of or as security for his debt, receives deed or mortgage from fraudulent grantee, 114 ALR 406.

To whom must acknowledgment, new promise, or payment be made in order to

toll statute of limitations after creditor's death, 117 ALR 224.

Creditor's release of, or promise to release, guarantor as affected by existence or sufficiency of consideration, 126 ALR 1241.

Right of one whose property without his consent was fraudulently or mistakenly applied to an indebtedness for which he was not responsible, to be subrogated to creditor's rights or security held by him, 129 ALR 196.

Bankruptcy of debtor as affecting necessity of compliance with conditions precedent to enforcement of bond in attachment or other judicial proceeding, 130 ALR 1162.

Discharge in bankruptcy of one spouse as bar to satisfaction of obligation of both spouses out of property owned by them by entireties, 130 ALR 1244.

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Gift of debt to debtor, 63 ALR2d 259.

Creditor's participation in alleged act of bankruptcy as precluding him from filing or joining in involuntary petition, 6 ALR3d 476.

Validity and effect of agreement that debt or legal obligation contemporaneously or subsequently incurred shall be canceled by death of creditor or obligee, 11 ALR3d 1427.

Liability of director or dominant shareholder for enforcing debt legally owed him by corporation, 56 ALR3d 212.

Garnishee's duty to give debtor notice of garnishment prior to delivery of money without judgment against the garnishee on the debt, 36 ALR4th 824.

18-2-1. Creation of relationship of debtor and creditor.

Whenever one person, by contract or by law, is liable and bound to pay to another an amount of money, certain or uncertain, the relation of debtor and creditor exists between them. (Orig. Code 1863, § 1946; Code 1868, § 1934; Code 1873, § 1944; Code 1882, § 1944; Civil Code 1895, § 2686; Civil Code 1910, § 3215; Code 1933, § 28-101.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

BANK DEPOSITS

ALIMONY

General Consideration

O.C.G.A. § 18-2-1 gives generic meaning of term "creditor." — While generic meaning of term "creditor," was defined by former Civil Code 1910, § 3215 (see now O.C.G.A. § 18-2-1), it was used in former Civil Code 1910, § 2220 (see now O.C.G.A. § 14-4-63) in its more circumscribed and ordinary meaning as denoting a holder of an obligation arising ex contractu. *Howard v. Long*, 142 Ga. 789, 83 S.E. 852 (1914).

Liability for conversion included. — Relationship of debtor and creditor is defined broader than is generally supposed, and would seem to include liability for wrongful conversion of property for which trover would lie. *Banks v. McCandless*, 119 Ga. 793, 47 S.E. 332 (1904).

Liability for trespass. — Words "liable and bound by law to pay another an amount of money, certain or uncertain," certainly were broad enough to embrace a person liable to pay for trespass, and that before amount of trespass, or extent of damage, was ascertained; for the words were, "an amount of money, certain or uncertain." *Powell v. Westmoreland*, 60 Ga. 572 (1878).

Relation between stock certificate holder and issuing association. — True relation between holder of certificate of stock in loan and building association and association is neither more nor less than that of debtor and creditor. *Cook v. Equitable Bldg. & Loan Ass'n*, 104 Ga. 814, 30 S.E. 911 (1898); *Cashen v. South-*

ern Mut. Bldg. & Loan Ass'n, 114 Ga. 983, 41 S.E. 51 (1902).

Right to set aside fraudulent transfers. — Former Civil Code 1933, §§ 28-101, 28-102, 28-201, and 28-202 (see now O.C.G.A. § 18-2-1, 18-2-20, 18-2-22 and 18-2-23 [see now, also, O.C.G.A. § 18-2-70]) provide creditors with the right to set aside fraudulent transfers, and this remedy was available to any creditor at time of transfer who thereafter reduces the creditor's claim to judgment lien. *United States v. Hickox*, 356 F.2d 969 (5th Cir. 1966).

Renunciation of lien privileges. — Judgment creditor may lose, surrender, or waive benefit of creditor's lien by renunciation of privileges secured by such lien. *Law v. Coleman*, 173 Ga. 68, 159 S.E. 679 (1931).

Principal of dissolved corporate business still subject to unliquidated claim. — Unliquidated tort claims by a customer against a car dealership survived as a debt owed to the customer by the principal of the dealership, to whom the dealership had conveyed the dealership's assets while insolvent; furthermore, the principal's responses to and filing of summary judgment motions, and participation in the lawsuit in other ways, waived any objections to the trial court's exercise of personal jurisdiction. *Hodge v. Howes*, 260 Ga. App. 107, 578 S.E.2d 904 (2003).

Cited in *Watson v. Whatley*, 218 Ga. 86, 126 S.E.2d 621 (1962); *First Nat'l Bank & Trust Co. v. Kunes*, 230 Ga. 888, 199

S.E.2d 776 (1973); *Redman Indus., Inc. v. Tower Properties, Inc.*, 517 F. Supp. 144 (N.D. Ga. 1981); *Threatt v. Forsyth County*, 262 Ga. App. 186, 585 S.E.2d 159 (2003).

Bank Deposits

Debtor/creditor relationship between bank and depositor. — When money is placed in bank on general deposit, title passes immediately to the bank, and the relation of the debtor and creditor is thereby created between the bank and the depositor. *Foster v. People's Bank*, 42 Ga. App. 102, 155 S.E. 62 (1930).

Ordinarily, when checks or drafts are endorsed and deposited in a bank, the presumption is that the title does not pass and the relation of debtor and creditor does not exist until the collection has been made. *Foster v. People's Bank*, 42 Ga. App. 102, 155 S.E. 62 (1930).

When checks or drafts are received on deposit by the bank with the intention that the checks or drafts be treated as cash, title passes immediately to the bank and the relationship of the debtor and the creditor is established between the bank and the depositor. *Foster v. People's Bank*,

42 Ga. App. 102, 155 S.E. 62 (1930).

Alimony

Spouse owed alimony is "creditor." — Willful failure to provide for maintenance and support of spouse and children creates a lawful demand which, when legally enforced, was called alimony, and spouse to whom alimony was due is a creditor within the meaning of this section. *Carter v. Bush*, 216 Ga. 429, 116 S.E.2d 568 (1960) (see O.C.G.A. § 18-2-1).

Proceeding by spouse to set aside conveyance. — Under former Code 1933, §§ 28-101 and 28-201 (see now O.C.G.A. §§ 18-2-1 and 18-2-22 (repealed)), wife may bring equitable proceeding to cancel and set aside conveyance of property made by her husband with intent to defeat recovery by her of alimony, and such proceeding will lie against grantee of husband, who took with knowledge of such intention or with reasonable grounds to suspect such intent. A different result is not required by Ga. L. 1950, p. 365, § (see now O.C.G.A. § 19-5-7), relating to filing of lis pendens notice, since the grantee was not an innocent purchaser. *Wood v. McGahee*, 211 Ga. 913, 89 S.E.2d 634 (1955).

RESEARCH REFERENCES

ALR. — Acceptance of cashier's check from debtor as absolute or conditional payment, 36 ALR 470; 42 ALR 1353; 45 ALR 1487.

Title to commercial paper deposited by customer of bank to his account, 99 ALR 486.

What is an action for "debt" within attachment or garnishment statute, 12 ALR2d 787.

Rule denying relief to one who conveyed his property to defraud his creditors as applicable where the threatened claim which occasioned the conveyance was paid or was never established, 21 ALR2d 589; 6 ALR4th 862.

Creditor's acceptance of obligation of third person as constituting novation, 61 ALR2d 755.

Unsolicited mailing, distribution, house call, or telephone call as invasion of privacy, 56 ALR3d 457.

Liability of creditor for excessive attachment or garnishment, 56 ALR3d 493.

Rule denying recovery of property to one who conveyed to defraud creditors as applicable where the claim which motivated the conveyance was never established, 6 ALR4th 862.

Spouse's liability, after divorce, for community debt contracted by other spouse during marriage, 20 ALR4th 211.

18-2-2. Compulsory election of remedy least likely to jeopardize rights of other creditors.

As among themselves, creditors shall so prosecute their own rights as not to jeopardize unnecessarily the rights of others; hence, a creditor having a lien on two funds of the debtor, equally accessible to him, will be compelled to pursue the one on which other creditors have no lien. (Orig. Code 1863, § 1951; Code 1868, § 1939; Code 1873, § 1949; Code 1882, § 1949; Civil Code 1895, § 2691; Civil Code 1910, § 3220; Code 1933, § 28-106.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

LIMITATION ON COMPULSORY ELECTION

General Consideration

For illustration of application of statute, see *Richardson v. Conn*, 100 Ga. 39, 27 S.E. 978 (1896), overruled insofar as inconsistent with *Love v. Goodson*, 150 Ga. 46, 102 S.E. 429 (1920).

Doctrine of two funds applies only when contending creditors have a common debtor. *Carter v. Neal*, 24 Ga. 346, 71 Am. Dec. 136 (1858).

Rule of this statute does not apply between debtor and creditor. *Union Point Ginnery & Co. v. Harriman Nat'l Bank*, 142 Ga. 727, 83 S.E. 657 (1914).

Mortgagees cannot charge other mortgagees of equal rank with solvent collaterals unless those mortgagees have collected the collateral. *Vance & Kirby v. Roberts*, 86 Ga. 457, 12 S.E. 653 (1890).

Limit on mortgage creditor's rights as against transferee of tax execution. — In equity, mortgage creditor as against transferee of tax execution is not entitled to have satisfaction of mortgage debt with property the value of which exceeds indebtedness. *Thompson v. Harris*, 177 Ga. 53, 169 S.E. 349 (1933).

When one creditor abandons claim against one fund. — When one creditor, in order to bring fund into court, abandons claim on other property, equity will not permit another creditor, who has claim on the money and also on the property relinquished, to take money, but will remand

the creditor to the property, it being accessible to the creditor; especially so, when the creditor stood by, and took no part in a fight which resulted in a compromise verdict under which the fund was brought into court. *Sims v. Albea*, 72 Ga. 751 (1884).

Impact on other lien holders and debtor considered. — When a creditor held a second priority security interest in real estate while a bank held a first priority security interest in promissory notes and the real estate, marshaling under O.C.G.A. § 18-2-2 was enforced by subrogation in favor of the creditor after consideration of the impact on other lienholders and on the Chapter 11 debtor. *Customized Distrib., LLC v. Coastal Bank & Trust Co. (In re Lee's Famous Recipes, Inc.)*, No. 11-5482-BEM, 2013 Bankr. LEXIS 480 (Bankr. N.D. Ga. Jan. 24, 2013).

Cited in *Newsom v. McLendon*, 6 Ga. 392 (1849); *Johnson v. Lewis*, 8 Ga. 460 (1850); *Weed v. Gainesville, Jefferson & S.R.R.*, 119 Ga. 576, 46 S.E. 885 (1904); *Moore v. Cofield*, 10 Ga. App. 197, 73 S.E. 45 (1911); *Hardy v. Truitt*, 20 Ga. App. 529, 93 S.E. 149 (1917); *Ash v. Fitzgerald Cotton Oil Co.*, 27 Ga. App. 35, 107 S.E. 342 (1921); *NCR Co. v. Stubbs*, 29 Ga. App. 543, 116 S.E. 44 (1923); *Shemwell v. Garrett*, 159 Ga. 222, 125 S.E. 497, 36 A.L.R. 658 (1924); *Federal Land Bank v. Farmers' & Merchants' Bank*, 177 Ga. 505, 170 S.E. 504 (1933); *Nicholson v.*

Thurmond, 178 Ga. 457, 173 S.E. 391 (1934); Brown v. Smith, 50 Ga. App. 332, 178 S.E. 180 (1935); Thompson v. Harris, 181 Ga. 495, 182 S.E. 903 (1935); Irwin v. Willis, 202 Ga. 463, 43 S.E.2d 691 (1947); Keller v. Hand, 173 Ga. App. 829, 328 S.E.2d 431 (1985).

Limitation on Compulsory Election

Holder of mortgage, who purchased property in good faith. — Equity will not compel election by holder of mortgage, who purchased property in good faith, to protect the holder's title. Georgia Chem. Works v. Cartledge, 77 Ga. 547, 4 Am. St. R. 96 (1886).

Mortgagees holding defeasible deed without power to sell judgment lien. — Fact that mortgagees sought to be postponed had defeasible deed to certain realty from the debtor, would not compel the mortgagees to relinquish the mortgagees' lien upon money in hands of the sheriff to be distributed, and to proceed against the land, when the mortgagees had no judgment lien against the land, and it did not appear that the deed to them contained power authorizing them to sell the land for purpose of paying the debt. Vance & Kirby v. Roberts, 86 Ga. 457, 12 S.E. 653 (1890).

When second fund located out of state. — Creditor having two securities, one within this state, and one beyond the state, will not, at instance of a competing creditor holding junior lien on former security, be driven out of state to exhaust the creditor's security there before being allowed to proceed here. Denham v. Williams, 39 Ga. 312 (1869); Calloway v. People's Bank, 54 Ga. 572 (1875).

Limit on compulsory election. — Principles stated in former Code 1933, §§ 28-106 and 37-501 (see now O.C.G.A. §§ 18-2-2 and 23-1-24) did not mean that a creditor having priority against fund in court can be required to relinquish the creditor's direct claim thereon, and proceed at the creditor's own additional expense with delay in an independent suit upon an indemnifying bond from the

debtor, which does not by its terms protect the creditor seeking to compel such election. Savannah Bank & Trust Co. v. Meldrim, 195 Ga. 765, 25 S.E.2d 567 (1943).

Limit on scope of law in certain circumstances. — Equitable remedy of marshaling securities will not be so extended as to delay or inconvenience the creditor in collection of a debt secured by collateral notes by confining the creditor to particular collaterals at instance of one whose note is included among collaterals and who claims equitable set-off against the payee of the note. Hanesley v. National Park Bank, 147 Ga. 96, 92 S.E. 879 (1917).

When two creditors, not two funds of one creditor, are involved. — When one creditor holds a claim against two persons, and another creditor holds a claim against one of those two, equity will not compel the former creditor to proceed against that one of joint debtors against whom the latter creditor has no claim, in order that the funds of the debtor may be applied exclusively to the payment of the debtor's claim. Equity will never do this for the sake of the creditor who has a single claim, but will do it when it is equitable as between the two debtors that it should be done. Love v. Goodson, 150 Ga. 46, 102 S.E. 429 (1920).

Applicability to detriment of third person with equity equivalent to that of invoking creditor. — This section was subject to limitation that such marshaling must not be applied to detriment of third person with an equity equal to or greater than that of creditor seeking to invoke the rule. Beneficiaries of homestead have such equity and interest in homestead estate as to be within protection of this limitation. Mulherin v. Porter, 1 Ga. App. 153, 58 S.E. 60 (1907).

Doctrine of compulsory election style was inapplicable when sought to be applied to the detriment of a third person with an equity equal to or greater than that of the creditor seeking to invoke the rule. Northwest Atlanta Bank v. Manning, 193 Ga. 186, 17 S.E.2d 547 (1941).

RESEARCH REFERENCES

C.J.S. — 37 C.J.S., Fraudulent Conveyances, § 199.

18-2-3. Reaching of equitable assets by creditors.

Courts of equity jurisdiction shall assist creditors in reaching equitable assets in every case where to refuse interference would jeopardize the collection of their debts. (Orig. Code 1863, § 1948; Code 1868, § 1936; Code 1873, § 1946; Code 1882, § 1946; Civil Code 1895, § 2688; Civil Code 1910, § 3217; Code 1933, § 28-103.)

Law reviews. — For article, "Retirement Benefits: Protection from Creditors' Claims," see 24 Ga. St. B.J. 118 (1988).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION INTERESTS IN ESTATES

General Consideration

Injunctive relief to protect rights in endangered fund. — Judgment creditor was granted injunction and receiver in state court when only fund out of which the creditor could get the creditor's rights was in danger. *Merchants' & Planters' Nat'l Bank v. Trustees of Masonic Hall*, 63 Ga. 549 (1879).

Action by corporate creditor to hold one liable as trustee ex maleficio. — Petition in equity against corporation and individual states cause of action when it is alleged that the plaintiff is the creditor of a now insolvent corporation, and that the individual has converted to the individual's own use assets of the corporation in excess of the amount of the plaintiff's claim, leaving no other assets sufficient in amount with which to pay the corporate debt, and which suit seeks to hold liable individual as trustee ex maleficio. *Turner v. Tyson*, 211 Ga. 53, 84 S.E.2d 86 (1954).

Creditor can reach beneficiary's interest in trust unless exempt. — Creditors can bring a bill in equity to reach interest of beneficiary under a trust unless beneficiary's interest is exempt by terms of trust or by statute. The creditor

must exhaust legal remedies before proceeding in equity, but this requirement does not apply if it appears that an attempt to exhaust legal remedies would be futile. *Henderson v. Collins*, 245 Ga. 776, 267 S.E.2d 202 (1980).

Irrevocable trust. — Trust income from husband's irrevocable trust was subject to the wife's claims to the same extent any income of a spouse would be subject to the claims of the other spouse for alimony and distribution of property. *Speed v. Speed*, 263 Ga. 166, 430 S.E.2d 348 (1993).

Equity available in satisfaction of alimony debt. — Willful failure to provide for maintenance and support of spouse and children creates lawful demand which, when legally enforced, is called alimony, and is a debtor/creditor relation. Thus, the wife was a creditor at the time of the conveyances which are alleged to have been made to defeat her claim for alimony, although no alimony judgment had been rendered at the time and it would be inequitable and unjust not to allow her to maintain an action for judgment in rem against the husband's property when she was unable to obtain personal service due to the husband's will-

ful avoidance of service. *Carter v. Bush*, 216 Ga. 429, 116 S.E.2d 568 (1960).

Judgment creditor's right to appointment of receiver when prior judgment creditor holds deed to secure debt. — When debt secured by deed to secure debt was interest bearing and not due, and redemption under former Code 1933, §§ 39-201 and 39-202 (see now O.C.G.A. § 9-13-60) would cause the judgment creditor to lose substantial sum approximating an amount of unearned interest, the debtor having no other property from which to satisfy the judgment, the subsequent judgment creditor may proceed in equity for an appointment of the receiver for purpose of selling property subject to principal of debt and accrued interest. *Cook v. Securities Inv. Co.*, 184 Ga. 544, 192 S.E. 179 (1937).

Availability of cash surrender or loan value of life insurance. — Cash surrender and cash loan value of policy of life insurance accruing at end of specified tontine period is not subject to garnishment by creditors of insured; nor will such value be made available to judgment creditor of insured by court of equity in proceedings instituted for purpose of obtaining equitable relief analogous to process of garnishment at law. *F & M Bank v. National Life Ins. Co.*, 161 Ga. 793, 131 S.E. 902, 44 A.L.R. 1184 (1926).

Cited in *Turnipseed v. Schaefer*, 76 Ga. 109, 20 Am. St. R. 15 (1886); *Taylor Lumber Co. v. Clark Lumber Co.*, 33 Ga. App. 815, 127 S.E. 905 (1925); *Howard v. Pate*, 218 Ga. 741, 130 S.E.2d 752 (1963); *Banks v. Employees Loan & Thrift Corp.*, 112 Ga. App. 38, 143 S.E.2d 787 (1965); *Chatham County Hosp. Auth. v. Barnes*, 226 Ga. 508, 175 S.E.2d 854 (1970).

Interests in Estates

Reaching distributive share of estate to which insolvent debtor is entitled. — Court of equity will aid judgment creditor who has pursued the

creditor's legal remedies to every available extent, to reach distributive share of estate to which insolvent debtor is entitled in debtor's own right, in hands of administrator held in trust for such judgment debtor. *Dukes v. Cairo Banking Co.*, 220 Ga. 507, 140 S.E.2d 182 (1964).

Devisee of vested remainder entitled to equitable interference in suit by creditors. — To refuse equitable interference by appointment of receiver for devisee's interest in vested remainder, in suit by creditors against executor would "jeopard the collections" of debts, within meaning of former Civil Code 1910, § 3217. *Bank of Statesboro v. Waters*, 165 Ga. 848, 142 S.E. 156 (1928).

Equitable procedure for reaching assets after exhaustion of legal remedies. — Generally, if creditor exhausts the creditor's legal remedies against estate so as to entitle oneself to reach assets through court of equity, the creditor should obtain judgment and fieri facias which can be levied on goods of testator or intestate, and procure a return of nulla bona. *Lemon v. Thaxton*, 59 Ga. 706 (1877).

Effect of contingent interest of legatee. — When under will only bare contingency or possibility rather than present right or interest, legal or equitable, devolved upon "ultimate" legatee upon probate, judgment creditor of latter was not entitled to appointment of a receiver to sell interest of legatee and apply proceeds thereof to satisfaction of judgment. *Yancy v. Grafton*, 197 Ga. 117, 27 S.E.2d 857 (1943).

Statutory provisions for spouse's one year support (see now O.C.G.A. § 53-5-2) may not be used to defraud judgment creditors of widow's debtor son by attempting to assign as year's support the son's share of the estate, when this amount was far above the widow's legitimate needs for one year. *Dukes v. Cairo Banking Co.*, 220 Ga. 507, 140 S.E.2d 182 (1964).

RESEARCH REFERENCES

C.J.S. — 37 C.J.S., *Fraudulent Conveyances*, § 199.

ALR. — *Creditor's knowledge that*

stock is unpaid as affecting stockholders' liability, 7 ALR 972; 69 ALR 881.

Valuation of notes and accounts receiv-

able in determining question of insolvency or bankruptcy, 133 ALR 1274.

Jurisdiction, and propriety of its exercise, to require real property in another state or country to be applied in satisfaction of debt (including the setting aside of

a fraudulent conveyance thereof), 144 ALR 646.

Right of creditors of life insured as to options or other benefits available to him during his lifetime, 37 ALR2d 268.

ARTICLE 2

ACTS VOID AS AGAINST CREDITORS

RESEARCH REFERENCES

ALR. — Necessity of participation by the grantee or transferee in the fraud of the grantor or transferrer in order to avoid a voluntary conveyance or transfer as against creditors, 17 ALR 728.

Right of insolvent to insure life for benefit of relatives, 34 ALR 838.

Right of creditor or one representing him to recover money paid or property transferred by debtor on illegal consideration, 34 ALR 1297.

Right of creditor of heir to contest will, 46 ALR 1490; 128 ALR 963.

Scope and effect of statutory provisions extending debtor's exemptions to claims or proceeds of claims for personal injuries or death, 116 ALR 1481.

Right of creditors or their representatives to complain of a voluntary transfer or pledge of corporate assets by a corporation which subsequently becomes insolvent, 117 ALR 1263.

Rule denying relief to one who conveyed his property to defraud his creditors as applicable where the threatened claim which occasioned the conveyance was paid or was never established, 21 ALR2d 589; 6 ALR4th 862.

Conveyance or transfer in consideration of legal services, rendered or to be rendered, as fraudulent as against creditors, 45 ALR2d 500.

Right to follow chattel into hands of purchaser who took in payment of pre-existing debt, 11 ALR3d 1028.

Rule denying recovery of property to one who conveyed to defraud creditors as applicable where the claim which motivated the conveyance was never established, 6 ALR4th 862.

Purchase of annuity by debtor as fraud on creditors, 74 ALR6th 549.

18-2-20. Rights of creditors to be favored by courts.

The rights of creditors shall be favored by the courts; and every remedy and facility shall be afforded them to detect, defeat, and annul any effort to defraud them of their just rights. (Orig. Code 1863, § 1947; Code 1868, § 1935; Code 1873, § 1945; Code 1882, § 1945; Civil Code 1895, § 2687; Civil Code 1910, § 3216; Code 1933, § 28-102.)

JUDICIAL DECISIONS

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GENERAL CONSIDERATION ACTIONS

General Consideration

Rights to set aside fraudulent transfers. — Former Code 1933, §§ 28-101, 28-102, 28-201 and 28-202 (see now O.C.G.A. §§ 18-2-1, 18-2-20 and 18-2-70) provided the creditors with the right to set aside fraudulent transfers, and this remedy was available to any creditor at the time of transfer who thereafter reduced the creditor's claim to a judgment lien. *United States v. Hickox*, 356 F.2d 969 (5th Cir. 1966).

Intervention by former partner was authorized by former Code 1933 §§ 28-102 and 28-103 (see now O.C.G.A. §§ 18-2-20 and § 18-2-3, respectively) to wind up affairs since the partner's allegations were sufficient. *Sheppard v. Bridges*, 137 Ga. 615, 74 S.E. 245 (1912).

Interlocutory appointment of receiver under creditor's bill attacking voluntary assignment for fraud was not error. *Oliver & Co. v. Victor & Co.*, 74 Ga. 543 (1885).

Debtors cannot shift assets at will, giving creditors mere notice. — If not a violation of the letter of former Civil Code 1910, §§ 3216 and 3217 (see now O.C.G.A. §§ 18-2-20 and § 18-2-3, respectively) it would certainly not accord with their spirit and purpose to hold that a firm of debtors could shift their assets at will, and impose on their creditors duties by mere notice, but could prevent a creditor from accepting for the creditor's benefit the status which they had thrust upon the creditor for their own. *Sheppard v.*

Bridges, 137 Ga. 615, 74 S.E. 245 (1912).

One to whom alimony is due is creditor. — Willful failure to provide for the maintenance and support of spouse and children creates a lawful demand which, when legally enforced, is called alimony, and is a debtor/creditor relation. *Carter v. Bush*, 216 Ga. 429, 116 S.E.2d 568 (1960).

Cited in *Robert v. Tift*, 60 Ga. 566 (1878); *Daniel v. Prost*, 62 Ga. 697 (1879); *Orton v. Madden*, 75 Ga. 83 (1885); *Hood v. Perry*, 75 Ga. 310 (1885); *Turnipseed v. Schaefer*, 76 Ga. 109, 2 Am. St. R. 15 (1886); *Banks v. McCandless*, 119 Ga. 793, 47 S.E. 332 (1904); *Stewart v. Mundy*, 131 Ga. 586, 62 S.E. 986 (1908); *Taylor Lumber Co. v. Clark Lumber Co.*, 33 Ga. App. 815, 127 S.E. 905 (1925); *Johnson v. Tifton Buick Co.*, 40 Ga. App. 158, 149 S.E. 73 (1929).

Actions

It is essential that creditors' pleadings set forth facts entitling each to maintain an action. *Fouche v. Brower*, 74 Ga. 251 (1884).

Creditor bringing suit to prevent fraudulent conveyances acquires lien at commencement of suit. — Creditor, who brings suit to prevent the debtor from carrying into effect a threat to convey away all of the debtor's property for purpose of defeating claims of such creditor, acquires a lien from commencement of the suit to prevent such fraudulent conveyance, and after service of process. *Law v. Coleman*, 173 Ga. 68, 159 S.E. 679 (1931).

RESEARCH REFERENCES

C.J.S. — 37 C.J.S., Fraudulent Conveyances, §§ 1, 197, 198.

ALR. — Larceny or embezzlement as affected by purpose to take or retain property in payment of, or as security for, a claim, 13 ALR 142; 116 ALR 997.

Availability of judgment under which exempt property has been seized as a set-off or counterclaim against claim based on the wrongful seizure, 20 ALR 276.

Attachment or execution creditor as purchaser within rule that first of two purchasers to obtain possession will prevail, 21 ALR 1031.

Right of creditor to interest after bankruptcy, declared insolvency, or appointment of receiver, where assets are more than sufficient to pay the principal of all claims, 39 ALR 457; 44 ALR 1170.

Property covered by power of appointment as subject to claims of donee's creditors, 121 ALR 803.

Right of creditors in respect of property gratuitously conveyed or transferred to a third person for alleged benefit of debtor, 147 ALR 1160.

Purchase of annuity by debtor as fraud on creditors, 154 ALR 727.

Construction and effect of provision in

note for "renewal until paid," and the like, 35 ALR2d 1090.

Conveyance or transfer in consideration of legal services, rendered or to be rendered, as fraudulent as against creditors, 45 ALR2d 500.

Exemption of proceeds of national service life insurance from claims of creditors, 54 ALR2d 1335.

Right of creditor to set up statute of limitations against other creditors of his debtor, 71 ALR2d 1049.

Unsolicited mailing, distribution, house call, or telephone call as invasion of privacy, 56 ALR3d 457.

Creditor's right to have bankruptcy discharge of individual debtor revoked, vacated, and set aside, 138 ALR Fed 253.

18-2-21. Right of creditors to attack judgments, conveyances, or other arrangements interfering with creditors' rights.

Creditors may attack as fraudulent a judgment, conveyance, or any other arrangement interfering with their rights, either at law or in equity. (Orig. Code 1863, § 1949; Code 1868, § 1937; Code 1873, § 1947; Code 1882, § 1947; Civil Code 1895, § 2689; Civil Code 1910, § 3218; Code 1933, § 28-104.)

JUDICIAL DECISIONS

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General Consideration

Insolvent's acquisition of property in name of third party. — If insolvent debtor, for purpose of hindering, delaying, and defrauding creditors, uses the debtor's assets in the purchase of property, taking title in the name of a third person who has full knowledge of the purpose of the transaction, such transaction is fraudulent as to existing creditors. *Harper v. Atlanta Milling Co.*, 203 Ga. 608, 48 S.E.2d 89 (1948).

One to whom alimony is due is creditor. — Willful failure to provide for the maintenance and support of spouse and children creates a lawful demand which, when legally enforced, is called alimony, and is debtor/creditor relationship. Thus, wife was creditor at time of conveyances which are alleged to have been made to defeat her claim for alimony, although no alimony judgment had been rendered at time of conveyances, and it would be inequitable and unjust not to allow her to maintain an action for judgment in rem against the husband's property when she was unable to obtain personal service due

to his willful avoidance of service. *Carter v. Bush*, 216 Ga. 429, 116 S.E.2d 568 (1960).

Statutory provisions for spouse's one year support (see now O.C.G.A. § 53-5-2) may not be used to defraud judgment creditors of widow's debtor son by attempting to assign as year's support the son's share of the estate, when this amount was far above widow's legitimate needs for one year. *Dukes v. Cairo Banking Co.*, 220 Ga. 507, 140 S.E.2d 182 (1964).

Reaching distributive share of estate to which insolvent debtor is entitled. — Court of equity will aid judgment creditor who has pursued the creditor's legal remedies to every available extent, to reach distributive share of estate to which insolvent debtor is entitled in the debtor's own right, in hands of the administrator held in trust for such judgment debtor. *Dukes v. Cairo Banking Co.*, 220 Ga. 507, 140 S.E.2d 182 (1964).

Cited in *Seagraves v. Powell Co.*, 143 Ga. 572, 85 S.E. 760 (1915); *Foremost Dairy Prod., Inc. v. Sawyer*, 185 Ga. 702,

196 S.E. 436 (1938); *Neal v. Stapleton*, 203 Ga. 236, 46 S.E.2d 130 (1948); *Bank of LaFayette v. Giles*, 208 Ga. 674, 69 S.E.2d 78 (1952); *Stone Mt. Pool Supply Co. v. Imperial Pool Co.*, 170 Ga. App. 283, 316 S.E.2d 769 (1984); *Howell v. Bank of Fitzgerald*, 181 Ga. App. 57, 351 S.E.2d 258 (1986).

Judgments

Collateral attack. — Unreversed judgment of competent court cannot be collaterally attacked absent fraud or collusion. *Smith v. Cuyler*, 78 Ga. 654, 3 S.E. 406 (1887); *Williams v. Lancaster*, 113 Ga. 1020, 39 S.E. 471 (1901).

Setting judgment aside by another creditor. — Judgment of foreclosure in favor of one creditor may not be set aside by another, except for fraud. *Mahan v. Cavender*, 77 Ga. 118 (1886).

Setting aside judgment foreclosing liens. — When judgment foreclosing liens was on the judgment's face valid and regular, the plaintiffs were not, so long as the judgment remained of force, entitled to an injunction for which the plaintiffs prayed. *Dixon, Mitchell & Co. v. Baxter & Co.*, 106 Ga. 180, 32 S.E. 24 (1898); *Suwannee Turpentine Co. v. Baxter & Co.*, 109 Ga. 597, 35 S.E. 142 (1900).

Judgment on petition consolidating four liens on separate parcels of land not void. — When in suit for foreclosure of four different liens for different amounts, each on land different and distinct from that affected by other liens, were consolidated in one petition and judgment prayed setting up and establishing liens for aggregate sum of all liens on all the land, and such judgment was rendered by the court, the judgment was irregular but not void. *Suwannee Turpentine Co. v. Baxter & Co.*, 109 Ga. 597, 35 S.E. 142 (1900).

Collateral attack against default judgment against debtor known to be insane. — When attorney for plaintiff-creditor knew that the defendant had been judged insane at the time of obtaining a default judgment, this knowledge did not constitute such fraud or collusion as would open a judgment to collateral attack by another creditor, in proceeding in nature of a money rule.

Burkhalter v. Virginia-Carolina Chem. Co., 42 Ga. App. 312, 156 S.E. 272 (1930).

Actions

Single suit seeking both judgment on debt and setting aside fraudulent conveyance. — Since Uniform Procedure Act of 1887, Ga. L. 1887, p. 64, a creditor may in one suit proceed for judgment on the debt and to set aside fraudulent conveyance made by a debtor. *Harper v. Atlanta Milling Co.*, 203 Ga. 608, 48 S.E.2d 89 (1948).

Creditor may in one action in superior court proceed against a debtor for judgment on creditor's demand and to set aside fraudulent conveyance joining debtor and grantee. *Hyde v. Atlanta Woolen Mills Corp.*, 204 Ga. 450, 50 S.E.2d 52 (1948).

Third party to fraudulent transaction is necessary party. — Defrauded creditor may, in court of equity, have fraudulent transaction set aside; and, for this purpose, third party to transaction would be proper and necessary party. *Harper v. Atlanta Milling Co.*, 203 Ga. 608, 48 S.E.2d 89 (1948).

Actions at law. — O.C.G.A. § 18-2-21 provided a viable cause of action at law for fraudulent conveyance because, when the legislature repealed O.C.G.A. § 18-2-22, the common law reemerged as an appropriate remedy for fraudulent conveyance. O.C.G.A. § 18-2-21 referred plaintiffs to the Uniform Fraudulent Transfers Act (UFTA) (now Uniform Voidable Transactions Act), O.C.G.A. § 18-2-70 et seq., or, in the case of those claims that could not be brought under UFTA, to the common law cause of action. *Wessinger v. Spivey* (In re Galbreath), 475 B.R. 749 (Bankr. S.D. Ga. 2003).

Judgment creditor did not have an equitable right to have a testamentary trust declared null and void when the creditor had failed to make a claim against the trust during the time between the trust's establishment and the enactment of the Georgia Trust Act, the act applied to the trust and, since it gives a creditor having a tort judgment a statutory right to proceed against distributions from the trust, the creditor was not entitled to equitable relief. *Jordan v.*

Actions (Cont'd)

Caswell, 264 Ga. 638, 450 S.E.2d 818 (1994).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Creditor's Bills, §§ 3, 4.

37 Am. Jur. 2d, Fraud and Deceit, § 497.

Am. Jur. Pleading and Practice Forms. — 12A Am. Jur. Pleading and Practice Forms, Fraudulent Conveyances, § 3.

C.J.S. — 37 C.J.S., Fraudulent Conveyances, §§ 197, 198.

ALR. — Creditor's receipt of proceeds of conveyance or transfer by debtor as estopping him to claim that conveyance or transfer was fraudulent, 9 ALR 358.

Necessity of exhausting remedies against other judgment debtor before bringing suit to set aside conveyance as fraudulent, 22 ALR 200.

Right of creditor or one representing him to recover money paid or property transferred by debtor on illegal consideration, 34 ALR 1297.

Delivery of key as satisfying condition of immediate delivery and actual or continued change of possession to uphold sale of personal property against subsequent purchaser or third persons generally, 56 ALR 518.

Absolute conveyance or transfer with secret reservation as fraudulent per se as against creditors, 68 ALR 306.

Joinder of grantees or transferees in different conveyances or transfers in suit to avoid them as in fraud of creditors, 69 ALR 229.

When statute of limitations or laches commences to run against action to set aside conveyance or transfer in fraud of creditors, 76 ALR 864; 100 ALR2d 1094.

Remedies of creditors of insolvent decedent's estate where other creditors have received excessive payments, 77 ALR 981.

Validity as against creditors of conveyance in trust for settlor for life with remainder to his appointees, 93 ALR 1211.

Right of creditor of decedent, before perfecting his claim or after loss of recourse against decedent's estate, to pur-

sue remedy against property conveyed by the decedent in fraud of his creditors, 103 ALR 555.

Fraud of judgment debtor in concealing assets or misrepresenting his financial condition as affecting failure to issue execution or revive judgment within the statutory period or as ground of action for fraud and deceit causing loss of legal remedy on the judgment, 104 ALR 214.

Decree in suit by judgment creditor to set aside conveyance in fraud of creditors as bar to another suit for same purpose in respect of another conveyance, 108 ALR 699.

Succession, estate, or gift tax in respect of or as affected by conveyance or transfer restoring to original owner property transferred by him to defraud or delay creditors, 108 ALR 1508.

Criterion of jurisdictional amount in action in form of creditors' bill or suit to avoid conveyance in fraud of creditors, 109 ALR 1185.

Conflict of laws as regards validity of fraudulent and preferential transfers and assignments, 111 ALR 787.

Rights as between creditors of fraudulent grantor, where one or more of them, in payment of or as security for his debt, receives deed or mortgage from fraudulent grantee, 114 ALR 406.

Right to attack and conditions of attack upon conveyance, mortgage, or transfer as fraudulent as against creditors as affected by mortgage or other security for indebtedness to attacking creditor, 116 ALR 1048.

Complainant's purpose to defraud creditors as defense to suit to recover property paid for by him but conveyed to defendant, 117 ALR 1464.

Right of individual creditor or creditors of debtor in liquidation or receivership to maintain bill to set aside conveyances or transfers in fraud of creditors, 119 ALR 1339.

Statute of limitation applicable to suit

by creditor to set aside transfers of debtor's property, 128 ALR 1289.

Right of grantee, or his privies, to maintain suit or proceeding for affirmative relief, where claim is made or anticipated that conveyance was made with intention on part of grantor, but without actual fraud by grantee, to defraud former's creditors, 128 ALR 1504.

Conditions of creditor's bill or suit to avoid conveyance as a fraud on creditors where creditor has recovered foreign judgment, 129 ALR 506.

Right to set aside, for benefit of heirs and distributees, a conveyance or transfer by decedent in fraud of his creditors, 148 ALR 230.

Rights as between creditors of grantor or transferrer and those of grantee or transferee in respect of property conveyed or transferred in fraud of creditors, 148 ALR 520.

Pleading and proof of exempt character of property in suit to set aside its conveyance as in fraud of creditors, 154 ALR 913.

Right of wife or child by virtue of right to support to maintain action to set aside conveyance by husband or parent as fraudulent, without reducing claim to judgment, 164 ALR 524.

Right of attachment or judgment creditor, or officer standing in his shoes, to attack older lien or security interest for usury, 70 ALR2d 1409.

Right of tort claimant, prior to judgment, to attack conveyance or transfer as fraudulent, 73 ALR2d 749.

Conveyance as fraudulent where made in contemplation of possible liability for future tort, 38 ALR3d 597.

Right of secured creditor to have set aside fraudulent transfer of other property by his debtor, 8 ALR4th 1123.

Right of creditor to recover damages for conspiracy to defraud him of claim, 11 ALR4th 345.

Purchase of annuity by debtor as fraud on creditors, 74 ALR6th 549.

18-2-22. Conveyances by debtors deemed fraudulent.

Reserved. Repealed by Ga. L. 2002, p. 141, § 2, effective July 1, 2002.

Editor's notes. — This Code section was based on Laws 1818, Cobb's 1851 Digest, p. 168; Code 1863, § 1954; Ga. L. 1865-66, p. 29, § 1; Code 1868, § 1942; Code 1873, § 1952; Code 1882, § 1952;

Civil Code 1895, § 2695; Civil Code 1910, § 3224; Code 1933, § 28-201; Ga. L. 1984, p. 22, § 18. For present comparable provisions, see Code Section 18-2-70 et seq.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 12A Am. Jur. Pleading and

Practice Forms, Fraudulent Conveyances, § 3.

18-2-23. Validity of conveyance to innocent subsequent purchaser.

Reserved. Repealed by Ga. L. 2002, p. 141, § 2, effective July 1, 2002.

Editor's notes. — This Code section was based on Civil Code 1895, § 2696;

Civil Code 1910, § 3225; Code 1933, § 28-202.

18-2-24. Effect of giving debtor permission to exercise dominion over or use property conveyed, assigned, or mortgaged as security for any debt.

Where any property is conveyed, assigned, or mortgaged as security for any debt and permission is given to the debtor to exercise dominion over or to use the property or the proceeds thereof or any part thereof, the giving of such permission shall not cause the conveyance, assignment, or mortgage to be deemed fraudulent or to create a presumption of fraud as to creditors. (Ga. L. 1952, p. 154, § 1.)

RESEARCH REFERENCES

ALR. — Conveyance in consideration of future support as fraudulent against creditors, 2 ALR 1438; 23 ALR 584.

Right of secured creditor to have set aside fraudulent transfer of other property by his debtor, 8 ALR4th 1123.

18-2-25. Effect of misrepresentation, suppression of material fact, or private agreement giving preference upon settlement between debtor and creditor.

If a debtor misrepresents or suppresses any material fact in the statement of his affairs either as to the amount of his property or of his indebtedness, the composition shall be void. If a debtor privately agrees to give a creditor better security or to pay a creditor more than other creditors, the contract with the others shall be void. (Civil Code 1895, § 2692; Civil Code 1910, § 3221; Code 1933, § 28-107.)

History of Code section. — This Code section is derived from the decision in *Woodruff & Co. v. Saul*, 70 Ga. 271 (1883).

JUDICIAL DECISIONS

Cited in *Saul v. Buck*, *Hefflebower & Neer*, 72 Ga. 254 (1884); *Burgess v. Simpson Grocery Co.*, 128 Ga. 423, 57 S.E. 717 (1907).

RESEARCH REFERENCES

ALR. — Confirmation of composition in bankruptcy as barring later confirmation of composition or discharge within six years, 80 ALR 406.

Debtor's waiver of, or refraining from

exercising, right to resort to bankruptcy, or his insolvency, as consideration for release of all or part of liability, 108 ALR 656.

ARTICLE 3

PREFERENCES AND ASSIGNMENTS FOR BENEFIT OF CREDITORS

Law reviews. — For article, “The Problem and the Law of the Insolvent Debtor,” see 16 Ga. B.J. 391 (1954).

For note suggesting corporations, persons, and firms may execute common-law

assignments to allow assignee to carry on and such assignment would preempt creditors attempting to gain preference by judgment, see 10 Ga. B.J. 129 (1947).

JUDICIAL DECISIONS

Partial assignment of single debt. — Creditor cannot divide obligation to pay creditor a stated sum of money into fragments, and assign them to a number of different persons, thereby subjecting debtor to more than one claim, and in order to enforce such partial assignment of a single debt, acceptance by debtor must be shown. *Graham v. Southern Ry.*, 173 Ga. 573, 161 S.E. 125 (1931).

Partial assignment of a debt due is enforceable in equity, although debtor may not assent, if all parties at interest are before the court, so that the right of each in the fund may be determined in one suit and settled by one decree. *Graham v. Southern Ry.*, 173 Ga. 573, 161 S.E. 125 (1931).

RESEARCH REFERENCES

ALR. — Preference of wages over lien creditors of corporation in hands of receiver, in absence of statutory provision therefor, 5 ALR 690.

Validity and effect of provisions in assignments for creditors authorizing assignees to continue assignor’s business, 23 ALR 199.

Constitutionality of statute relating to preferences in assets of insolvent bank, 31 ALR 790; 79 ALR 582; 83 ALR 1080.

Right to setoff loss under mutual insurance policy against premium or assessment, 31 ALR 1281.

Payment of judgment by debtor without notice of its assignment, 32 ALR 1021.

Right of creditor to interest after bankruptcy, declared insolvency, or appointment of receiver, where assets are more than sufficient to pay the principal of all claims, 44 ALR 1170.

Duty of mortgagee to account for rents and profits or for use and occupation for benefit of owner of equity of redemption or junior lienor, 46 ALR 138.

Transfer in bankruptcy, or otherwise in interest of creditors or lien holders, as violating covenant in lease against assignment, 46 ALR 847.

Priority of assignment of chose in action over subsequent garnishment as affected by lack of notice to debtor of assignment, 52 ALR 109.

Waiver of or estoppel to assert lien by filing claim with or receiving dividend from assignee for creditors, 55 ALR 993.

State’s prerogative right of preference at common law, 65 ALR 1331; 90 ALR 184; 167 ALR 640.

Enforceability in equity of assignment of part of a debt without the debtor’s consent, 80 ALR 413.

Pledge of accounts as affected by pledgor’s reservation of partial dominion or control, 85 ALR 222.

Assignment by creditor of insolvent debtor or estate as carrying full amount named or merely dividends payable in respect of that amount, 93 ALR 1525.

Assignability of contemplated debt before execution of agreement by which it is to be created, 116 ALR 955.

Right of debtor who pays creditor to control application of payments made by latter to his creditor with proceeds of original payment, 130 ALR 198; 166 ALR 641.

Application of payment as between disputed and undisputed claims, 164 ALR 940.

Debtor's transfer of assets to representative of creditors as effectuating release of unsecured claims, in absence of express agreement to that effect, 8 ALR3d 903.

Bankruptcy: Right of creditor who has not filed timely petition for review of referee's order to participate in appeal secured by another creditor, 22 ALR3d 914.

18-2-40. Right of debtor to prefer creditors.

A debtor may prefer one creditor over another; and to that end he may rightfully give a lien by mortgage or other legal means, sell in payment of the debt, or transfer choses in action as collateral security, where the surplus in such cases is not reserved for the debtor's own benefit. (Orig. Code 1863, § 1955; Code 1868, § 1943; Code 1873, § 1953; Code 1882, § 1953; Civil Code 1895, § 2697; Civil Code 1910, § 3230; Code 1933, § 28-301.)

Law reviews. — For article, "Preparing the Georgia Farmer (or Other Small Entrepreneur) for Bankruptcy," see 22 Ga. State Bar J. 186 (1986).

For note discussing assignments for benefit of creditors, see 12 Ga. L. Rev. 814 (1978).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- CONVEYANCES BETWEEN SPOUSES
- PREFERENCES BY CORPORATE OFFICERS
- ASSIGNMENTS
- ACTIONS

General Consideration

Legislative intent behind this section and former § 18-2-22. — Construing former Code 1868, §§ 1942 and 1943 (see now O.C.G.A. §§ 18-2-22 (repealed) and 18-2-40) together, as being in pari materia, the intention of the legislature was that an insolvent debtor may assign property in trust, for the benefit of one or more of the debtor's creditors, to the exclusion of others, if it was done bona fide, and no trust or benefit was reserved to the assignor, or any person for the assignor. *Embry & Fisher v. Clapp*, 38 Ga. 245 (1868).

Discussion of effect of Ga. L. 1865-66, p. 29 on former Code 1882, § 1953. — See *Powell, Brother & Co. v. Kelly Brothers & Porter*, 82 Ga. 1, 9 S.E. 278, 3 L.R.A. 139 (1889).

Even an insolvent debtor may prefer one creditor to another, and to this end the debtor may transfer choses in action as collateral security for preexisting debt, surplus in such case not being reserved for the debtor's own benefit. *Suttles v. Vickery*, 179 Ga. 751, 177 S.E. 714 (1934).

Effect of pendency of suit. — Mere pendency of suit against debtor does not extinguish debtor's right to prefer one creditor over another, and in such case, controlling question is "existence or non-existence of fraud in the transfer." *Suttles v. Vickery*, 179 Ga. 751, 177 S.E. 714 (1934).

Transfer to be made in good faith and not benefit debtor. — Debtor is permitted to prefer one creditor over another and to make assignments to that end so long as the transfer is made in good

faith and does not benefit the debtor. *Bank of Cave Spring v. Gold Kist, Inc.*, 173 Ga. App. 679, 327 S.E.2d 800 (1985).

Means of accomplishing preference of one creditor over others. — Insolvent debtor may give preference in a great variety of ways to one creditor to the exclusion of others, provided it be done with good faith. *McWhorter v. Wright, Nichols & Co.*, 5 Ga. 555 (1848).

Insolvent debtor cannot assign all property for benefit of part of creditors. — Assignment made by insolvent debtor of all debtor's property for benefit of part of creditors is not allowed by laws of this state, but one in debt may sell part of the debtor's property to pay one of the debtor's creditors. *Bones v. Printup Bros. & Co.*, 64 Ga. 753 (1880).

Prerequisites to valid preferential conveyance. — Debtor may in good faith prefer one creditor to others by conveying property, even while insolvent, in total or partial payment of a debt, and without additional consideration, provided that such payment or credit represents the fair market value of the property or is not unreasonably disproportionate to such value; and provided that no secret trust or covert benefit, prohibited by former Code 1933, § 28-301, was reserved to the debtor; and provided further that the intent of the debtor, known to the creditor, shall not be to hinder, delay, or defraud other creditors. *Moncrief Furnace Co. v. Northwest Atlanta Bank*, 193 Ga. 440, 19 S.E.2d 155 (1942).

Intent as key in judging validity of preferential conveyance. — Husband who is indebted to his wife may convey property to her in preference to other creditors; but this rule is subject to qualification that conveyance must be made only for purpose of paying or securing his wife as creditor, and not be tainted with any intention to hinder, delay, or defraud others, such conveyance being judged by intention with which it is made and accepted, and not by its consideration or effect. *Cotton States Fertilizer Co. v. Childs*, 179 Ga. 23, 174 S.E. 708 (1934).

While it is true that "a debtor may prefer one creditor to another," and may convey property for this purpose, such right is subject to qualification that con-

veyance must be made only for purpose of paying or securing creditor so preferred, and not be tainted with any intentions to hinder, delay, or defraud others; such conveyance being judged by intention with which it is made and accepted, and not by its consideration or effect. *Dickson v. Citizens Bank & Trust Co.*, 184 Ga. 398, 191 S.E. 379 (1937).

Good faith conveyance for consideration to creditor before another creditor obtains judgment. — Creditor may in good faith and for valuable consideration take from the creditor's debtor a deed to property before another creditor obtains judgment, and such a valid deed, even though improperly recorded or not recorded until after judgment, will not be subordinate thereto. *Moncrief Furnace Co. v. Northwest Atlanta Bank*, 193 Ga. 440, 19 S.E.2d 155 (1942).

Preference enabling one creditor to obtain advantageous judgment. — Insolvent debtor may prefer one creditor to others by dividing debt which the debtor owes to that creditor into smaller debts so that they shall be within jurisdiction of court in which judgment may be obtained on them that shall be such as to give that creditor an advantage over others. *Bank of Savannah v. Planters Bank*, 22 Ga. 466 (1857); *Andrews & Co. v. Kaufmans*, 60 Ga. 669 (1878).

Mortgage by insolvent debtor to secure payment of preexisting debt. — Mortgage, executed by insolvent debtor to secure payment of bona fide preexisting debt, is not per se fraudulent as against creditors. *Davis v. Anderson*, 1 Ga. 176 (1846); *Lee v. Brown*, 7 Ga. 275 (1849).

Partner's sale of share of partnership assets to pay individual indebtedness. — Under this section and the law generally, each partnership member has the right, with consent of a partner, to sell the partner's share in firm assets in payment of the partner's individual indebtedness. *Ellison & Son v. Lucas & McDuffie*, 87 Ga. 223, 13 S.E. 445, 27 Am. St. R. 242 (1891).

Sale of stock of goods to extinguish debt. — Former Civil Code 1895, § 2697 (see now O.C.G.A. § 18-2-40) was not repealed by the former Bulk Sales Act (see now O.C.G.A. § 11-6-101 et seq.), but the

General Consideration (Cont'd)

sale of a stock of goods in extinguishment of a debt, in whole or in part, was permissible, if the Bulk Sales Act was complied with. *Sampson v. Brandon Grocery Co.*, 127 Ga. 454, 56 S.E. 488, 9 Ann. Cas. 331 (1907).

No distinction as to kind of creditor preferred or property used. — No distinction is made as to kind of creditors who may be preferred or as to kind of property which may be used for this purpose. *Ellison & Son v. Lucas & McDuffie*, 87 Ga. 223, 13 S.E. 445, 27 Am. St. R. 242 (1891).

Debtor cannot discriminate in trust deed among creditors. — Debtor may prefer creditors by direct sale to them, in extinguishment of the creditor's claims, or the debtor may bona fide sell the debtor's property to a stranger, and apply the proceeds to debts of favored creditors; but the debtor cannot discriminate, in trust deed, between creditors. *Brown v. Lee*, 7 Ga. 267 (1849); *Hobbs v. Davis*, 50 Ga. 213 (1873); *McLendon v. Reynolds Grocery Co.*, 160 Ga. 763, 129 S.E. 65 (1925).

Recording agreement to prefer certain creditor in event of insolvency. — Fact that agreement by debtor to prefer certain creditor in case of insolvency is not recorded does not render the agreement fraudulent since such agreement is not required by law to be recorded, and its record would therefore not constitute notice. *Fechheimer v. Baum*, 43 F. 719 (S.D. Ga. 1890).

Extinguishment of right to prefer. — Right of the debtor to prefer one creditor to another in a bona fide transaction continues up to the date when a judgment or lien is obtained against the debtor. The mere pendency of a suit does not extinguish that right to prefer. *Bank of Waynesboro v. Ellison*, 162 Ga. 657, 134 S.E. 751 (1926).

Mortgage not ground for equitable relief. — That insolvent firm seeks to prefer certain creditors by mortgage constitutes no ground for equitable relief. *Heidingsfelder v. Slade & Etheridge*, 60 Ga. 396 (1878).

Cited in *Lamkin v. Clary*, 103 Ga. 631, 30 S.E. 596 (1898); *Mobley v. Merchants &*

Planters Bank, 157 Ga. 658, 122 S.E. 233 (1924); *Durden v. Royster Guano Co.*, 158 Ga. 234, 123 S.E. 603 (1924); *Cowan v. Bank of Rockdale*, 159 Ga. 123, 125 S.E. 194 (1924); *Walker v. Martin*, 170 Ga. 447, 153 S.E. 41 (1930); *Johnson v. Sherrer*, 185 Ga. 340, 195 S.E. 149 (1938); *Anderson v. Chambers*, 59 Ga. App. 115, 200 S.E. 478 (1938); *First Nat'l Bank v. Kelly*, 190 Ga. 603, 10 S.E.2d 66 (1940); *Williams v. Russell*, 82 Ga. App. 529, 61 S.E.2d 567 (1950); *Threlkeld v. Whitehead*, 95 Ga. App. 378, 98 S.E.2d 76 (1957).

Conveyances Between Spouses

Burden of proof. — When transaction between husband and wife is attacked for fraud by creditors of either, burden is on husband and wife to show that the transaction was fair. *Cotton States Fertilizer Co. v. Childs*, 179 Ga. 23, 174 S.E. 708 (1934).

Conveyance by husband to wife holding equitable title. — When wife's money is used with her consent to purchase a tract of land, the title to which was intended to be in her but unknown to her at the time, was taken in the name of the husband, the wife had equitable title and it was perfectly proper and lawful for the husband to convey such land to her. *Rowe v. Cole*, 183 Ga. 477, 188 Ga. 668 (1936).

Failure of wife to make claim known does not deprive her of rights as creditor, even as against one of husband's creditors who gave credit to him in ignorance of her claim, there being no inquiry made of her by such creditor. *Rowe v. Cole*, 183 Ga. 477, 188 S.E. 668 (1936).

Preferences by Corporate Officers

Officers' scheme to indemnify selves against loss. — Officers and directors of insolvent corporation may not use position to prefer themselves over creditors, and any scheme or device, the purpose of which is to indemnify themselves against loss, whether as creditors or as endorsers of notes given by the corporation or otherwise, constitutes legal fraud. *Ware v. Rankin*, 97 Ga. App. 837, 104 S.E.2d 555 (1958).

Preference by officers of insolvent corporation. — Officers and directors of

insolvent corporation may prefer one creditor over another, and may pay a debt which is due and payment of which is being demanded, even though the effect of payment is to reduce assets available to other creditors, and even though such action by directors or officers may result in some incidental benefit, such as extinguishment of liability they may have previously incurred as endorsers or sureties on commercial paper in hands of a preferred creditor. *Ware v. Rankin*, 97 Ga. App. 837, 104 S.E.2d 555 (1958).

Intent key in determining whether preference fraudulent. — Test for determining whether or not a creditor preference by directors of insolvent corporation is fraudulent is intent or purpose which induced the making of payment or giving of security. *Ware v. Rankin*, 97 Ga. App. 837, 104 S.E.2d 555 (1958).

Assignments

Accounts may be transferred as collateral security. *Boykin v. Epstein*, 94 Ga. 750, 22 S.E. 218 (1894).

Right of heir to interest in estate of ancestor is a chose in action and is assignable. *Greenwood v. Greenwood*, 178 Ga. 605, 173 S.E. 858 (1934).

Choses in action. — Choses in action are not subject to seizure and sale under executions based upon ordinary judgments and can only be reached by judgment creditor through garnishment or some other collateral proceedings; and, inasmuch as such garnishment or collateral proceeding is necessary to fix lien of judgment so as to make it effective, an assignment of the chose in action by the debtor before institution of such collateral proceeding passes to assignee property of the debtor in the chose in action assigned, freed from lien of general judgment previously rendered against assignor. *Greenwood v. Greenwood*, 178 Ga. 605, 173 S.E. 858 (1934).

Assignable interest of voluntary bankrupt. — Voluntary bankrupt has an assignable interest in property claimed in the bankrupt's petition as exempt under the constitution and homestead laws of this state; and the bankrupt may assign property in good faith to an existing creditor before it is set apart by a trustee in

bankruptcy, and therefore before exemption is confirmed by a referee in bankruptcy. *Strickland Hdwe. Co. v. Fletcher*, 152 Ga. 445, 110 S.E. 229 (1921).

Voluntary bankrupt has an assignable interest in the property claimed by the bankrupt in the bankrupt petition as exempt under the constitution and homestead laws of this state and can transfer this interest in good faith to the bankrupt's creditor either in extinguishment of, or to secure, a preexisting debt, before the property is set aside by the trustee in bankruptcy, and before the proceeding is confirmed by the bankrupt court. *Silver & Goldstein v. Chapman*, 163 Ga. 604, 136 S.E. 914 (1927).

Assignment prior to service of summons of garnishment. — If assignment is made before service of summons of garnishment upon the drawee, the garnishing creditor will be postponed to the assignee, and this is so whether or not the garnishee was notified of the assignment. *Suttles v. Vickery*, 179 Ga. 751, 177 S.E. 714 (1934).

Assignment of life insurance policy to secure debt. — Life insurance policy was a chose in action and may be assigned by an insured as security for a debt under former Code 1933, §§ 28-301 and 85-1803 (see now O.C.G.A. §§ 18-2-40 and 44-12-22), and generally the effect of such assignment was to vest legal title to the policy in the assignee to the amount of debt secured. *Parramore v. Williams*, 215 Ga. 179, 109 S.E.2d 745 (1959).

Since rights of beneficiary and debtor were subjected by assignment of insurance policy to full amount of debt secured by such assignment which debt exceeded the value of the policies, the beneficiary had no further interest in such policies, and no rights to assert as to the policies in receivership proceedings. *Parramore v. Williams*, 215 Ga. 179, 109 S.E.2d 745 (1959).

Mortgage to creditor on all property followed by general assignment for creditors. — When mortgage is given by insolvent debtor to one of the debtor's creditors on all the debtor's property, and is followed immediately by other mortgages which in effect constitute a general assignment for creditors, the first mort-

Assignments (Cont'd)

gage does not constitute part of the assignment. *Fechheimer v. Baum*, 43 F. 719 (S.D. Ga. 1890).

Sufficient consideration to support equitable and legal assignments to secure preexisting indebtedness, see *Suttles v. Vickery*, 179 Ga. 751, 177 S.E. 714 (1934).

Actions

Petition stating cause of action under this statute and authorizing injunctive relief, see *Moncrief Furnace Co. v. Northwest Atlanta Bank*, 193 Ga. 440, 19 S.E.2d 155 (1942).

RESEARCH REFERENCES

C.J.S. — 6A C.J.S., Assignments for Benefit of Creditors, § 48. 37 C.J.S., Fraudulent Conveyances, § 143.

ALR. — Conveyance in consideration of future support as fraudulent against creditors, 2 ALR 1438; 23 ALR 584.

Attachment or execution creditor as purchaser within rule that first of two purchasers to obtain possession will prevail, 21 ALR 1031.

Right of surety who discharges obligation due to government to be subrogated to priority or preference of latter, 24 ALR 1502; 83 ALR 1131.

Right of surety discharges obligation due to government, to be subrogated to rights of latter against third persons, 24 ALR 1523.

Priority as between different assignees of same chose in action as affected by notice to debtor, 31 ALR 876; 110 ALR 774.

Preference in event of debtor's insolvency in respect of funds designated or set apart by him for payment of specified obligations, 32 ALR 950.

Right of debtor who pays creditor to control application of payments made by latter to his creditor with proceeds of original payment, 41 ALR 1297; 130 ALR 198; 166 ALR 641.

Character of service contemplated by statutes giving a lien or preference, in event of insolvency, to servants, employees, laborers, etc, 54 ALR 567.

Trust or preference in respect of money deposited in bank by court, or pursuant to its order, or by officer of court, 86 ALR 209.

State's prerogative right of preference at common law, 90 ALR 184; 167 ALR 640.

Right of creditor who institutes supplementary proceedings to priority over other creditors in respect of property disclosed thereby, 92 ALR 1435; 153 ALR 211.

Conflict of laws as regards validity of fraudulent and preferential transfers and assignments, 111 ALR 787.

Equality among claimants under indemnity or surety bond which is insufficient to pay all claimants in full, 128 ALR 1096.

Judgment debtor's personal injury claims against third person or latter's liability insurer as subject to creditor's bill, 51 ALR 2d 595.

Debtor's return of merchandise to selling creditor for credit as preferential transfer voidable in bankruptcy proceedings, 62 ALR2d 774.

Right of creditor to set up statute of limitations against other creditors of his debtor, 71 ALR2d 1049.

Validity of provision in deed or transfer to assignee for benefit of creditors for payment of attorneys' fees, 79 ALR2d 513.

Creditor's knowledge of preference, or of debtor's insolvency, under § 60(b) of Bankruptcy Act, as indicated by receipt of property in payment of debt, 88 ALR2d 1050.

18-2-41. Right of nonmunicipal corporation to assign for benefit of creditors and prefer creditors.

Any corporation, not municipal, may make an assignment for the benefit of creditors; but no such corporation shall be allowed in such assignment to prefer any creditor or class of creditors, except creditors

who have debts entitled to priority by law. (Ga. L. 1894, p. 90, § 1; Civil Code 1895, § 2698; Civil Code 1910, § 3231; Code 1933, § 28-302.)

JUDICIAL DECISIONS

Comparison of corporate rights to those of individual. — Corporation has an equal right with an individual allowing preference, but clearly under the law a corporation “shall not be allowed to prefer any creditor or class of creditors, except such as have debts entitled to priority by the laws of this State.” *Milledgeville Banking Co. v. McIntyre Alliance Store*, 98 Ga. 503, 25 S.E. 567 (1896).

Assignments with or without preferences. — Insolvent corporation is capable of making a general assignment for benefit of creditors, either with or without giving preference and priority of payment to certain of the creditors. *Albany & Rensselaer Iron & Steel Co. v. Southern Agric. Works*, 76 Ga. 135, 2 Am. St. R. 26 (1886).

Preference of creditor even though incidental benefit accrues to directors. — Right of debtor corporation to

prefer a creditor, and right of creditor to be preferred, cannot be lost simply because, as a mere incident to the transaction by which preference is effected, the directors may themselves gain some benefit. *Milledgeville Banking Co. v. McIntyre Alliance Store*, 98 Ga. 503, 25 S.E. 567 (1896); *Atlas Tack Co. v. Macon Hdwe. Co.*, 101 Ga. 391, 29 S.E. 27 (1897).

Sole owner of insolvent corporation preferring self as creditor. — Sole owner and president of defendant corporation may not, after corporation becomes insolvent, seize all the corporation's remaining assets and apply those assets to the debt owed by the corporation to the owner personally, thereby rendering the corporation incapable of paying its other business debts. *Fountain v. Burke*, 160 Ga. App. 262, 287 S.E.2d 39 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Assignments for Benefit of Creditors, § 10.

ALR. — Right of resident creditors of foreign corporation to preference over nonresident creditors, 1 ALR 648.

Right of creditor of corporation to maintain action or suit for his own benefit against another creditor to whom corporation has given a preference, 12 ALR 246.

Right of corporation to prefer creditors, 19 ALR 320; 38 ALR 90; 48 ALR 479; 56 ALR 207; 62 ALR 738.

Waiver of right of government to preference in the assets of insolvent debtor by taking security, 24 ALR 1495; 83 ALR 1119.

Priority as between different assignees of same chose in action as affected by notice to debtor, 31 ALR 876; 110 ALR 774.

Power of municipality to transfer or assign its right to enforce assessment or lien for local improvements, 55 ALR 667.

Payment of depositor's check after insolvency of bank as an unlawful preference, 74 ALR 937.

Debtor's return of merchandise to selling creditor for credit as preferential transfer voidable in bankruptcy proceedings, 62 ALR2d 774.

Validity of provision in deed or transfer to assignee for benefit of creditors for payment of attorneys' fees, 79 ALR2d 513.

18-2-42. Right of persons and firms to make assignments and prefer creditors.

Persons and firms may make assignments and prefer creditors. (Ga. L. 1894, p. 90, § 2; Civil Code 1895, § 2699; Civil Code 1910, § 3232; Code 1933, § 28-303.)

JUDICIAL DECISIONS

Even an insolvent debtor may prefer one creditor to another, and to this end the debtor may transfer choses in action as collateral security for preexisting debt, surplus in such case not being reserved for the debtor's own benefit. *Suttles v. Vickery*, 179 Ga. 751, 177 S.E. 714 (1934).

Mere pendency of suit against debtor does not extinguish the debtor's right to prefer one creditor over another, and in such case, controlling question is "existence or nonexistence of fraud in the transfer." *Suttles v. Vickery*, 179 Ga. 751, 177 S.E. 714 (1934).

Assignment to be made in good faith and not benefit debtor. — Debtor is permitted to prefer one creditor over another and to make assignments to that end, so long as the transfer is made in

good faith and does not benefit the debtor. *Bank of Cave Spring v. Gold Kist, Inc.*, 173 Ga. App. 679, 327 S.E.2d 800 (1985).

Effect of assignment prior to service of summons of garnishment. — If assignment is made before service of summons of garnishment upon drawee, garnishing creditor will be postponed to assignee, and this is so whether or not garnishee was notified of assignment. *Suttles v. Vickery*, 179 Ga. 751, 177 S.E. 714 (1934).

Sufficient consideration to support equitable and legal assignments to secure preexisting indebtedness. — *Suttles v. Vickery*, 179 Ga. 751, 177 S.E. 714 (1934).

Cited in *Anderson v. Chambers*, 58 Ga. App. 844, 200 S.E. 478 (1938).

RESEARCH REFERENCES

Am. Jur. 2d. — 21 Am. Jur. 2d, Creditor's Bills, §§ 35, 79.

C.J.S. — 6A C.J.S., Assignments for Benefit of Creditors, §§ 12, 44, 48.

ALR. — Priority as between different assignees of same chose in action as affected by notice to debtor, 31 ALR 876; 110 ALR 774.

Preference in event of debtor's insolvency in respect of funds designated or set apart by him for payment of specified obligations, 32 ALR 950.

Right of debtor who pays creditor to control application of payments made by latter to his creditor with proceeds of original payment, 41 ALR 1297; 130 ALR 198; 166 ALR 641.

Debtor's return of merchandise to selling creditor for credit as preferential transfer voidable in bankruptcy proceedings, 62 ALR2d 774.

Validity of provision in deed or transfer to assignee for benefit of creditors for payment of attorneys' fees, 79 ALR2d 513.

18-2-43. Deeds of assignment for benefit of creditors — Execution, filing, and recording.

In all cases the deed of assignment for the benefit of creditors shall be executed, filed, and recorded as provided for deeds in Code Section 44-2-1. (Ga. L. 1894, p. 90, § 3; Civil Code 1895, § 2700; Civil Code 1910, § 3233; Code 1933, § 28-304.)

18-2-44. Deeds of assignment for benefit of creditors — Property to be conveyed generally; description of property; attachment of list of creditors of assignor.

(a) All assignments referred to in Code Section 18-2-42 shall convey all of the property of every sort which is claimed or owned by the assignor at the time of the execution thereof. Such assignments shall:

(1) Identify any lands owned or any interest in lands;

(2) Identify goods, wares, and merchandise by general words of description, indicating the location, kind, and quality thereof, with a statement as accurate as possible, containing the purchase price and selling price of the lot as a whole; and

(3) Describe in general terms any shares of capital stock, livestock, or personal property which are not connected with any mercantile or manufacturing business.

(b) The assignor shall attach a list of all creditors with their post office addresses and amounts due to each. (Ga. L. 1894, p. 90, § 4; Civil Code 1895, § 2701; Civil Code 1910, § 3234; Code 1933, § 28-305.)

JUDICIAL DECISIONS

Description of nature of debts in schedule. — Assignors' schedule of creditors need not describe nature and character of debts; if the schedule sets forth in detail the name of, amount due to, and residence of each of the creditors of as-

signors, no further description of the debts is required. *Stultz & Blair v. Fleming & Bussey*, 83 Ga. 14, 9 S.E. 1067 (1889).

Cited in *Burkhalter v. Glennville Bank*, 184 Ga. 147, 190 S.E. 644 (1937).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Assignments for Benefit of Creditors, §§ 4, 5, 47.

C.J.S. — 6A C.J.S., Assignments for Benefit of Creditors, § 4.

ALR. — Conflict of laws as regards validity of fraudulent and preferential transfers and assignments, 111 ALR 787.

Valuation of notes and accounts receiv-

able in determining question of insolvency or bankruptcy, 133 ALR 1274.

Creditor's knowledge of preference, or of debtor's insolvency, under § 60(b) of Bankruptcy Act, as indicated by receipt of property in payment of debt, 88 ALR2d 1050.

18-2-45. Deeds of assignment for benefit of creditors — Conveyances; statements as to aggregate amounts.

Assignments referred to in Code Section 18-2-42 shall convey all books, books of account, choses in action, notes, drafts, bills, judgments, liens, and mortgages held or owned, indicating, as near as may be, the aggregate amount thereof, with a statement as to the total amounts which are considered good, doubtful, or bad. (Ga. L. 1894, p. 90, § 5; Civil Code 1895, § 2702; Civil Code 1910, § 3235; Code 1933, § 28-306.)

JUDICIAL DECISIONS

Cited in *Burkhalter v. Glennville Bank*, 184 Ga. 147, 190 S.E. 644 (1937).

RESEARCH REFERENCES

ALR. — What language in conveyance or contract amounts to assumption of mortgage by grantee, 101 ALR 281.

Release of vendee (or intermediate as-

signee of vendee's interest) by subsequent dealings between assignee and vendor, 125 ALR 979.

18-2-46. Deeds of assignment for benefit of creditors — Annexation of affidavit to deed; contents of affidavit.

At the time of signing the deed of assignment provided for in Code Section 18-2-43, the person or firm making an assignment or the officer acting for the corporation making an assignment shall make an affidavit which shall be annexed to such assignment, and which affidavit shall state that:

(1) The assignment conveys all property held, claimed, or owned by the assignor at the time of making the assignment;

(2) All recitals and all estimates of totals and values therein and all list creditors are true to the best of his knowledge and belief;

(3) The debts set out as due to the preferred creditors are bona fide just, due, and unpaid; and

(4) The assignment is not made for the purpose of hindering, delaying, or defrauding creditors. (Ga. L. 1894, p. 90, § 6; Civil Code 1895, § 2703; Civil Code 1910, § 3236; Code 1933, § 28-307.)

JUDICIAL DECISIONS

Cited in *Burkhalter v. Glennville Bank*, 184 Ga. 147, 190 S.E. 644 (1937).

RESEARCH REFERENCES

ALR. — The fact that the parties to a conveyance in fraud of creditors are not in pari delicto as affecting the right of the party guilty of fraud to relief, 7 ALR 150.

Who may take affidavit as basis for warrant of arrest, 16 ALR 923.

Conveyance in consideration of future

support as fraudulent against creditors, 23 ALR 584.

Imputation of agent's knowledge to bankrupt or to creditor as satisfying conditions of provisions of Bankruptcy Act excepting unscheduled debts from discharge, 134 ALR 185.

18-2-47. Preparation after recording of assignment of list of all property of assignor at time of assignment; affidavits of assignor and assignee as to accuracy of list.

Within 15 days after the recording of the assignment provided for in Code Section 18-2-43, the assignor shall, in connection with the assignee, prepare a full and complete list of all property of every kind,

character, and description held, claimed, owned, or possessed by the assignor at the date of making such assignment, to which shall be attached the affidavit of the assignor that the list is true. The assignee shall also attach an affidavit that he has examined the books and other papers of the assignor, that he assisted in the preparation of the list as far as possible, and that to the best of his knowledge, information, and belief the list is correct. If he cannot make such affidavit, he shall state the reason therefor. (Ga. L. 1894, p. 90, § 7; Civil Code 1895, § 2704; Civil Code 1910, § 3237; Code 1933, § 28-308.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under former Ga. L. 1880-81, p. 174 and Ga. L. 1884-85, p. 100 have been included in the annotations for this Code section.

Construction of Act. — Former Ga. L. 1880-81, p. 174 was remedial in nature and should be strictly construed against the assignor and assignee, and liberally in favor of the creditors. *Turnipseed v. Schaefer*, 76 Ga. 109, 2 Am. St. R. 15 (1886) (decided under former Ga. L. 1880-81, p. 174).

Effect of noncompliance. — Former Ga. L. 1880-81, p. 174 was mandatory and assignment by an insolvent debtor for the benefit of creditors is void and conveyed no title when no schedule or inventory was attached to the deed of assignment. *Crittenden Bros. v. Coleman & Co.*, 70 Ga. 293 (1883); *Crittenden Bros. v. Coleman & Co.*, 74 Ga. 331 (1884) (decided under former Ga. L. 1880-81, p. 174).

Annexed schedules are not part of the contract. *Birdseye v. Underhill*, 82 Ga. 142, 7 S.E. 863, 14 Am. St. R. 142, 2 L.R.A. 99 (1888) (decided under former Ga. L. 1880-81, p. 174).

Specificity of schedules. — It is essential to rights of creditors that schedule of property assigned be made out specifically, so that it may be seen if assignment

covers property sold by them, and whether, by reason of fraud in debtor, they can claim title thereto. *Crittenden Bros. v. Coleman & Co.*, 70 Ga. 293 (1883) (decided under former Ga. L. 1880-81, p. 174).

Inventory and schedule need not state values of property listed. — It is not essential to validity of deed of assignment that values should be affixed to items of property included in inventory and schedule thereto attached. *Anthony v. Price & Maas*, 92 Ga. 170, 17 S.E. 1024 (1893) (decided under former Ga. L. 1880-81, p. 174).

Intention to defraud by material omissions from schedule. — See *Wood & Lovingood v. Haynes, Henson & Co.*, 92 Ga. 180, 18 S.E. 47 (1893) (decided under former Ga. L. 1880-81, p. 174).

Omission from schedule of property assigned of a right of redemption. — When one who made a voluntary assignment for the benefit of creditors omitted from schedule attached thereto the right of redemption which that person had in certain premises which the person conveyed for security of a debt, such omission was fatal to the assignment. *McMillan v. Knapp*, 76 Ga. 171, 2 Am. St. R. 29 (1886) (decided under former Ga. L. 1880-81, p. 174).

Cited in *Burkhalter v. Glennville Bank*, 184 Ga. 147, 190 S.E. 644 (1937).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Assignments for Benefit of Creditors, §§ 4, 5.

ALR. — Imputation of agent's knowl-

edge to bankrupt or to creditor as satisfying conditions of provisions of Bankruptcy Act excepting unscheduled debts from dis-

charge, 134 ALR 185.

Bankrupt's right to object to allowance of claims, 64 ALR2d 889.

18-2-48. List to remain on file ten days.

The list referred to in Code Section 18-2-47 shall remain on file for ten days in the clerk of the court's office in the county in which the assignment was filed, subject to examination by any interested person. (Ga. L. 1894, p. 90, § 8; Civil Code 1895, § 2705; Civil Code 1910, § 3238; Code 1933, § 28-309.)

JUDICIAL DECISIONS

Cited in *Burkhalter v. Glennville Bank*,
184 Ga. 147, 190 S.E. 644 (1937).

18-2-49. Correcting of innocent or unintentional mistake or omission in list of assets or creditors.

Where an unintentional mistake or omission has been made in the description of the property, in the list of assets, in the method of preparing the list of assets, or in the list of creditors, the same may be amended upon proof thereof to the court. (Ga. L. 1894, p. 90, § 18; Civil Code 1895, § 2715; Civil Code 1910, § 3248; Code 1933, § 28-319.)

RESEARCH REFERENCES

C.J.S. — 6A C.J.S., Assignments for
Benefit of Creditors, § 83.

18-2-50. Notification of creditors of filing of assignment; notification of creditors of institution of actions attacking assignment; sufficient notice.

Within 30 days after filing the assignment, the assignee shall notify each creditor that the same has been filed. Within 30 days after the date the assignee is served with the complaint attacking the assignment, he shall give notice of the filing of the complaint to each creditor named. Depositing a letter in the post office, stamped and properly addressed, shall be sufficient notice under this Code section. (Ga. L. 1894, p. 90, § 17; Civil Code 1895, § 2714; Civil Code 1910, § 3247; Code 1933, § 28-318.)

JUDICIAL DECISIONS

Cited in *Burkhalter v. Glennville Bank*,
184 Ga. 147, 190 S.E. 644 (1937).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Assignments for Benefit of Creditors, § 117.

C.J.S. — 6A C.J.S., Assignments for Benefit of Creditors, § 79.

18-2-51. Foreign assignments to conform with laws of state.

No property in this state shall pass under any assignment made by corporations, persons, or firms out of this state unless such foreign assignment shall conform to the law of assignments in this state. (Ga. L. 1894, p. 90, § 9; Civil Code 1895, § 2706; Civil Code 1910, § 3239; Code 1933, § 28-310.)

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Later change in law. — Assignment contrary to law at time it was made is void, although law was afterwards altered. *Mason & Fant v. S. Stricker & Co.*, 37 Ga. 262 (1867).

Situs of debt follows creditor, and law of creditor's domicile prevails where

creditor and debtor are residents of different states. *Birdseye v. Underhill*, 82 Ga. 142, 7 S.E. 863, 14 Am. St. R. 142, 2 L.R.A. 99 (1888).

Cited in *Burkhalter v. Glennville Bank*, 184 Ga. 147, 190 S.E. 644 (1937).

RESEARCH REFERENCES

C.J.S. — 6A C.J.S., Assignments for Benefit of Creditors, § 95.

18-2-52. Provision and filing of bond by assignee for benefit of assignor's creditors; amount of bond.

Upon the request of any three of the creditors of the assignor, the assignee shall make and file a bond with surety, in a sum to be fixed by the judge of the superior court, conditioned for the faithful performance of his trust, which bond shall be made payable to the judge of the probate court of the county and his successors in office, for the benefit of all creditors of the assignor. In no case shall the bond be less than the estimated value of the property assigned. (Ga. L. 1894, p. 90, § 10; Civil Code 1895, § 2707; Civil Code 1910, § 3240; Code 1933, § 28-311.)

JUDICIAL DECISIONS

Cited in *Burkhalter v. Glennville Bank*, 184 Ga. 147, 190 S.E. 644 (1937).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Assignments for Benefit of Creditors, §§ 4, 5.

C.J.S. — 6A C.J.S., Assignments for Benefit of Creditors, § 103.

ALR. — Power, after institution of bankruptcy proceedings, of court in which receivership or assignment proceedings have previously begun, to allow or pay fees or other compensation or expenses connected therewith, 90 ALR 1217.

18-2-53. Duties of assignee generally; payment of preferred debts after filing.

The assignee shall proceed to carry out the duties imposed upon him by the assignment, but he shall not pay any preferred debt until after 60 days from the filing of the assignment in the clerk of the court's office in the county in which the assignment was filed. (Ga. L. 1894, p. 90, § 11; Civil Code 1895, § 2708; Civil Code 1910, § 3241; Code 1933, § 28-312.)

JUDICIAL DECISIONS

Cited in Burkhalter v. Glennville Bank, 184 Ga. 147, 190 S.E. 644 (1937).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Assignments for Benefit of Creditors, § 90 et seq.

C.J.S. — 6A C.J.S., Assignments for Benefit of Creditors, § 32.

ALR. — Preference in event of debtor's insolvency in respect of funds designated or set apart by him for payment of specified obligations, 32 ALR 950.

18-2-54. Powers and rights of assignee.

The assignee shall succeed to all rights of the assignor but may attack and set aside any fraudulent conveyances or recover property conveyed by the assignor for the purpose of hindering, delaying, or defrauding creditors. (Ga. L. 1894, p. 90, § 12; Civil Code 1895, § 2709; Civil Code 1910, § 3242; Code 1933, § 28-313.)

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Assignee for creditors can sue on account included in deed of assignment for use of purchaser. — Trustee or assignee holding legal title to choses in action under valid deed of assignment for benefit of creditors can sue for amount of an account included in such assignment

for use of one who purchased the account at public sale held by that person as such trustee or assignee. May v. McCarty, 11 Ga. App. 454, 75 S.E. 672 (1912).

Cited in Burkhalter v. Glennville Bank, 184 Ga. 147, 190 S.E. 644 (1937).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Assignments for Benefit of Creditors, § 90 et seq.

C.J.S. — 6A C.J.S., Assignments for Benefit of Creditors, § 32.

ALR. — The fact that parties to a conveyance in fraud of creditors are not in pari delicto as affecting the right of the party guilty of fraud to relief, 7 ALR 150.

Conveyance in consideration of future support as fraudulent against creditors, 23 ALR 584.

Preference in event of debtor's insolvency in respect of funds designated or set apart by him for payment of specified obligations, 32 ALR 950.

Absolute conveyance or transfer with secret reservation as fraudulent per se as against creditors, 68 ALR 306.

Assignees for creditors as within protection of statute requiring filing or recording of conditional-sale contract or chattel mortgage, 71 ALR 981.

18-2-55. Actions to set aside assignments — Nature of actions generally; priorities and payment to creditors on judgments rendered after filing of complaint to set aside assignment.

No assignment shall be set aside except in a direct action filed for that purpose; and no creditor shall obtain any priority or preference of payment out of the assets assigned on any judgment rendered after the filing of a complaint to set aside the assignment if the assignment is set aside and decreed to be void. (Ga. L. 1894, p. 90, § 13; Civil Code 1895, § 2710; Civil Code 1910, § 3243; Code 1933, § 28-314.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1884-85, p. 100, are included in the annotations for this Code section.

Complainants attacking assignment as fraudulent could proceed without first reducing complainants' claims to judgment. Burns v. Beck, 83

Ga. 471, 10 S.E. 121 (1889) (decided under former Ga. L. 1884-85, p. 100, No. 429).

Cited in Coleman & Burden Co. v. Rice, 115 Ga. 510, 42 S.E. 5 (1902); Burkhalter v. Glennville Bank, 184 Ga. 147, 190 S.E. 644 (1937).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Assignments for Benefit of Creditors, § 116.

C.J.S. — 6A C.J.S., Assignments for Benefit of Creditors, § 30. 37 C.J.S., Fraudulent Conveyances, §§ 197, 198.

ALR. — Priority of assignment of chose in action over subsequent garnishment as affected by lack of notice to debtor of assignment, 52 ALR 109.

18-2-56. Actions to set aside assignments — Parties.

In all actions to set aside assignments, the assignee and assignor shall be indispensable parties; and any preferred or unpreferred creditor may be made a party plaintiff or defendant at any time in term or vacation. (Ga. L. 1894, p. 90, § 14; Civil Code 1895, § 2711; Civil Code 1910, § 3244; Code 1933, § 28-315.)

JUDICIAL DECISIONS

Cited in *Burkhalter v. Glennville Bank*,
184 Ga. 147, 190 S.E. 644 (1937).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Assignments for Benefit of Creditors, § 117.

C.J.S. — 37 C.J.S., Fraudulent Conveyances, § 236 et seq.

18-2-57. Actions to set aside assignments — Necessity of showing fraud, collusion, or notice thereof in assignee.

When the assignment is attacked as fraudulent or void for any reason, it shall not be necessary to show fraud or collusion or notice thereof in the assignee in order to render the assignment void. (Ga. L. 1894, p. 90, § 15; Civil Code 1895, § 2712; Civil Code 1910, § 3245; Code 1933, § 28-316.)

JUDICIAL DECISIONS

Cited in *Burkhalter v. Glennville Bank*,
184 Ga. 147, 190 S.E. 644 (1937).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Assignments for Benefit of Creditors, § 116.

C.J.S. — 6A C.J.S., Assignments for Benefit of Creditors, § 30. 37 C.J.S., Fraudulent Conveyances, §§ 197, 198.

ALR. — The fact that parties to a conveyance in fraud of creditors are not in *pari delicto* as affecting the right of the party guilty of fraud to relief, 7 ALR 150.

Conveyance in consideration of future support as fraudulent against creditors, 23 ALR 584.

Absolute conveyance or transfer with secret reservation as fraudulent per se as against creditors, 68 ALR 306.

18-2-58. Necessity for reduction of debt to judgment before action against assignor or assignee.

No creditor shall be required to reduce his debt to judgment before asking equitable relief in any action against the assignor or assignee, or both. (Ga. L. 1894, p. 90, § 16; Civil Code 1895, § 2713; Civil Code 1910, § 3246; Code 1933, § 28-317.)

JUDICIAL DECISIONS

Cited in *Burkhalter v. Glennville Bank*,
184 Ga. 147, 190 S.E. 644 (1937).

RESEARCH REFERENCES

C.J.S. — 37 C.J.S., Fraudulent Conveyances, § 199.

ALR. — Death of principal defendant as abating or dissolving garnishment or attachment, 21 ALR 272; 131 ALR 1146.

Right of creditors in respect of property gratuitously conveyed or transferred to a third person for alleged benefit of debtor, 147 ALR 1160.

18-2-59. Appointment of new assignees upon death or removal from jurisdiction of courts of state of sole or surviving assignee; authority thereof.

In all cases of assignments for the benefit of creditors, where the sole or surviving assignee has died or moved beyond the jurisdiction of the courts of the state, the superior courts of this state shall have full power and authority, upon the petition of two or more of the parties interested in such assignment and on such notice as the court shall direct, in a summary manner, to appoint a new assignee or assignees in the place of the deceased or nonresident assignee; and the new assignee shall have all the authority and responsibilities of the deceased or nonresident assignee; and all laws or enactments shall be as applicable and in as full force in respect to the new as to the old assignee; and the court may in its discretion require a bond and security of such assignee. (Ga. L. 1861, p. 32, § 1; Code 1868, § 2296; Code 1873, § 2322; Code 1882, § 2322; Civil Code 1895, § 3166; Civil Code 1910, § 3746; Code 1933, § 28-320.)

JUDICIAL DECISIONS

When trustee failed to appoint successor. — When property was devised to named trustee with power to appoint trustee's own successor, but trustee died without exercising this power, judge of superior court was authorized to appoint trustee. *White v. McKeon*, 92 Ga. 343, 17 S.E. 283 (1893).

When trustee of naked trust died, judge might appoint successor, who could

maintain ejectment on title. *Logan v. Goodall*, 42 Ga. 95 (1871).

Power to appoint when trust was executed by children reaching majority. — When trust was executed by children reaching majority, a judge did not have power, on resignation of trustees after death of grantor, to appoint a successor in trust for the children. *Milledge v. Bryan*, 49 Ga. 397 (1873).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Assignments for Benefit of Creditors, § 86.

C.J.S. — 6A C.J.S., Assignments for Benefit of Creditors, § 16.

ALR. — Death of principal defendant as abating or dissolving garnishment or attachment, 21 ALR 272; 131 ALR 1146.

Jurisdiction to garnish debt as affected by previous assignment by principal defendant to a nonresident served constructively, 39 ALR 1465.

ARTICLE 4

UNIFORM VOIDABLE TRANSACTIONS ACT

Cross references. — Provision that plaintiff may state claim for money and claim to set aside fraudulent conveyance without first obtaining judgment establishing claim for money, § 9-11-18. Form of complaint on claim for debt and to set aside fraudulent conveyance, § 9-11-113. Rights of unsecured creditors of seller of goods which have been identified to contract for sale, § 11-2-402. Attack by creditors on transactions between husband and wife, § 19-3-10. Gifts void as against creditors and bonafide purchasers, § 44-5-88. Wrongful sale or removal of mortgaged property, § 44-14-6.

Editor's notes. — Ga. L. 2015, p. 996, § 1-1/SB 65, not codified by the General Assembly, provides that: “(a) This Act shall be known and may be cited as the ‘Debtor-Creditor Uniform Law Modernization Act of 2015.’

“(b) To promote consistency among the states, it is the intent of the General Assembly to modernize certain existing uniform laws promulgated by the Uniform Law Commission affecting debtor and creditor rights, responsibilities, and relationships and other federally recognized

laws affecting such rights, responsibilities, and relationships.”

Ga. L. 2015, p. 996, § 7-1(d)/SB 65, not codified by the General Assembly, provides that: “(d) The amendments made by Parts 4A and 4B of this Act shall:

“(1) Apply to a transfer made or obligation incurred on or after July 1, 2015;

“(2) Not apply to a transfer made or obligation incurred before July 1, 2015;

“(3) Not apply to a right of action that has accrued before July 1, 2015; and

“(4) For purposes of this subsection, a transfer is made and an obligation is incurred at the time provided in Code Section 18-7-76.”

Law reviews. — For article surveying domestic relations law in 1984-85, see 37 Mercer L. Rev. 221 (1985). For article, “Preparing the Georgia Farmer (or Other Small Entrepreneur) for Bankruptcy,” see 22 Ga. State Bar J. 186 (1986).

For note discussing fraudulent conveyances by debtors, see 12 Ga. L. Rev. 814 (1978).

For comment on *Downs v. Powell*, 215 Ga. 62, 108 S.E.2d 715 (1959), see 11 Mercer L. Rev. 241 (1959).

JUDICIAL DECISIONS

ANALYSIS

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EFFECT OF INVALIDATING CONVEYANCE

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1863, §§ 1952 and 1954, former Code 1873, §§ 1944 and 1952, former Civil Code 1895, §§ 2687, 2726, 2727, and 2695, former Civil Code 1910, §§ 3220, 3223, 3224, 3225 and 3230, former Code 1933, §§ 28-101, 28-102, 28-103, 28-104, 28-201, 28-202 and 28-203, and former Code Sections §§ 18-2-20 through 18-2-25 are included in the annotations for this article.

Fraudulent Conveyance Act was based on the statute of Elizabeth (13 Eliz. Chap. 5). *Chattanooga Fed. Sav. & Loan Ass'n v. Northwest Recreational Activities, Inc.*, 4 Bankr. 36 (Bankr. N.D. Ga. 1980) (decided under former Code 1933, § 28-201).

For discussion of history of former Code 1868, § 1944, see *Westmoreland v. Powell*, 59 Ga. 256 (1877) (decided under former Code 1868, § 1944); *McDowell v. McMurria*, 107 Ga. 812, 33 S.E. 709, 73 Am. St. R. 155 (1899) (decided under former Civil Code 1895, § 2695); *Boswell v. Boswell*, 147 Ga. 734, 95 S.E. 247 (1918) (decided under former Civil Code 1910, § 3224).

Former Civil Code 1910, § 3224 referred to creditors at time of conveyance. *Mitchell v. Langley*, 148 Ga. 244, 96 S.E. 430 (1918) (decided under former Civil Code 1910, § 3224); *Gormley v. Askew*, 177 Ga. 554, 170 S.E. 674 (1933) (decided under former Civil Code 1910, § 3224).

Applicability. — Fraudulent Conveyance Act applied to conveyance of own property intended to delay or defraud, known to taker. *Jones v. Foster*, 150 Ga. 277, 103 S.E. 491 (1920) (decided under former Civil Code 1910, § 3224).

Before conveyance by insolvent debtor can be attacked by debtor's creditor, it must appear that the insolvent debtor actually parted with some valuable asset which belonged to the debtor, and which, if title had been retained, might have been subjected to debts. *S.T. & W.A. Dewees Co. v. Paul B. Carter & Co.*, 190 Ga. 68, 8 S.E.2d 376 (1940) (decided under former Code 1933, § 28-201).

This rule applies with equal force in determining character and the purpose of the transaction between an individual and a corporation controlled by the individual. *S.T. & W.A. Dewees Co. v. Paul B. Carter & Co.*, 190 Ga. 68, 8 S.E.2d 376 (1940) (decided under former Code 1933, § 28-201).

As to claims against one corporation whose property has been purchased by another, the general law would apply, prohibiting any transaction in fraud of creditors, and preventing an assignment by an insolvent wherein it or stockholders reserved any benefit or trust. *Hawkins v. Central of Ga. Ry.*, 119 Ga. 159, 46 S.E. 82 (1903) (decided under former Civil Code 1895, § 2695); *White v. Atlanta, B. & A.R.R.*, 5 Ga. App. 308, 63 S.E. 234 (1908) (decided under former Civil Code 1895, § 2695).

Former § 18-2-22 did not apply to an assent to probate of a will since such assent did not operate as an assignment or conveyance of any property interest subject to execution or levy by the plaintiff because the plaintiff's judgment was not entered until several months after the assent was given. *Moody v. Davis*, 234 Ga. App. 146, 505 S.E.2d 844 (1998) (decided under former § 18-2-22).

Word "others" as used in the phrase "creditors and others" includes plaintiffs with claims against debtors "liable as tortfeasors, or otherwise . . . for an unascertained damage to person or property, so far as fraudulent conveyances are concerned." *Rolleston v. Cherry*, 237 Ga. App. 733, 521 S.E.2d 1, cert. denied, 528 U.S. 1046, 120 S. Ct. 580, 145 L. Ed. 2d 482 (1999) (decided under former § 18-2-22); *Bonner v. Smith*, 247 Ga. App. 419, 543 S.E.2d 457 (2000) (decided under former § 18-2-22).

Plaintiff in trover is protected. *Banks v. McCandless*, 119 Ga. 793, 47 S.E. 332 (1904) (decided under former Civil Code 1895, § 2687).

Conditions for transfer invalid. — Transfer is invalid against creditors, and therefore a trustee in bankruptcy if: (1) debtor conveys property with intent to delay or defraud debtor's creditors; and (2) recipient of property knows of debtor's intention to defraud. *Loeb v. Dante*, 1

General Consideration (Cont'd)

Bankr. 547 (Bankr. N.D. Ga. 1979) (decided under former Code 1933, 28-201).

Invalidation. — Invalidation is permitted whenever: (1) bona fide creditor of debtor exists at time of transfer; (2) debtor and transferee intended conveyance as a gift rather than a sale; and (3) debtor is insolvent at time of transfer or rendered insolvent as a result of transfer. *Loeb v. Dante*, 1 Bankr. 547 (Bankr. N.D. Ga. 1979) (decided under former Code 1933, § 28-201).

Meaning of "delay." — "Delay" cannot be construed to include situations in which debtor files reorganization petition in bankruptcy and obtains protection of automatic stay to suspend creditors from recovering possession of collateral; the automatic stay of an otherwise proper petition is not a delay prohibited or contemplated. *Chattanooga Fed. Sav. & Loan Ass'n v. Northwest Recreational Activities, Inc.*, 4 Bankr. 36 (Bankr. N.D. Ga. 1980) (decided under former Code 1933, § 28-201).

Distinction between equitable and legal remedies. — Equitable remedy of setting aside the conveyance for satisfaction of the original debt is completely different from the right at law to recover damages for the fraud of the conveyance itself, and judgment creditors are not required to give up their right to satisfy the judgment debt by getting the conveyance set aside, in order to get damages for the fraud. *Kesler v. Veal*, 182 Ga. App. 444, 356 S.E.2d 254, modified on other grounds, 257 Ga. 677, 362 S.E.2d 214 (1987) (decided under former § 18-2-22).

Remedy available to one reducing claim to judgment lien. — Former Code 1933, §§ 28-101, 28-102, 28-201, and 28-202 provided creditors with the right to set aside fraudulent transfers, and this remedy was available to any creditor at the time of transfer who thereafter reduces the creditor's claim to a judgment lien. *United States v. Hickox*, 356 F.2d 969 (5th Cir. 1966) (decided under former Code 1933, §§ 28-101, 28-102, 28-201, and 28-202).

Time of acquisition of lien. — Creditor, who brings suit to prevent a debtor

from carrying into effect a threat to convey away all of the debtor's property for purpose of defeating claims of such creditor, acquires a lien from commencement of suit to prevent such fraudulent conveyance, and after service of process. *Law v. Coleman*, 173 Ga. 68, 159 S.E. 679 (1931) (decided under former Civil Code 1910).

Status of trustee in bankruptcy. — Condition precedent to filing action was that only judgment creditors can void certain acts: Section 544(b) of the Bankruptcy Code provides trustee with status of a hypothetical judgment creditor. Therefore, this condition precedent is satisfied in suit by trustee alleging fraudulent conveyance of real property by debtor to debtor's spouse. *Pettigrew v. Graham*, 16 Bankr. 606 (Bankr. N.D. Ga. 1981) (decided under former Code 1933, § 28-201).

Remedy under bankruptcy law. — When a creditor has been injured by fraudulent or other willful misconduct by the debtor, the appropriate remedy under bankruptcy law as to the debtor is an exception to or a denial of a discharge. As to another creditor which may have willfully participated in the misconduct, the appropriate remedy under bankruptcy law is an adjudication of the relative priorities between the wrongdoer and the other innocent creditors. *Sandersville Prod. Credit Ass'n v. Douthit*, 47 Bankr. 428 (M.D. Ga. 1985) (decided under former § 18-2-22).

Denial of discharge in bankruptcy. — Determination that bankruptcy debtor made the subject transfers to the debtor's wife in an intentional effort to perpetrate fraud and conceal assets may constitute a sufficient legal basis for denying the debtor's discharge pursuant to 11 U.S.C. § 727(a)(2)(A). *Sikes v. Norton*, 185 Bankr. 945 (Bankr. N.D. Ga. 1995) (decided under former § 18-2-22).

Right of trustee in bankruptcy to avoid transfer. — Trustee in bankruptcy may avoid any transfer of property by bankrupt which any creditor of bankrupt might have avoided; and this right of trustee extends to all transfers made and accepted in fraud of creditors, regardless of whether transactions occurred within four months prior to bankruptcy or not.

Sullivan v. Ginsberg, 180 Ga. 840, 181 S.E. 163 (1935) (decided under former Code 1933, § 28-201).

When an insolvent debtor did not receive equivalent value in exchange for a transfer, the transfer could be avoided. *Ragsdale v. South Fulton Mach. Works, Inc. (In re Whitacre Sunbelt, Inc.)*, 200 Bankr. 422 (Bankr. N.D. Ga. 1996) (decided under former § 18-2-22).

In spite of fraudulence of conveyance, subsequent creditor who sustains no harm is denied relief. — One may make a conveyance with actual intent to defraud future creditor or to defeat debt which, though contemplated, is not yet in actual existence; and, unless creditor is hurt by such conveyance, relief will be denied. *Roach v. Roach*, 212 Ga. 40, 90 S.E.2d 423 (1955) (decided under former Code 1933).

Tort claim against vendor. — One having tort claim against vendor may, in proper case, attack a conveyance as fraudulent. *Foremost Dairies, Inc. v. Kelley*, 51 Ga. App. 722, 181 S.E. 204 (1935) (decided under former Code 1933, § 28-203).

Alimony claims. — Words “and others” appearing in former Code 1933, § 28-201 bring a claim for alimony within the statute’s provisions. *McGahee v. McGahee*, 204 Ga. 91, 48 S.E.2d 675 (1948) (decided under former Code 1933, § 28-201).

One suing for alimony may obtain relief against fraudulent conveyance by spouse, as such person, if not a creditor in the ordinary sense, is within phrase “and others.” *Von Kamp v. Gary*, 204 Ga. 875, 52 S.E.2d 591 (1949) (decided under former Code 1933, § 28-201).

Conveyances in pursuance of common scheme. — Fact that value of property covered by several conveyances was largely in excess of debt due petitioner did not afford ground for demurrer as all of the conveyances were executed in pursuance of a common scheme and could be attacked without reference to the amount of the judgment creditor’s debt as compared to the value of property conveyed. *Peoples Loan Co. v. Allen*, 199 Ga. 537, 34 S.E.2d 811 (1945) (decided under former Code 1933, § 28-201).

Deed to secure debt also subject to attack. — Conveyance of property for

present valuable consideration may be void as to creditors and a deed to secure debt is as much open to attack for fraud as an absolute conveyance. *Burkhalter v. Glennville Bank*, 184 Ga. 147, 190 S.E. 644 (1937) (decided under former Code 1933, § 28-201); *Peoples Loan Co. v. Allen*, 199 Ga. 537, 34 S.E.2d 811 (1945) (decided under former Code 1933, § 28-201).

Plaintiff claiming equitable title and contending defendant’s conveyance was fraudulent. — Plaintiff suing for land on equitable title, and contending that defendant’s conveyance was fraudulent and voluntary, held not to be within the statutes. *Wommack v. Wommack*, 150 Ga. 401, 104 S.E. 421 (1920) (decided under former Civil Code 1910, § 3224).

Sale under power of land set aside as year’s support. — Former Civil Code 1910, § 3220 was inapplicable to restrain sale under power in security deeds, when equity in lands was set apart as year’s support. *Redman v. Thaxton*, 167 Ga. 646, 146 S.E. 445 (1929) (decided under former Civil Code 1910, § 3220).

Effect on parties of deed void as to creditors. — Deed void as to creditors may, nevertheless, be good between the parties. *Jones v. Dougherty*, 10 Ga. 273 (1851) (decided under former law).

Deed made to defraud creditors, though void as to creditors was good between grantor and grantee, and former after executing such deed has no title to property thereby conveyed, and therefore cannot have title set apart and exempted as a homestead under the laws of this state. *McDowell v. McMurria*, 107 Ga. 812, 33 S.E. 709, 73 Am. St. R. 155 (1899) (decided under former Civil Code 1895, § 2695).

Conveyances, though void as to creditors and other persons designated, are good between parties to the conveyances and all persons other than creditors or persons having rightful claims against the grantor for which those people are entitled to judgment. *Gunn v. Chapman*, 166 Ga. 279, 142 S.E. 873 (1928) (decided under former law).

Under the 1882 provisions, the law was designed solely to protect rights of creditors, and consequently rendered a fraudulent transfer void only as against them,

General Consideration (Cont'd)

and make no provision whatever in regard to its effect between the parties to the transfer. *McCranie v. Cobb*, 174 Ga. 370, 162 S.E. 692 (1932) (decided under former law).

Though deed be made to defraud creditors, neither vendor nor those in privity with vendor will be allowed to set up this fact to defeat action of ejectment brought by vendee as the deed is good as between parties thereto and those in privity with them, though void as to creditors. *McCranie v. Cobb*, 174 Ga. 370, 162 S.E. 692 (1932) (decided under former law).

When deed is made to defraud creditors, it is good as between parties thereto and those in privity with them, though void as to creditors. *Fuller v. Fuller*, 213 Ga. 103, 97 S.E.2d 306 (1957) (decided under former law).

Grantor of fraudulent conveyance may not have it set aside. — Courts will not set aside a conveyance to hinder, delay, or defraud creditors at instance of grantor. *Watkins v. Nugen*, 118 Ga. 375, 45 S.E. 260 (1903) (decided under former law). *Tune v. Beeland*, 131 Ga. 528, 62 S.E. 976 (1908) (decided under former law);.

Action by administrator of grantor of fraudulent conveyance. — When a debtor, to defraud creditors conveys the debtor's property to another, the debtor's administrator cannot maintain an equitable action against such grantee to recover the property for the purpose of paying the creditors of the decedent. *Crosby v. De Graffenreid*, 19 Ga. 290 (1856) (decided under former law); *Boswell v. Boswell*, 147 Ga. 734, 95 S.E. 247 (1918) (decided under former law).

Applicability of doctrine that grantor in fraudulent deed cannot question deed's validity. — Doctrine that grantor in deed made for purpose of hindering, delaying, or defrauding the debtor's creditors, or one claiming in the debtor's right, cannot be heard to question the validity of such deed, does not apply when the deed was not in fact delivered. *Allen v. Bemis*, 193 Ga. 556, 19 S.E.2d 516 (1942) (decided under former law); *Fuller v. Fuller*, 211 Ga. 201, 84 S.E.2d 665 (1954) (decided under former law).

Cited in *Hightower v. Mustian*, 8 Ga. 506 (1850); *Burnside v. Terry*, 51 Ga. 186 (1874); *Planters' & Miners' Bank v. Willeo Cotton Mills*, 60 Ga. 168 (1878); *Heflin v. Kiser & Co.*, 88 Ga. 306, 14 S.E. 585 (1892); *Lamkin v. Clary*, 103 Ga. 631, 30 S.E. 596 (1898); *Ernest v. Merritt*, 107 Ga. 61, 32 S.E. 898 (1899); *Oglesby v. Walton & Co.*, 118 Ga. 203, 44 S.E. 990 (1903); *Hinkle v. James Smith & Son*, 133 Ga. 255, 65 S.E. 427 (1909); *Fourth Nat'l Bank v. Consolidated Steamboat Co.*, 12 Ga. App. 864, 76 S.E. 1057 (1913); *Pincus v. S. H. Meinhard & Bro.*, 139 Ga. 365, 77 S.E. 82 (1913); *Adams v. First Nat'l Bank*, 147 Ga. 470, 94 S.E. 568 (1917); *Jones v. Foster*, 150 Ga. 277, 103 S.E. 491 (1920); *Mobley v. Merchants & Planters Bank*, 157 Ga. 658, 122 S.E. 233 (1924); *Jackson v. B.T. Kight & Sons*, 159 Ga. 584, 126 S.E. 379 (1925); *Gunn v. Chapman*, 166 Ga. 279, 142 S.E. 873 (1928); *Davenport & Broadhurst v. Wood*, 166 Ga. 365, 143 S.E. 398 (1928); *Young v. Cochran Banking Co.*, 166 Ga. 877, 144 S.E. 652 (1928); *Peck v. Calhoun*, 38 Ga. App. 764, 145 S.E. 528 (1928); *Seagraves v. Couch & Jackson*, 163 Ga. 38, 147 S.E. 61 (1929); *Walker v. Martin*, 170 Ga. 447, 153 S.E. 41 (1930); *Parker v. Pender*, 174 Ga. 579, 163 S.E. 506 (1932); *Rowe v. Cole*, 176 Ga. 592, 168 S.E. 882 (1933); *Bandy v. Taylor Iron Works & Supply Co.*, 177 Ga. 455, 170 S.E. 368 (1933); *Strobel v. Gormley*, 50 Ga. App. 358, 178 S.E. 192 (1935); *Stonecypher v. Elliott*, 181 Ga. 438, 182 S.E. 587 (1935); *Killebrew v. Smith*, 182 Ga. 117, 184 S.E. 714 (1936); *Ayer v. First Nat'l Bank & Trust Co.*, 182 Ga. 765, 187 S.E. 27 (1936); *Segars v. Virginia-Carolina Chem. Corp.*, 56 Ga. App. 597, 193 S.E. 786 (1937); *New England Mut. Life Ins. Co. v. Childs*, 185 Ga. 198, 194 S.E. 561 (1937); *Tucker v. Talmadge*, 186 Ga. 798, 198 S.E. 726 (1938); *Armour Fertilizer Works v. Maxwell*, 186 Ga. 801, 199 S.E. 120 (1938); *Owen v. S.P. Richards Paper Co.*, 188 Ga. 258, 3 S.E.2d 660 (1939); *Beavers v. Le Sueur*, 188 Ga. 393, 3 S.E.2d 667 (1939); *Dwight v. Acme Lumber & Supply Co.*, 189 Ga. 473, 6 S.E.2d 586 (1939); *Cunningham v. Avakian*, 192 Ga. 391, 15 S.E.2d 493 (1941); *Caldwell v. Northwest Atlanta Bank*, 194 Ga. 370, 21 S.E.2d 619 (1942); *First Nat'l Bank v.*

Carmichael, 198 Ga. 309, 31 S.E.2d 811 (1944); *Stubbs v. Fulton Nat'l Bank*, 146 F.2d 558 (5th Cir. 1945); *United States v. Phillips*, 59 F. Supp. 1006 (S.D. Ga. 1945); *Hoard v. Maddox*, 202 Ga. 274, 42 S.E.2d 744 (1947); *Williams v. Russell*, 82 Ga. App. 529, 61 S.E.2d 567 (1950); *Mitchell v. Waller*, 83 Ga. App. 7, 62 S.E.2d 383 (1950); *Bank of LaFayette v. Giles*, 208 Ga. 674, 69 S.E.2d 78 (1952); *Johnston v. Clement A. Evans & Co.*, 111 Ga. App. 659, 143 S.E.2d 38 (1965); *Kamlapat v. Purvis-Wade Carpet Mills*, 112 Ga. App. 781, 146 S.E.2d 138 (1965); *Leachman v. Cobb Dev. Co.*, 229 Ga. 207, 190 S.E.2d 537 (1972); *United Bldg. Supply, Inc. v. Atlanta Dry Wall Co.*, 231 Ga. 554, 203 S.E.2d 159 (1974); *Valley View Church of God in Christ, Inc. v. King*, 236 Ga. 337, 223 S.E.2d 701 (1976); *Jones v. Milligan*, 238 Ga. 440, 233 S.E.2d 202 (1977); *American Nat'l Bank & Trust Co. v. Davis*, 241 Ga. 333, 245 S.E.2d 291 (1978); *Ingram v. Warren*, 244 Ga. 189, 259 S.E.2d 448 (1979); *Silverman v. Morton Gruber & Assocs.*, 244 Ga. 396, 260 S.E.2d 92 (1979); *Nicholson v. Merken*, 477 F. Supp. 97 (N.D. Ga. 1979); *Duncan v. First Nat'l Bank*, 597 F.2d 51 (5th Cir. 1979); *Southern Educators Assocs. v. Silver*, 245 Ga. 520, 284 S.E.2d 3 (1981); *Aiken v. Citizens & S. Bank*, 249 Ga. 481, 291 S.E.2d 717 (1982); *Sheppard v. Tribble Heating & Air Conditioning, Inc.*, 163 Ga. App. 732, 294 S.E.2d 572 (1982); *Pettigrew v. Graham*, 747 F.2d 1383 (11th Cir. 1984); *Artrac Corp. v. Austin Kelley Adv., Inc.*, 197 Ga. App. 772, 399 S.E.2d 529 (1990); *Dime Savs. Bank v. Sandy Springs Assocs.*, 261 Ga. 485, 405 S.E.2d 491 (1991); *Ray v. Atkins*, 205 Ga. App. 85, 421 S.E.2d 317 (1992); *In re Munford, Inc.*, 172 Bankr. 404 (Bankr. N.D. Ga. 1993); *Merrell v. Beckwith*, 263 Ga. 779, 439 S.E.2d 488 (1994); *Smith v. Travis Pruitt & Assocs.*, 265 Ga. 347, 455 S.E.2d 586 (1995); *Dearing v. A.R. III, Inc.*, 266 Ga. 301, 466 S.E.2d 565 (1996); *Integon Indem. Corp. v. Henry Medical Ctr., Inc.*, 235 Ga. App. 97, 508 S.E.2d 476 (1998); *Brown v. Cooper*, 237 Ga. App. 348, 514 S.E.2d 857 (1999); *Hadlock v. Anderson*, 246 Ga. App. 291, 540 S.E.2d 282 (2000).

Construction

Liberal construction. — Though this provision is strict, courts will give liberal construction to the statute's provisions. *Duncan v. Freeman*, 152 Ga. 332, 110 S.E. 5 (1921) (decided under former Code 1863, § 1954).

Construction in pari materia with § 18-2-23. — Former Civil Code 1910, §§ 3224 and 3225 (see now O.C.G.A. §§ 18-2-23 and 18-2-59), the innocent subsequent purchaser statute, being in pari materia, were to be construed together. *Warren v. Citizens Nat'l Bank*, 145 Ga. 503, 89 S.E. 520 (1916); *FDIC v. United States*, 654 F. Supp. 794 (N.D. Ga. 1986) (decided under former O.C.G.A. § 18-2-23).

Direct cause of action against transferee. — Former O.C.G.A. § 18-2-22 does not, either by the statute's terms or by implication, create a direct cause of action in tort against the transferee for the transferor's negligence in a completely separate transaction. *Brown Transp. Corp. v. Street*, 194 Ga. App. 717, 391 S.E.2d 699 (1990) (decided under former O.C.G.A. § 18-2-22).

Basis for general and punitive damages. — If there is evidence of bad faith, actual fraud, or conspiracy on the part of the taking party or transferee in receiving assets fraudulently conveyed to the transferee by the debtor, an award of general and punitive damages against the transferee may be upheld. *Lawson v. Athens Auto Supply & Elec., Inc.*, 200 Ga. App. 609, 409 S.E.2d 60, cert. denied, 200 Ga. App. 895, 409 S.E.2d 60 (1991) (decided under former O.C.G.A. § 18-2-22).

Assignment for Benefit of Creditors

Creditor refusing to accept assignment as satisfaction. — Assignment by insolvent debtor for the benefit of the debtor's creditors, provided they would take property thereby conveyed in full satisfaction of their claims, is not binding on a creditor who refuses to accept the property. *McBride & Co. v. Bohanan*, 50 Ga. 527 (1874) (decided under former law); *Miller v. Conklin & Co.*, 17 Ga. 430,

Assignment for Benefit of Creditors (Cont'd)

63 Am. Dec. 248 (1855) (decided under former law).

Assignment for benefit of some creditors to exclusion of others. — Insolvent debtor may make assignment of the debtor's property in trust, bona fide, for benefit of one or more creditors to exclusion of others, provided no trust or benefit is reserved to assignor, or any person for the debtor. *Embry & Fisher v. Clapp*, 38 Ga. 245 (1868) (decided under former law).

Insolvent debtor may make assignment of property in trust, for benefit of one or more creditors, to exclusion of others, so long as no trust or benefit is reserved for the assignor, or any person for the debtor. *Embry & Fisher v. Clapp*, 38 Ga. 245 (1868) (decided under former law).

Validity of out-of-state assignment of property located within state. — Assignment by debtor for equal benefit of all debtor's creditors was valid and violated no law or public policy of this state. Therefore, such assignment lawfully made in South Carolina by a resident thereof will pass personal assets found in Georgia. *Miller v. Kernaghan*, 56 Ga. 155 (1876) (decided under former law).

Reservation of Benefit or Trust

Subject to attack by interested party in direct or collateral proceeding. — Assignment or transfer by insolvent debtor of any kind or character of property, when any trust or benefit is reserved to an assignor, is fraudulent and void. Being void, such transfer or assignment may be attacked by a party interested, in either a direct or collateral legal proceeding, when the proceeding is sought to be set up. *Coleman & Burden Co. v. Rice*, 115 Ga. 510, 42 S.E. 5 (1902) (decided under former Civil Code 1895, § 2695).

Retention of life estate in conveyed property invalidates conveyance. — If it be agreed between an insolvent debtor and purchaser of property from a debtor, that the debtor shall remain in possession thereof during the debtor's life, it is such a reservation of benefit to the

debtor as may avoid conveyance. *Barber v. Terrell*, 54 Ga. 146 (1875) (decided under the Act of 1818).

Agreement to return grantor's property if debt paid. — Fact that grantor may have executed deed to claimant with understanding that if grantor paid the indebtedness to claimant "he could get his land back" was not such a reservation of benefit in grantor as would invalidate the conveyance. *Johnson v. Sherrer*, 185 Ga. 340, 195 S.E. 149 (1938) (decided under former Code 1933, § 28-201).

Deed to creditor containing reversionary clause. — Stipulation in deed by debtor to creditor stating: "It is understood that should said grantee depart this life before grantor, then above-described property is to revert back to said grantor and become his property as if this deed had not been made," did not render the deed void as being repugnant. *Davie v. Tanner*, 150 Ga. 770, 105 S.E. 355 (1920) (decided under former Civil Code 1910, § 3224).

Assignment with provision requiring return of surplus is valid. — Assignment by insolvent bank to pay existing debt to creditor is not void because the amount of effects assigned is larger than would be reasonably sufficient to pay the debt and because there is a stipulation that the excess shall be returned to the bank. *Carey v. Giles*, 10 Ga. 9 (1851) (decided under the Act of 1818).

Deed to land given by insolvent debtor to creditor in trust to secure payment of debt, which deed provides that if debt is not paid in four months creditor may sell land at public outcry, and reimburse the creditor out of proceeds for the debtor's debt, cost, and expenses, and that the debtor is to pay balance, if any, to grantor, is not, on account of such provision for payment of balance, void. The law would give that direction to the balance without the provision. *Lay v. Seago*, 47 Ga. 82 (1872) (decided under the Act of 1818).

Loan with pledged collateral when collateral value exceeded debt. — When transaction was in nature of a loan and pledge of collateral to secure the loan, although amount of collateral exceeded amount of debt it was intended to secure,

no such prohibited trust was thereby created. *Booth v. Atlanta Clearing-House Ass'n*, 132 Ga. 100, 63 S.E. 907 (1909) (decided under the Act of 1818).

Transaction purporting to secure creditor for money advanced to named person. — When security deed involved was not in trust or for benefit of or on behalf of creditors, but was a transaction purporting to secure a creditor for money stated to have been advanced or loaned to a named person, it was not such a transaction as is declared to be void. *Jones v. Edwards*, 177 Ga. 723, 171 S.E. 285 (1933) (decided under former Civil Code 1910, § 3223).

Execution of release of retained benefits and acceptance by assignee. — Even if assignment, as originally executed, was violative of provisions it would not be so after the execution of endorsement releasing benefit and its acceptance by assignee. *John J. Cohen & Sons v. Summers*, 54 Ga. 501 (1875) (decided under former Civil Code 1863, § 1952).

Transfer of a mortgage to an alimony trust for the benefit of assignor's wife who was seeking a divorce was a fraudulent transfer under the circumstances of the case. *FDIC v. United States*, 654 F. Supp. 794 (N.D. Ga. 1986) (decided under former O.C.G.A. § 18-2-23).

Bona Fide Purchasers

Must be without notice or grounds for reasonable suspicion. — To be protected, purchaser must be without notice or grounds for reasonable suspicion — not simply without knowledge. *Nicol & Davidson v. Crittenden*, 55 Ga. 497 (1875) (decided under former Civil Code 1863, § 1952).

Bona fide purchaser holding under fraudulent conveyance. — Law protects bona fide purchasers even when those purchasers hold under fraudulent conveyance, when those purchasers have purchased for a valuable consideration and without notice or reasonable grounds for suspicion. *Thornton v. Carver*, 80 Ga. 397, 6 S.E. 915 (1888) (decided under former law).

Bona fide purchaser, without notice of promissory note and mortgage to secure the note, who buys before the debt be-

comes due, is protected against defense that mortgage was made by the debtor in anticipation of bankruptcy and to defraud the debtor's creditors. *Murray & Co. v. Jones*, 50 Ga. 109 (1873) (decided under former law).

Innocent purchaser at sale intended to defraud creditors not affected by fraud of seller, though property be attached in purchaser's hands before it is paid for, and before negotiable notes given for price have passed to innocent holders. *Nicol & Davidson v. Crittenden*, 55 Ga. 497 (1875) (decided under former Civil Code 1863, § 1952).

Bona fide sale without fraudulent intent not invalid. — Bona fide sale of property, not made to hinder, delay, or defraud creditors, is not rendered invalid because vendor may have been insolvent at time. *Burkhalter v. Glennville Bank*, 184 Ga. 147, 190 S.E. 644 (1937) (decided under former Code 1933, § 28-201).

Bona fide conveyance by debtor is not void because made when insolvent, and this is so with respect to conveyances by corporations and artificial persons as well. *Thornton v. Lane*, 11 Ga. 459 (1852) (decided under former law); *Hadden v. McQueen*, 138 Ga. 406, 75 S.E. 333 (1912) (decided under former law).

Purchaser of very inconsiderable portion of insolvent debtor's property. — Rule that sale of all of insolvent debtor's property is a badge of fraud does not apply in contest between creditors and one who has purchased a very inconsiderable portion thereof, especially when enough was left, at the time, to pay debts. *Scott v. Winship*, 20 Ga. 429 (1856) (decided under former law).

Fraudulent Intent — Generally

Party relying on former Code 1933, § 28-201)(2) must establish two elements: (1) the requisite intent of the grantor; and (2) grantee's knowledge of grantor's intent; the second element may be established either by proof of actual knowledge or by proof of circumstances sufficient to put grantee on inquiry. *Stokes v. McRae*, 247 Ga. 658, 278 S.E.2d 393 (1981) (decided under former Code 1933, § 28-201).

**Fraudulent Intent —
Generally (Cont'd)**

Proof of bad faith, actual fraud, or conspiracy required. — Legislature did not intend the taking party to be liable for general and punitive damages based solely upon the fraudulent conveyance without proof of bad faith, actual fraud, or conspiracy on the party's part. *Kesler v. Veal*, 257 Ga. 677, 362 S.E.2d 214 (1987) (decided under former O.C.G.A. § 18-2-22).

Act done by debtor merely to delay creditor may amount to fraud. *Von Kamp v. Gary*, 204 Ga. 875, 52 S.E.2d 591 (1949) (decided under former Code 1933, § 28-101).

Badges of fraud do not in themselves constitute fraud; but are only signs or indicia from which it may be inferred as a matter of evidence; and they are subject to explanation. *Burkhalter v. Glennville Bank*, 184 Ga. 147, 190 S.E. 644 (1937) (decided under former Code 1933, § 28-201).

Fraudulent intent to be inferred from facts. — It is impossible that a sale can defraud creditors, unless the sale was made with fraudulent intent; and the nature of intent will not be presumed as a matter of law, but must be inferred by the jury from the facts in evidence. *Nicol & Davidson v. Crittenden*, 55 Ga. 497 (1875) (decided under former Civil Code 1863, § 1952); *Almand v. Thomas*, 148 Ga. 369, 96 S.E. 962 (1918) (decided under former law).

Inference or presumption of fraud. — That a given act was followed necessarily by delay to creditors, however strong a circumstance to be weighed by the jury, is not ground for presuming as a matter of law that it was intended to have that effect. *Nicol & Davidson v. Crittenden*, 55 Ga. 497 (1875) (decided under former Civil Code 1863, § 1952).

Fraud may be inferred from sale pending litigation and from vendor's retention of property. *Bozikis v. Anestos*, 33 Ga. App. 422, 126 S.E. 555 (1925) (decided under former Civil Code 1910, § 3224).

Insolvency of the debtor is determined by ascertaining whether the debtor retained sufficient assets to satisfy the

debtor's obligations after the transfers. *Rolleston v. Cherry*, 237 Ga. App. 733, 521 S.E.2d 1, cert. denied, 528 U.S. 1046, 120 S. Ct. 580, 145 L. Ed. 2d 482 (1999) (decided under former O.C.G.A. § 18-2-22).

Insolvency of debtor need not be shown. *Anderson Oil Co. v. Benton Oil Co.*, 246 Ga. 304, 271 S.E.2d 207 (1980) (decided under former Code 1933, § 28-201).

Applicability of paragraph (2). — Former Code 1933, § 28-201(2) may be applied in a proper case either to a deed based on valuable consideration or to a voluntary conveyance, regardless of whether the grantor was solvent or insolvent. *Von Kamp v. Gary*, 204 Ga. 875, 52 S.E.2d 591 (1949) (decided under former Code 1933, § 28-201).

Conveyance by insolvent intended to defraud creditors. — Creditor, or third person, may pay full and fair price to insolvent debtor for property, yet if transaction was made with intention to delay or defraud creditors of the creditors' rights, it is void as to those creditors. *Peck v. Land*, 2 Ga. 1 (1847) (decided under the Act of 1818).

Circumstances sufficient to set aside fraudulent conveyance. — To invalidate conveyance of property as one made with intent to delay or defraud creditors, it is essential that it was made with such intention on the part of the debtor and that such intention be known to the party to whom conveyance is made. *Pekor-Cook Jewelry Co. v. Schwartz*, 67 Ga. App. 738, 21 S.E.2d 440 (1942) (decided under former Code 1933, § 28-201).

When a sale, other than between husband and wife, is attacked as having been made to hinder, delay, or defraud creditors, it is necessary to show that the grantor had such intention in making the sale, and that the intention was known to the grantee or circumstances were sufficient to put the grantee on inquiry. *Avary v. Avary*, 202 Ga. 22, 41 S.E.2d 314 (1947) (decided under former Code 1933, § 28-201).

In case wherein plaintiff seeks cancellation of deed as having been made in fraud of creditor, it is ordinarily not necessary for the plaintiff to show more than that

there is a liability to the plaintiff for which judgment is prayed, and that conveyance was made with intent to defraud the plaintiff with reference to such liability, and that such intention was known to the parties taking or that the parties had reasonable cause to suspect that intention. *Von Kamp v. Gary*, 204 Ga. 875, 52 S.E.2d 591 (1949) (decided under former Code 1933, § 28-201).

Insolvency irrelevant in determining validity. — Deed may be set aside when the deed was made with design and intent to hinder, delay, or defraud creditors, which intent may be found to have existed whether or not the grantor was or is insolvent. *Keeter v. Bank of Ellijay*, 190 Ga. 525, 9 S.E.2d 761 (1940) (decided under former Code 1933, § 28-201).

Conveyance with fraudulent intent made for valuable consideration. — When a conveyance is made with intent to hinder, delay, or defraud a creditor, and this fact is known to a grantee, or a grantee has a reasonable ground to suspect that such was the intention of the grantor, the conveyance is void as against the creditor, even though it is given on a valuable consideration. *Durham Iron Co. v. Durham*, 62 Ga. App. 361, 7 S.E.2d 804 (1940) (decided under former Code 1933, § 28-201).

Intention to hinder, delay, or defraud creditors may exist, though debtor is not insolvent. — Deed may be set aside when the deed was made with design and intention to hinder, delay, or defraud creditors, and such intention may be found to have existed even though the grantor was not and is not insolvent. *Mercantile Nat'l Bank v. Aldridge*, 233 Ga. 318, 210 S.E.2d 791 (1974) (decided under former Code 1933, § 28-201).

Claim denied for failure to show intent. — Given the undisputed testimony of the former property owner and the owner's spouse that a house was conveyed to an irrevocable trust for estate planning purposes, there were no circumstances from which a jury could infer that they acted with an intent to defraud creditors based on this transaction; therefore, the trial court properly granted summary judgment to the owner and the owner's spouse as to a fraudulent conveyance

claim. *Albee v. Krasnoff*, 255 Ga. App. 738, 566 S.E.2d 455 (2002) (decided under former § 18-2-22).

Acquisition of property in name of third party fraudulent as to existing creditors. — If an insolvent debtor, for purpose of hindering, delaying, and defrauding creditors, uses the debtor's assets in purchase of property, taking title in name of third person, who has full knowledge of purpose of transaction, such transaction is fraudulent as to existing creditors. *Harper v. Atlanta Milling Co.*, 203 Ga. 608, 48 S.E.2d 89 (1948) (decided under former Code 1933, § 28-201).

Mortgage fraudulently withheld from record to protect mortgagor's credit. — Mortgage given for valuable consideration more than four months before the petition was filed was held fraudulent and void as to creditors because the mortgage was fraudulently withheld from the record until the day the petition was filed. *National Bank v. Shackelford*, 239 U.S. 81, 36 S. Ct. 17, 60 L. Ed. 158 (1915) (decided under former Civil Code 1910, § 3224).

When mortgage is made and accepted with understanding between parties that the mortgage will be withheld from record for purpose of protecting financial credit of mortgagor, such agreement may amount to fraud as against subsequent creditors, depending upon intention of parties to be determined as an issue of fact. *Sullivan v. Ginsberg*, 180 Ga. 840, 181 S.E. 163 (1935) (decided under former Code 1933, § 28-201).

Mortgages withheld from record, by secret agreement between bankrupt and creditor, inducing other creditors to sell goods to bankrupt is a fraudulent conveyance. *Clayton v. Exchange Bank*, 121 F. 630 (5th Cir.), cert. denied, 191 U.S. 567, 24 S. Ct. 840, 48 L. Ed. 305 (1903) (decided under former Civil Code 1895, §§ 2726 and 2727).

Mortgage given for loan to pay some creditors and defraud others. — When bankrupt, with knowledge of insolvency, mortgaged bankrupt's entire stock of goods and pledged bankrupt's choses in action for large loan secured by demand note, and used proceeds to pay three creditors, leaving considerable number unpro-

**Fraudulent Intent —
Generally (Cont'd)**

tected, and lender had reasonable grounds for suspicion that transfer was made with intent to delay bankrupt's other creditors, it was invalid. *In re Walden Bros. Clothing Co.*, 199 F. 315 (N.D. Ga. 1912), *aff'd*, 204 F. 372 (5th Cir. 1913) (decided under former Civil Code 1910, § 3224).

One extending credit subsequent to and with notice of conveyance. — When undisputed evidence produced by creditor showed that creditor had knowledge of defendant's conveyance of real estate to spouse, prior to time creditor renewed defendant's loan, creditor clearly did not rely on defendant's ownership of such real estate when it subsequently extended defendant credit, and as subsequent creditor with notice, could not void conveyance as fraudulent. *Peachtree Bank & Trust Co. v. Atha*, 151 Ga. App. 565, 260 S.E.2d 559 (1979) (decided under former Code 1933, § 28-201).

Transaction between parent and child. — Mere fact that transaction occurred between parent and child does not of itself establish fraud; there must be some other badge of fraud in connection therewith. *Martin v. Martin*, 180 Ga. 782, 180 S.E. 851 (1935) (decided under former Code 1933, § 28-201).

Party seeking to set aside transfer of house from parent to daughter did not meet the party's burden of proving intent to delay or defraud creditors. *Nelson v. United States*, 821 F. Supp. 1496 (M.D. Ga. 1993) (decided under former § 18-2-33).

Reacquisition of conveyed property by corporation controlled by debtor. — When insolvent debtor executed deed to secure indebtedness, which indebtedness at all times greatly exceeded value of security given, and lien was foreclosed by grantee, and at sale the property was bought by grantee, fact that such grantee purchaser may have subsequently conveyed property to corporation of which debtor was president and treasurer would not render such subsequent sale void as against creditors of debtor, where no attack is made upon validity of foreclosure sale, and when it appears that

consideration of purchase by corporation was furnished wholly by corporation, and not by debtor. *S.T. & W.A. Dewees Co. v. Paul B. Carter & Co.*, 190 Ga. 68, 8 S.E.2d 376 (1940) (decided under former Code 1933, § 28-201).

Conveyance to creditor and immediate reconveyance to debtor's spouse. — See *Curtis v. Wortsman*, 25 F. 893 (S.D. Ga. 1885) (decided under former Civil Code 1863, § 1952).

Purchase by attorney from client of judgment or execution. — Purchase by attorney at law, from client or client's agent, of a judgment or execution belonging to client in hands of attorney for collection, is presumptively invalid as against client's creditors. *Stubinger v. Frey*, 116 Ga. 396, 42 S.E. 713 (1902) (decided under former Civil Code 1895, § 2695).

Agreement by purchaser of insolvent partnership's assets to employ partner. — Mere fact that in a sale by insolvent partnership of all the partnership's assets there is an agreement by purchasers to employ one partner at stipulated compensation per month to manage business, will not per se render sale void as against creditors. If there was no intention to defraud, delay, or hinder the creditors, and if sale was for full value above and beyond agreement for employment, the transaction was valid. *Cribb & Co. v. Bagley & Rivers*, 83 Ga. 105, 10 S.E. 194 (1889) (decided under former Civil Code 1863, § 1952); *McKenzie v. Thomas*, 118 Ga. 728, 45 S.E. 610 (1903) (decided under former Civil Code 1895, § 2695).

Conveyance of property of value larger than debt to be paid. — Conveyance of effects in amount larger than debt to be paid does not make assignment void; but it is a badge of fraud to be considered by jury. *Banks v. Clapp*, 12 Ga. 514 (1853) (decided under the Act of 1818).

Conveyance to oneself as trustee. — Making of deed by one as an individual to oneself in that person's representative capacity, the deed being for land in which the person has a contingent remainder, is, on insolvency, sufficient evidence on which to base a verdict that the deed was executed with the intent to hinder and delay collection of the grantor's other debts.

Eberhardt v. Bennett, 163 Ga. 796, 137 S.E. 64 (1927) (decided under former Civil Code 1910, § 3224).

Deed by trustee with power of sale created in fraudulent transfer. — If assignment or transfer was prohibited and is made to named trustee with power of sale, an execution of power conveys no title to purchaser, and a deed purporting to convey to the purchaser any part of property so transferred is likewise void. *Coleman & Burden Co. v. Rice*, 115 Ga. 510, 42 S.E. 5 (1902) (decided under former Civil Code 1895, § 2695).

Conveyance made with fraudulent intent, known to grantee. — Absolute deed made with intent to delay or defraud creditors, though made also to secure debt, is void as against creditors if grantee takes the deed with notice of fraudulent intention. *Palmour & Smith v. Johnson*, 84 Ga. 91, 10 S.E. 500 (1889) (decided under former Civil Code 1863, § 1952); *McLendon v. Reynolds Grocery Co.*, 160 Ga. 763, 129 S.E. 65 (1925) (decided under former Civil Code 1910, § 3224).

Under former Code 1933, § 28-320 (see now O.C.G.A. § 18-2-59), a conveyance of real estate had or made with intent to delay or defraud creditors, with such intent known to party taking, is invalid as to existing creditors. *Citizens & S. Nat'l Bank v. Kontz*, 185 Ga. 131, 194 S.E. 536 (1937) (decided under former Code 1933, § 28-201).

Every conveyance of property made with intent to delay or defraud creditors of grantor is void against such creditors when the grantee has knowledge of such intention or reasonable ground to suspect that intention. *Hilburn v. Hightower*, 178 Ga. 534, 173 S.E. 389 (1934); *Cunningham v. Avakian*, 187 Ga. 575, 1 S.E.2d 433 (1939) (decided under former Civil Code 1910, § 3224).

Deed is void as to creditors when made for purpose of hindering, delaying, or defrauding creditors in collection of the creditors' debts, and when grantee in taking the deed has knowledge of such fraudulent intent or reasonable ground to suspect it. *Taylor v. Gates*, 206 Ga. 880, 59 S.E.2d 365 (1950) (decided under former Code 1933, § 28-201).

Transaction upheld. — The kind of transaction, based upon valuable consid-

eration, which will be upheld is "a bona fide transaction on valuable consideration, and without notice or grounds for reasonable suspicion." *Conley v. Buck*, 100 Ga. 187, 28 S.E. 97 (1897) (decided under former Civil Code 1895, § 2695).

Charge requiring finding of intent to "delay, hinder, and defraud." — In trial of action by creditor to set aside and cancel a fraudulent conveyance, it was inaccurate and therefore erroneous to charge that if debtor made conveyance with intention to "delay, hinder, and defraud" the creditors, it would be void. The acts voiding the conveyance should have been stated disjunctively as stating the acts conjunctively imposed upon creditor a greater burden than the law does. *Evans v. Coleman*, 101 Ga. 152, 28 S.E. 645 (1897) (decided under former Civil Code 1895, § 2695).

Verdict finding no intent to defraud, but an intent to delay creditors, is not void for inconsistency and uncertainty; debtor who attempts to postpone time of payment endeavors to deprive the debtor's creditors of a valuable right, and it matters not what the debtor's motive may be. *Monroe Mercantile Co. v. Arnold & McCord*, 108 Ga. 449, 34 S.E. 176 (1899) (decided under former Civil Code 1933, § 2695).

Inadequate Consideration

Inference of fraud in transfer. — Great inadequacy of consideration in transfer of property creates strong inference that the transfer was fraudulent. *United States v. McMahan*, 392 F. Supp. 1159 (N.D. Ga. 1975), *aff'd*, 556 F.2d 362 (5th Cir. 1977), *rev'd in part on other grounds*, 569 F.2d 889 (5th Cir. 1978) (decided under former Code 1933, § 28-201).

Conveyance for inadequate consideration, when insolvent or causing insolvency. — If at time of conveyance, for greatly inadequate consideration, defendant was insolvent, or if such transfer rendered defendant insolvent as to defendant's creditors, such conveyance was fraudulent within meaning of former Code 1933, § 28-320 (see O.C.G.A. § 18-2-59), and, as such, may be set aside. *United States v. McMahan*, 392 F. Supp. 1159

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(N.D. Ga. 1975), aff'd, 556 F.2d 362 (5th Cir. 1977), rev'd in part on other grounds, 569 F.2d 889 (5th Cir. 1978) (decided under former Code 1933, § 28-201).

Inadequate price, accompanied by other doubtful and suspicious circumstances. — While inadequacy of price alone is not sufficient grounds to set aside a conveyance in a court of equity, that circumstance, taken in consideration and in connection with others of a doubtful and suspicious nature, may afford such a strong presumption of fraud so as to authorize a court to set it aside. *United States v. McMahan*, 392 F. Supp. 1159 (N.D. Ga. 1975), aff'd, 556 F.2d 362 (5th Cir. 1977), rev'd in part on other grounds, 569 F.2d 889 (5th Cir. 1978) (decided under former Code 1933, § 28-201).

Inadequacy of consideration in otherwise good faith conveyance. — When one honestly and in good faith purchases property from another, the mere fact that the consideration paid was inadequate will not authorize creditor of grantor, who afterwards obtains judgment against latter, to subject property to satisfaction of creditor's judgment. *Childers v. Ackerman Constr. Co.*, 211 Ga. 350, 86 S.E.2d 227 (1955) (decided under former Code 1933, § 28-201).

Consideration deemed adequate. — Severance payments to corporate officers did not lack consideration when the corporation was assured that the officers would not leave without providing the corporation recourse in the event their leaving frustrated its plans to sell its stock. *Munford v. Valuation Research Corp.*, 98 F.3d 604 (11th Cir. 1996), cert. denied, 522 U.S. 1068, 118 S. Ct. 738, 139 L. Ed. 2d 675 (1998) (decided under former § 18-2-22).

Retention of Possession by Debtor

Possession retained by vendor after absolute sale of real property is prima facie evidence of fraud, although it may be explained and rebutted. *Hilburn v. Hightower*, 178 Ga. 534, 173 S.E. 389 (1934) (decided under former Civil Code 1910, § 3224).

Possession of property, real or personal,

remaining with vendor after an absolute conveyance is evidence of fraud. *Peck v. Land*, 2 Ga. 1, 46 Am. Dec. 368 (1847) (decided under the Act of 1818); *Fleming v. Townsend*, 6 Ga. 103, 50 Am. Dec. 318 (1849) (decided under former law); *Perkins, Hopkins & White v. Patten*, 10 Ga. 241 (1851) (decided under former law); *Smith v. McDonald*, 25 Ga. 377 (1858) (decided under former law); *Stephens v. Southern Cotton Oil Co.*, 147 Ga. 410, 94 S.E. 245 (1917) (decided under former law); *Virginia-Carolina Chem. Co. v. Hollis*, 23 Ga. App. 634, 99 S.E. 154 (1919) (decided under former Civil Code 1910, § 3224); *Greene v. Matthews*, 31 Ga. App. 265, 120 S.E. 434 (1923) (decided under former Civil Code 1910, § 3224).

Possession of personal property remaining with vendor after absolute conveyance is evidence of fraud, when such possession is not satisfactorily explained. *Scruggs v. Blackshear Mfg. Co.*, 45 Ga. App. 855, 166 S.E. 249 (1932) (decided under former Civil Code 1910, § 3224).

If debtor, shortly after conveying to claimant absolutely, is in possession of premises, and so continues until levy is made, debtor's possession, in absence of evidence to show when or how it commenced, may be presumed to have existed at date of conveyance; and such continuous possession, unexplained, is a badge of fraud. *Collins v. Taggart*, 57 Ga. 355 (1876) (decided under former Civil Code 1863, § 1952).

Possession retained by grantor in security deed. — Possession remaining with grantor after absolute conveyance is evidence of fraud; but the same is not true of possession retained by grantor in security deed. *Burkhalter v. Glennville Bank*, 184 Ga. 147, 190 S.E. 644 (1937) (decided under former Code 1933, § 28-201).

Delivery delayed for several months after sale to allow clearing up mortgage. — Fact that it was a few months after execution and delivery of bill of sale before the defendant delivered possession of property sold to the claimant, property being under mortgage and it taking some time to clear property up before delivery to the claimant, did not tend to render bill of sale void on account of fraud or show any fraudulent intent

upon the part of parties thereto. *Foremost Dairies, Inc. v. Kelley*, 51 Ga. App. 722, 181 S.E. 204 (1935) (decided under former Code 1933, § 28-203).

Retention of possession by grantor after conveyance in trust for spouse and children. — When personal property is conveyed by spouse to trustee for benefit of the other spouse and children, subsequent possession by spouse being consistent with object of deed is not evidence of fraud. *Clayton v. Brown*, 17 Ga. 217 (1855) (decided under former law).

When mortgagee purchasing at foreclosure sale allows mortgagor to retain possession. — When creditor forecloses a mortgage and purchases mortgaged property at sheriff's sale and suffers property so purchased to remain in possession of mortgagor after sale, such retention of possession, by mortgagor, is a badge of fraud as against other judgment creditors. *Williams v. C. & G.H. Kelsey & Halsted*, 6 Ga. 365 (1849) (decided under former law).

Grantee's Notice of Fraud

Transaction carried out so as to excite suspicion of its fairness. — See *Hoffer v. Gladden*, 75 Ga. 532 (1885) (decided under former Civil Code 1863, § 1952).

Suspicion alone insufficient. — Contrary to trial court's conclusion, reasonable grounds for suspicion alone do not suffice to render a subsequent purchaser's title void, and when buyer acquired automobile for value, and had no notice that seller's title was obtained through fraud, the buyer received good title. *Hall v. Hidy*, 263 Ga. 422, 435 S.E.2d 215 (1993) (decided under former § 18-2-23).

Fraudulent conveyance void as to grantor and grantee having notice. — If a defendant sells property in order to prevent defendant's creditors from making their claims out of it, the sale will be void as to defendant; and if at time of sale the purchaser has reasonable ground to suspect that such is the defendant's object, the sale will be void also as to the purchaser. *Smith v. Wellborn*, 75 Ga. 799 (1885) (decided under former Civil Code 1863, § 1952); *Virginia-Carolina Chem. Co. v. Hollis*, 23 Ga. App. 634, 99 S.E. 154

(1919) (decided under former Civil Code 1910, § 3224); *Greene v. Matthews*, 31 Ga. App. 265, 120 S.E. 434 (1923) (decided under former Civil Code 1910, § 3224).

Fraudulent intent of grantor of which grantee had no notice. — Fraudulent intent in execution of a deed, upon part of grantor, which was unknown to grantee and which grantee had no reasonable ground to suspect, will not vitiate grantee's title. *Hollis v. Sales*, 103 Ga. 75, 29 S.E. 482 (1897) (decided under former law).

Child, who testified, uncontradicted, did not know why the child's parent gave the child the house, had no actual knowledge of the parent's intent to delay or defraud the parent's creditors. *Nelson v. United States*, 821 F. Supp. 1496 (M.D. Ga. 1993) (decided under former § 18-2-33).

Grantee having reasonable ground to suspect spouse's fraudulent intent. — It is not necessary to prove that both husband and wife joined to hinder, delay, and defraud other creditors in collection of their debts, if it can be shown that wife had reasonable ground to suspect that her husband's purpose was to hinder, delay, and defraud other creditors in collection of their debts. *United States v. McMahan*, 392 F. Supp. 1159 (N.D. Ga. 1975), *aff'd*, 556 F.2d 362 (5th Cir. 1977), *rev'd in part* on other grounds, 569 F.2d 889 (5th Cir. 1978) (decided under former Code 1933, § 28-201).

Conveyance for consideration, but with known fraudulent intent. — Fact that transaction is based upon valuable consideration does not save the transaction from attack on ground of fraud when party taking has knowledge of such fraud or ground for reasonable suspicion. *Sullivan v. Ginsberg*, 180 Ga. 840, 181 S.E. 163 (1935) (decided under former Code 1933, § 28-201).

Conveyance of property, made with intention of hindering, delaying, or defrauding creditors, is void as against creditors; if transaction is bona fide and for valuable consideration, and party taking has no notice or ground for reasonable suspicion of intention to hinder, delay, or defraud creditors, it is valid, but if party taking has notice of intention of maker to hinder, delay, or defraud creditors, or has ground

Grantee's Notice of Fraud (Cont'd)

for reasonable suspicion of such intention, the conveyance is void as against creditors of maker. *Gardner v. Day*, 182 Ga. 113, 184 S.E. 710 (1936) (decided under former law).

Conveyance intended to defeat recovery of alimony. — Under former Code 1933, §§ 28-101 and 28-201 (see now O.C.G.A. §§ 18-2-1 and 18-2-59), one may bring equitable proceeding to cancel and set aside a conveyance of property made by spouse with intent to defeat recovery of alimony, and such proceeding will lie against grantee of spouse who took with knowledge of such intention or with reasonable grounds to suspect such intent. A different result was not required by former Code 1933, § 30-112 (see now O.C.G.A. § 19-5-7), as relating to filing of lis pendens notice, since the grantee is not an innocent purchaser. *Wood v. McGahee*, 211 Ga. 913, 89 S.E.2d 634 (1955) (decided under former Code 1933, § 28-201).

Under provisions of former Code 1933, § 28-320 (see now O.C.G.A. § 18-2-59), a deed executed by husband living separate and apart from his wife, conveying certain of his property to another with intent and purpose of defeating wife's right to alimony, is invalid as to wife if grantee knew or had grounds for reasonable suspicion that such was the purpose of grantor, even though deed was made to secure or in payment of valid preexisting debt due by husband to grantee. *McCallie v. McCallie*, 192 Ga. 699, 16 S.E.2d 562 (1941) (decided under former Code 1933, § 28-201).

Action to set aside conveyance of grantee's notice of fraudulent intent. — See *Webb-Crawford Co. v. Bozeman*, 178 Ga. 328, 173 S.E. 144 (1934) (decided under former Civil Code 1910, § 3224).

Charge requiring that grantee take "with no suspicion even" of fraudulent intent was error. *Norton v. Neely Co.*, 148 Ga. 652, 98 S.E. 76 (1919) (decided under former law).

Insolvency of Debtor

Test for insolvency. — Test for determining whether a debtor was insolvent, within the meaning of paragraph (3) of former Code 1933, § 28-201, was whether

the value of the debtor's remaining property was sufficient to pay in full all of the debtor's debts, and the value of the debtor's remaining property must be determined as of the date the conveyance sought to be set aside was made. *Goodman v. Lewis*, 247 Ga. 605, 277 S.E.2d 908 (1981) (decided under former Code 1933, § 28-201).

Evidence of insolvency. — Defendant's solvency at time of allegedly fraudulent conveyance is relevant, but evidence should be restricted to defendant's financial condition at time of conveyance. *Warren v. Citizens Nat'l Bank*, 145 Ga. 503, 89 S.E. 520 (1916) (decided under former Civil Code 1910, §§ 3224 and 3225).

Plaintiff may prove insolvency of debtor. — On trial of issue whether conveyance is fraudulent against creditors, plaintiff may prove insolvency of debtor at time of sale. *Tillman v. Fontaine*, 98 Ga. 672, 27 S.E. 149 (1896) (decided under former law).

Insolvency means inability to pay debts as the debts fall due. *Loeb v. Dante*, 1 Bankr. 547 (Bankr. N.D. Ga. 1979) (decided under former Code 1933, § 28-201).

Solvency determined by sufficiency of property to discharge all debts. — Unless one's property, whether real or personal, tangible or intangible, leviable or nonleviable, is insufficient in value to discharge all one's debts, one can in no proper sense be termed insolvent. *Keeter v. Bank of Ellijay*, 190 Ga. 525, 9 S.E.2d 761 (1940) (decided under former Code 1933, § 28-201).

Debtor is insolvent, if after voluntary deed or conveyance, property left or retained by the debtor is not ample to pay the debtor's existing debts. *Chambers v. Citizens & S. Nat'l Bank*, 242 Ga. 498, 249 S.E.2d 214 (1978) (decided under former Code 1933, § 28-201); *Barclay v. First Nat'l Bank*, 265 Ga. 744, 462 S.E.2d 374 (1995) (decided under former § 18-2-22); *Cavin v. Brown*, 246 Ga. App. 40, 538 S.E.2d 802 (2000) (decided under former § 18-2-22).

Under paragraph (3) of former Code 1933, § 28-201, a debtor was insolvent when property left or retained by the debtor after voluntary conveyance is in-

sufficient to pay the debtor's existing debts. *Moister v. Waters*, 8 Bankr. 163 (Bankr. N.D. Ga. 1981) (decided under former Code 1933, § 28-201).

Time of insolvency. — Solvency is to be tested by value of property at time of making of voluntary deed, rather than at time of transferor's death. *Wallace v. Williams*, 212 Ga. 692, 95 S.E.2d 369 (1956) (decided under former Code 1933, § 28-201).

Deduction of exempt property or homestead. — In determining whether property left or retained by debtor making conveyance to spouse is sufficient to pay existing debts and liabilities, property in which debtor is entitled to exemption or homestead, but which had not been exempted, is not to be deducted, unless jury should find as a fact that debtor, at time of conveyance, intended to exempt that property. *Mitchell v. Weekes*, 179 Ga. 886, 177 S.E. 737 (1934) (decided under former Civil Code 1910, § 3224).

Suretyship obligations on debts not matured at time of conveyance. — In testing the solvency of one who has made a voluntary conveyance of property, one's endorsements or suretyship on obligations of others, not matured at time of conveyance, should not be counted as one's debts when it does not appear that one's contingent liability was at that time likely to become absolute or in fact became so. *Moister v. Waters*, 8 Bankr. 163 (Bankr. N.D. Ga. 1981) (decided under former Code 1933, § 28-201).

Insolvency of debtor is conclusively shown by the fact that debtor is in the process of obtaining a discharge in bankruptcy at the time of the fraudulent conveyance. *Brown v. Citizens & S. Nat'l Bank*, 168 Ga. App. 385, 308 S.E.2d 850 (1983), rev'd on other grounds, 253 Ga. 119, 317 S.E.2d 180 (1984) (decided under former § 18-2-22).

Insolvency of debtor not conclusive of fraudulence of conveyance. — While insolvency of grantor is a pertinent matter for consideration in determining whether transfer or conveyance is fraudulent, it is only a circumstance, and is not conclusive. *Burkhalter v. Glennville Bank*, 184 Ga. 147, 190 S.E. 644 (1937) (decided under former Code 1933, § 28-201).

Conveyances Between Relatives and Spouses

Spouses bear burden of showing fairness of transaction. — For transactions between spouses which are attacked for fraud by the creditors of either, a burden to show fairness of the transactions is placed on the spouses; in other relationships such as business and social relationships this rule does not apply and the burden is on the party seeking to set aside the deed. However, regardless of the placing of the burden, the relationship between the parties is a circumstance to be considered in actions attacking transactions for fraud. *Stokes v. McRae*, 247 Ga. 658, 278 S.E.2d 393 (1981) (decided under former Code 1933, § 28-201).

Transactions between near relatives. — Transactions between near relatives, as brothers-in-law, are to be scanned with care and scrutinized closely, and slight evidence of fraud between the relatives may be sufficient to set aside the transaction. *Hilburn v. Hightower*, 178 Ga. 534, 173 S.E. 389 (1934) (decided under former Civil Code 1910, § 3224).

Transactions between relatives are to be scanned with care and scrutinized closely, and slight evidence of fraud shown between the relatives may be sufficient to set aside the transaction. *McLendon v. Reynolds Grocery Co.*, 160 Ga. 763, 129 S.E. 65 (1925) (decided under former Civil Code 1910, § 3224); *Scruggs v. Blackshear Mfg. Co.*, 45 Ga. App. 855, 166 S.E. 249 (1932) (decided under former Civil Code 1910, § 3224).

Mere fact of close relationship, unless marital, unsupported by other circumstances. — While transactions between near relatives are to be scrupulously inspected, and the law permits evidence of relationship to give additional weight to other circumstances, and thus to bear heavily upon transactions between them; mere fact of relationship, unsupported by other circumstances, will not authorize finding that transaction even between persons closely related, unless husband and wife, are fraudulent. *Webb-Crawford Co. v. Bozeman*, 178 Ga. 328, 173 S.E. 144 (1934) (decided under former Civil Code 1910, § 3224).

When sale is attacked as in contraven-

Conveyances Between Relatives and Spouses (Cont'd)

tion statute and as having been made to hinder, delay, or defraud creditors, burden was on plaintiff to establish plaintiff's contentions under same rules as were applicable to all other civil cases; and proof of near relationship other than that of husband and wife, without more, is not sufficient to constitute a badge of fraud. *Webb-Crawford Co. v. Bozeman*, 178 Ga. 328, 173 S.E. 144 (1934) (decided under former Civil Code 1910, § 3224).

Proof of near relationship between parties to deed, other than that of husband and wife, without more, is not sufficient to show fraud. *McCallie v. McCallie*, 192 Ga. 699, 16 S.E.2d 562 (1941) (decided under former Code 1933, § 28-201).

Conveyance by husband to wife. — In conveyance from husband and wife, the utmost good faith must be made to appear, and wife must show with great clearness that she was a bona fide purchaser, and that she had no reason to believe that transfer was made to delay or defraud creditors of her husband. *Curtis v. Wortsman*, 25 F. 893 (S.D. Ga. 1885) (decided under former Civil Code 1863, § 1952).

Voluntary conveyance to spouse not void if grantor retains ample property to pay existing debts and liabilities. *Mitchell v. Weekes*, 179 Ga. 886, 177 S.E. 737 (1934) (decided under former Civil Code 1910, § 3224).

Husband's transfer of 100% interest in the marital residence to his wife less than one year before he filed a bankruptcy petition was a fraudulent transfer. *Ellenberg v. Bouldin*, 196 Bankr. 202 (Bankr. N.D. Ga. 1996) (decided under former § 18-2-22).

Conveyance by husband to wife will not be set aside as fraudulent unless the conveyance was shown to have been made with intent to defraud creditors and the wife was shown to have had knowledge or some reasonable notice or suspicion of such intent. *United States v. McMahan*, 392 F. Supp. 1159 (N.D. Ga. 1975), *aff'd*, 556 F.2d 362 (5th Cir. 1977), *rev'd in part on other grounds*, 569 F.2d 889 (5th Cir. 1978) (decided under former Code 1933, § 28-201).

Transfer of funds from husband to wife. — Evidence showed that taxpayer fraudulently transferred funds to his wife, when he deposited receipts from his legal practice into bank accounts and wrote checks on the accounts payable to his wife, who then deposited the checks into her own account and wrote checks on that account to pay mortgage and other "household" expenses. *United States v. Tranakos*, 778 F. Supp. 1220 (N.D. Ga. 1991) (decided under former § 18-2-22).

Conveyance to wife and children. — Settlement in favor of wife and children, or either, will be supported, if made in good faith and with no intent to defraud creditors; but one by debtor in greatly embarrassed circumstances of the bulk of the debtor's estate, leaving but a pittance, insufficient for debts, cannot be supported. *Clayton v. Brown*, 30 Ga. 490 (1860) (decided under former law); *Reese v. Shell*, 95 Ga. 749, 22 S.E. 580 (1895) (decided under former Civil Code 1863, § 1952).

Facts subjecting conveyance by husband to wife to attack. — See *Mattox v. West*, 194 Ga. 310, 21 S.E.2d 428 (1942) (decided under former Code 1933, § 28-201).

Fraudulent conveyance to wife who insures for own benefit. — See *St. Paul Fire Ins. & Co. v. Brunswick Grocery Co.*, 113 Ga. 786, 39 S.E. 483 (1901) (decided under former Civil Code 1895, § 2695).

Burden of proof. — While absolute conveyance from husband to wife for valuable consideration will not be set aside at instance of creditor upon ground of fraud unless wife knew of fraud or had "ground for reasonable suspicion" thereof, burden is not upon creditor, as in other cases, to prove fraudulent scheme. *Cotton States Fertilizer Co. v. Childs*, 179 Ga. 23, 174 S.E. 708 (1934) (decided under former Civil Code 1910, § 3230).

Whenever transaction between husband and wife is attacked by husband's creditors for fraud, if wife claims the property purchased or received, onus is upon her to make fair showing about whole transaction, particularly where conveyance was a gift. *Spiegel v. Ross*, 188 F. Supp. 812 (N.D. Ga. 1960) (decided under former Code 1933, § 28-201).

In case where wife sets up title to property levied upon under deed from her husband, and his creditor attacks same upon ground that it was a fraudulent conveyance, intended to hinder, delay, and defraud such creditor, the law does not put upon creditor the burden of establishing fraud in the conveyance. On the contrary, it puts burden upon husband and wife, who must show that transaction as a whole is free from fraud. *Moore v. Loganville Mercantile Co.*, 184 Ga. 351, 191 S.E. 121 (1937) (decided under former law).

Spouse preferring payment to spouse who has loaned money. — Since wife, having loaned money to her husband, is a general creditor, husband may prefer payment to his wife over any other unsecured creditor, paying her in property or money without such payment being fraudulent, provided the property so conveyed be reasonably proportioned to amount of the debt. *United States v. McMahan*, 392 F. Supp. 1159 (N.D. Ga. 1975), *aff'd*, 556 F.2d 362 (5th Cir. 1977), *rev'd in part on other grounds*, 569 F.2d 889 (5th Cir. 1978) (decided under former Code 1933, § 28-201).

While husband has right to prefer his wife to other unsecured creditors and pay her with property or money, provided property conveyed in satisfaction of her debt is reasonably proportioned to amount of debt, a conveyance by him to her of property in a sum grossly in excess of amount due her, amounts to conveyance made with intent to delay and defraud creditors notwithstanding both husband's and wife's claims to have acted in good faith in the transaction. *United States v. McMahan*, 392 F. Supp. 1159 (N.D. Ga. 1975), *aff'd*, 556 F.2d 362 (5th Cir. 1977), *rev'd in part on other grounds*, 569 F.2d 889 (5th Cir. 1978) (decided under former Code 1933, § 28-201).

Jury charges relating to spousal conveyances. — See *Almond v. Gairdner & Arnold*, 76 Ga. 699 (1886) (decided under former Civil Code 1863, § 1952).

When there was some evidence that defendant's wife paid part of purchase price of property conveyed to her by her husband, trial court, in charging on setting aside of conveyances made with in-

tention of defrauding creditors, should add phrase, "and such intention known to party taking." *Baker v. Goddard*, 205 Ga. 477, 53 S.E.2d 754 (1949) (decided under former Code 1933, § 28-201).

For proper jury charge on validity of conveyance to creditor-spouse, see *Pharr v. Pharr*, 206 Ga. 354, 57 S.E.2d 177 (1950) (decided under former Code 1933, § 28-201).

Husband conveyed automobile to wife for valuable consideration when wife advanced \$2000 toward car purchase and made payments to creditor's credit union. *Brown v. Citizens & S. Nat'l Bank*, 253 Ga. 119, 317 S.E.2d 180 (1984) (decided under former § 18-2-22).

Constructive trust finding not valid when transferor's intent fraudulent. — In divorce action, jury decision that transfer of real property from husband to wife created a constructive trust in favor of husband should have been excluded by judgment notwithstanding the verdict when transfer was made with the intent and purpose of defrauding husband's creditors, and there was no issue of fact as to the intent and purpose of the husband at the time of the transfer. *Carden v. Carden*, 253 Ga. 546, 322 S.E.2d 226 (1984) (decided under former § 18-2-22).

Conveyance to son with knowledge of impending bankruptcy. — Evidence of an intent to defraud creditors is shown by circumstantial evidence that son, who knew that his family members were soon to declare bankruptcy, had their valuable assets transferred to the son with the intent to keep such assets within the family at the expense of the creditors. *Gower v. Cohn*, 643 F.2d 1146 (5th Cir. 1981) (decided under former Code 1933, § 28-201).

Transfer of property from Chapter 7 debtor to spouse. — Settlement of a bona fide family controversy and waiver of further claims for alimony or property division was a valuable consideration for post-nuptial agreements between a Chapter 7 debtor and the debtor's spouse, and the transfer of property to the spouse was not a fraudulent conveyance. *Tidwell v. Galbreath*, 207 Bankr. 309 (Bankr. M.D. Ga. 1997) (decided under former § 18-2-22).

Conveyances Between Relatives and Spouses (Cont'd)

Conveyance challenge estopped. — Chapter 7 trustee was estopped from challenging conveyance of collateral as fraudulent under state law because of secured creditor's prepetition agreement with debtor, in which it agreed not to contest debtor's conveyance of debtor's home to debtor's parent. *Harris v. Huff*, 160 Bankr. 256 (Bankr. M.D. Ga. 1993) (decided under former § 18-2-22).

Voluntary Conveyances

Voluntary deed is one totally without consideration. — Voluntary conveyance or deed is one without any valuable consideration, and a valuable consideration is founded on money, or something convertible into money, or having a value in money. *Stokes v. McRae*, 247 Ga. 658, 278 S.E.2d 393 (1981) (decided under former Code 1933, § 28-201).

Paragraph (3) was mandatory and admits of no exception. *King v. Poole*, 61 Ga. 373 (1878) (decided under former Civil Code 1863, § 1952).

Transfers not for valuable consideration. — Statute allows creditors to avoid certain transfers made by debtor which were not for valuable consideration. *Moister v. Eidson*, 10 Bankr. 432 (Bankr. N.D. Ga. 1981) (decided under former law).

Test for satisfaction of paragraph (3). — There were two elements which must be established in order to meet the test of paragraph (3) of former Code 1933, § 28-201: the debtor must: (1) convey by a voluntary deed, not for a valuable consideration; and (2) be insolvent at the time of the conveyance. *Stokes v. McRae*, 247 Ga. 658, 278 S.E.2d 393 (1981) (decided under former Code 1933, § 28-201); *Ambase Int'l Corp. v. Bank S., N.A.*, 196 Ga. App. 336, 395 S.E.2d 904 (1990) (decided under former § 18-2-22).

Intention of parties. — Whether conveyance is in fact voluntary depends upon intention of parties as ascertained from facts and circumstances at time of the conveyance's execution. *Pharr v. Pharr*, 206 Ga. 354, 57 S.E.2d 177 (1950) (decided under former Code 1933, § 28-201).

Showing of fraudulent intent not prerequisite. — While under paragraph (1) of former Code 1933, § 28-201, fraudulent intent of debtor was necessary to cancellation, it need not be shown when a voluntary conveyance was rendered void under paragraph (3) of that section. *Neal v. Stapleton*, 203 Ga. 236, 46 S.E.2d 130 (1948) superseded by statute, *Citizens Bank of Mass. V. Grand Street Parkway, LLC et al*, 21 Mass. L. Rep. 594 (2006) (decided under former Code 1933, § 28-201); *Mercantile Nat'l Bank v. Aldridge*, 233 Ga. 318, 210 S.E.2d 791 (1974) (decided under former Code 1933, § 28-201); *Drake v. Dennis*, 209 Bankr. 20 (Bankr. S.D. Ga. 1996) (decided under former § 18-2-22).

Retention of sufficient property to pay debts. — Good faith voluntary conveyance is valid if debtor retains sufficient property to pay debts. *Weed v. Davis*, 25 Ga. 684 (1858) (decided under former law).

Nonfraudulent conveyance, before bankruptcy, of small part of estate. — Voluntary conveyance by bankrupt to children before adjudication of bankruptcy is not void when there was no intent to defraud and property conveyed formed inconsiderable part of grantor's estate. *Adams v. Collier*, 122 U.S. 382, 7 S. Ct. 1208, 30 L. Ed. 1207 (1887) (decided under former law).

Voluntary deed executed when insolvent or rendering debtor insolvent. — Voluntary deed by debtor may be set aside by debtor's creditor if debtor was insolvent when deed was executed, or was thereby rendered insolvent. *Downs v. Powell*, 215 Ga. 62, 108 S.E.2d 715 (1959) (decided under former Code 1933, § 28-201).

Voluntary conveyance from insolvent debtor to wife. — If husband, insolvent at time and having no property subject to demands of judgment creditors, makes gift of property to his wife, such gift would be void as against creditors, whether or not wife had knowledge or notice of husband's fraudulent intent. *Garner v. State Banking Co.*, 150 Ga. 6, 102 S.E. 442 (1920) (decided under former Civil Code 1910, § 3224); *Oxford v. Hasty*, 213 Ga. App. 539, 445 S.E.2d 276 (1994)

(decided under former § 18-2-22).

Voluntary conveyance by insolvent debtor not binding on creditors. — Voluntary conveyance by insolvent debtor, based on no consideration either by payment of debt or otherwise, will not bind other creditors, and this is true irrespective of any fraudulent purpose on part of debtor, or any knowledge on part of creditor as to such purpose. *Moncrief Furnace Co. v. Northwest Atlanta Bank*, 193 Ga. 440, 19 S.E.2d 155 (1942) (decided under former law).

Voluntary conveyance with intent to defraud creditors. — When tort-feasor made voluntary conveyance with intent to delay or defraud party damaged, such conveyance is void as to that party whether or not volunteer grantee had notice of fraudulent intent. *Westmoreland v. Powell*, 59 Ga. 256 (1877) (decided under former Civil Code 1863, § 1952).

Voluntary conveyance by solvent or insolvent debtor, made with intent to delay or defraud the debtor's creditor in collection of the debt, is void as to the creditor, irrespective of notice or grounds of suspicion to party taking conveyance. *Citizens & S. Nat'l Bank v. Kontz*, 185 Ga. 131, 194 S.E. 536 (1937) (decided under former Code 1933, § 28-201).

Voluntary deed was void as to creditors, though grantor was not insolvent at time of execution, if the grantor's purpose in so doing is to hinder, delay, or defraud creditors, whether donee knew of fraudulent intention or not. *Peoples Loan Co. v. Allen*, 199 Ga. 537, 34 S.E.2d 811 (1945) (decided under former Code 1933, § 28-201); *Hyde v. Atlanta Woolen Mills Corp.*, 204 Ga. 450, 50 S.E.2d 52 (1948) (decided under former law).

Applicability of statute to conveyance by insolvent shareholder of insolvent national bank. — See *Duncan v. Freeman*, 152 Ga. 332, 110 S.E. 5 (1921) (decided under former Code 1933, § 28-201).

Conveyance in consideration of promise to care for grantor for life is not voluntary, but is for valuable consideration. *Avary v. Avary*, 202 Ga. 22, 41 S.E.2d 314 (1947) (decided under former Code 1933, § 28-201).

Conveyance in consideration of love, affection, and \$5.00. — Deed by father to the father's children, reciting as consideration love, affection, and \$5.00, is not on its face a voluntary conveyance; whether such conveyance is in fact voluntary depends upon intention of parties as ascertained from facts and circumstances at time of execution. *Glenn v. Tankersley*, 187 Ga. 129, 200 S.E. 709 (1938), later appeal sub nom. *Bussell v. Glenn*, 197 Ga. 816, 30 S.E.2d 617 (1944) (decided under former Code 1933, § 28-201).

Deed reciting consideration of "\$5.00 and love and affection" is not, on the deed's face, a voluntary conveyance. *Avary v. Avary*, 202 Ga. 22, 41 S.E.2d 314 (1947) (decided under former Code 1933, § 28-201).

Husband's deed to wife reciting consideration of love and affection for grantee and \$5.00, was not upon the deed's face a voluntary conveyance, but was prima facie a deed based on valuable consideration. *Pharr v. Pharr*, 206 Ga. 354, 57 S.E.2d 177 (1950) (decided under former Code 1933, § 28-201).

Deed to daughters in consideration of love and affection. — When deed by defendant in fieri facias to defendant's three daughters was without consideration other than natural love and affection, it was a voluntary conveyance, regardless of fact that this property came to him from his wife's father, and that he and his wife had long planned to convey it to his three daughters (claimants); while under appropriate facts, a resulting trust may be declared, no such facts or contention were involved as so far as the evidence showed title to property was vested unconditionally in the defendant without any obligation or agreement to convey it to his daughters. *Bussell v. Glenn*, 197 Ga. 816, 30 S.E.2d 617 (1944) (decided under former Code 1933, § 28-201).

Marriage is valuable consideration, and sufficient to support deed; and if the woman is guilty of no fraud, and enters into settlement without notice of debt due from man to third person, she will be protected in property conveyed by settlement against that debt. *Marshall v. Morris*, 16 Ga. 368 (1854) (decided under the Act of 1818).

Voluntary Conveyances (Cont'd)

Voluntary conveyances to family at a time when grantor is solvent. — When one executed voluntary conveyances of realty to his wife and two daughters and at time of execution he was indebted to creditor in a sum much less than the value of realty and personalty which he still owned, unencumbered so far as the record shows, he was not insolvent, and conveyances to wife and daughters should not be set aside. *Mitchell v. Weekes*, 179 Ga. 886, 177 S.E. 737 (1934) (decided under former Civil Code 1910, § 3224).

Purchase of land in trust for daughter as voluntary conveyance to latter. — See *Cohen v. Parish*, 105 Ga. 339, 31 S.E. 205 (1898) (decided under former Civil Code 1895, § 2695).

Good faith conveyance for purpose of preferring one creditor over another. — Conveyance made in good faith for purpose of preferring one creditor over another is not a "voluntary deed or conveyance". *Johnson v. Sherrer*, 185 Ga. 340, 195 S.E. 149 (1938) (decided under former Code 1933, § 28-201).

Promise to provide grantor with necessities of life. — Conveyance of property for sole consideration of promise by grantee to provide for and furnish to grantor, for remainder of her life, necessities of life such as lodging, food, clothing, and medical expenses, is not voluntary conveyance, but is one for valuable consideration. *Ayer v. First Nat'l Bank & Trust Co.*, 182 Ga. 765, 187 S.E. 27 (1936) (decided under former Code 1933, § 28-201).

Interest payments made to a party by a debtor corporation were in return for the valuable consideration of a bona fide antecedent debt of the corporation incurred as a result of the party's loan to it. Consequently, these payments were not "fraudulent conveyances" under paragraph (3) of former O.C.G.A. § 18-2-22. *Estes v. Cranshaw (In re N & D Properties, Inc.)*, 54 Bankr. 590 (N.D. Ga. 1985), modified on other grounds, 799 F.2d 726 (11th Cir. 1986) (decided under former § 18-2-22).

Actions

Judgment for debt and cancellation of fraudulent conveyance sought in same action. — Since the Uniform Procedure Act of 1887, a creditor may in one suit proceed for judgment on debt and to set aside fraudulent conveyance made by debtor. *Harper v. Atlanta Milling Co.*, 203 Ga. 608, 48 S.E.2d 89 (1948) (decided under former Code 1933, §§ 28-104 and 28-201).

Creditor may in one action in superior court proceed against a debtor for judgment on the creditor's demand and to set aside a fraudulent conveyance, joining the debtor and grantee. *Hyde v. Atlanta Woolen Mills Corp.*, 204 Ga. 450, 50 S.E.2d 52 (1948) (decided under former law).

Action for both alimony and cancellation of fraudulent conveyance. See *McCallie v. McCallie*, 192 Ga. 699, 16 S.E.2d 562 (1941) (decided under former Code 1933, § 28-201).

Action against both tortfeasor and grantee of conveyance with fraudulent purpose. — Parent of minor child killed by negligent tortious acts of another was within protection of former Code 1933, § 28-320 (see now O.C.G.A. § 18-2-59), and may proceed in one action against tortfeasor and grantee named in conveyances executed by tortfeasor to obtain: (1) judgment for damages against tortfeasor for negligent tortious homicide of the parent's child; and (2) decree adjudging null and void as to the conveyances of real and personal property, executed by the defendant tortfeasor subsequent to commission of tort, for purpose of hindering, delaying, or defrauding the plaintiff in collection of the plaintiff's claim for damages. *McVeigh v. Harrison*, 185 Ga. 121, 194 S.E. 208 (1937) (decided under former Code 1933, § 28-201); *Downs v. Powell*, 215 Ga. 62, 108 S.E.2d 715 (1959) (decided under former Code 1933, § 28-201).

Action in rem by alimony obligee against fraudulently conveyed property. — Willful failure to provide for maintenance and support of spouse and

children creates lawful demand which, when legally enforced, is called alimony, and is a debtor/creditor relationship. Thus, when spouse was creditor at time of conveyances which are alleged to have been made to defeat her claim for alimony, although no alimony judgment had been rendered at time of conveyances, it would be inequitable and unjust not to allow her to maintain action because she elected to obtain judgment in rem against husband's property when she was unable to obtain personal service because of his willful avoidance of service. *Carter v. Bush*, 216 Ga. 429, 116 S.E.2d 568 (1960) (decided under former Code 1933, §§ 28-101 — 28-104, and 28-201).

Action by creditor against transferee. — Creditor can obtain a personal money judgment against a transferee. *United States v. Tranakos*, 778 F. Supp. 1220 (N.D. Ga. 1991) (decided under former § 18-2-22).

Equitable relief to judgment creditor proving fraudulent conveyance. — See *Peoples Loan Co. v. Allen*, 199 Ga. 537, 34 S.E.2d 811 (1945) (decided under former Code 1933, § 28-201).

Showing of actual damage. — In action to cancel fraudulent conveyance, the plaintiff need not show that actual damage has accrued. *Von Kamp v. Gary*, 204 Ga. 875, 52 S.E.2d 591 (1949) (decided under former Code 1933, § 28-201).

Judgment for damages may be appropriate. — When plaintiff alleges that the defendant transferred and conveyed property to parties unknown, and that the property is now beyond the defendant's control, it would not be inappropriate to allow judgment for such damages as creditors may have sustained, not exceeding value of property. *Sullivan v. Ginsberg*, 180 Ga. 840, 181 S.E. 163 (1935) (decided under former Code 1933, § 28-201).

Jury charge upheld. — In suit based on paragraphs (2) and (3) of statute, giving statute in its entirety in charge to jury was not grounds for new trial. *Thompson v. Shellman Banking Co.*, 180 Ga. 495, 179 S.E. 75 (1935) (decided under former Civil Code 1910, § 3224).

Parties and Pleadings

Third party to fraudulent conveyance as necessary party. — Defrauded

creditor may, in court of equity, have fraudulent transaction set aside; and, for this purpose, third party to the transaction would be a proper and necessary party. *Harper v. Atlanta Milling Co.*, 203 Ga. 608, 48 S.E.2d 89 (1948) (decided under former Code 1933, §§ 28-104 and 28-201).

Grantor and first taker of stock not indispensable parties. — In a fraudulent conveyance action against the grantee of stock brought by a divorced wife who was awarded the stock in the divorce proceeding, the grantor, husband, and first taker, a corporation, were not indispensable parties since neither was necessary for a just adjudication of the merits of the action, and neither was required for complete relief. *Halta v. Bailey*, 219 Ga. App. 178, 464 S.E.2d 614 (1995) (decided under former § 18-2-22).

Special pleadings to show fraud. — In trial of statutory claim to land, it is not necessary to have special pleadings to show fraud. *Mattox v. West*, 194 Ga. 310, 21 S.E.2d 428 (1942) (decided under former Code 1933, § 28-201).

Plea failing to allege intent or notice. — Plea to action of ejectment, to effect that a certain deed, constituting one link in plaintiff's chain of title, was made in fraud of rights of creditors under whom defendants hold, and is fraudulent and void, but which did not allege intent to defraud or notice to grantee should, on motion, be stricken. *Baird v. Evans*, 58 Ga. 350 (1877) (decided under former law).

Allegation that assignee of insolvent debtor had notice of debtor's insolvency. — In action to set aside as fraudulent an assignment or transfer of property alleged to have been made by insolvent debtor in trust or for benefit of one of the creditors, when a benefit was reserved to the debtor, the petition need not allege that the assignee or transferee had notice of the debtor's insolvency at the time of transfer. *McKenzie v. Thomas*, 118 Ga. 728, 45 S.E. 610 (1903) (decided under former Civil Code 1895, § 2695).

Subsequent transferee of the debtor who sought to set aside the original transfer on the grounds of fraud had no argument that the transfer was invalid as to the original transferee because its

Parties and Pleadings (Cont'd)

claim to the property was based on its purchase from the debtor, it was the debtor's privy and stood in the debtor's shoes in challenging the validity of the debtor's contract with the original transferee. *Thomas Mote Trucking, Inc. v. PCL Civil Constructors, Inc.*, 246 Ga. App. 306, 540 S.E.2d 261 (2000) (decided under former § 18-2-22).

Identity of specific conveyance required. — In a fraudulent conveyances claim asserted under former O.C.G.A. § 18-2-22, the requirement that fraud be pled with particularity mandates that the claimant identify a specific conveyance with sufficient definiteness to advise the adversary of the conveyance which it must explain. *Gwinnett Property v. G & H Montage*, 215 Ga. App. 889, 453 S.E.2d 52 (1994) (decided under former § 18-2-22).

Petition stating cause of action authorizing injunctive relief. — See *Moncrief Furnace Co. v. Northwest Atlanta Bank*, 193 Ga. 440, 19 S.E.2d 155 (1942) (decided under former law).

Setting aside transfer as fraudulent. — Paragraph (3) of former O.C.G.A. § 18-2-22 was not available to the party seeking to set aside the transfer as fraudulent when the amended answer and pre-trial order only tracked the language of paragraph (2) of former O.C.G.A. § 18-2-22. *Nelson v. United States*, 821 F. Supp. 1496 (M.D. Ga. 1993) (decided under former § 18-2-22).

Evidentiary Issues

Circumstantial evidence may be of high importance. — When a conveyance, a security deed, or a mortgage is attacked as having been made to hinder, delay, or defraud the creditors of the maker of such instrument, circumstantial evidence is of the highest importance in determining the good faith or bad faith — the real intent — of the grantor in the execution of the instrument; direct testimony as to the real intent of the grantor and grantee whose motives are under attack can only be obtained from these interested persons, and consequently necessarily any circumstance that may throw light on their conduct and motive is ad-

missible for the jury's consideration. *Gower v. Cohn*, 643 F.2d 1146 (5th Cir. 1981) (decided under former Code 1933, § 28-201).

Failure to produce testimony is badge of fraud, when bona fides of transaction in issue, and witnesses who ought to be able to explain the transaction are in reach. *Eberhardt v. Bennett*, 163 Ga. 796, 137 S.E. 64 (1927) (decided under former Civil Code 1910, § 3224).

Facts necessary for conclusive presumption of fraud. — Only facts necessary to render deed from husband to wife fraudulent in law are indebtedness, insolvency of debtor, and voluntariness of deed. When these facts are proved, the law conclusively presumes fraudulent intent and declares instrument void so far as creditors who held demands against the debtor at the time of conveyance are concerned. *Chambers v. Citizens & S. Nat'l Bank*, 242 Ga. 498, 249 S.E.2d 214 (1978) (decided under former Code 1933, § 28-201); *Barclay v. First Nat'l Bank*, 265 Ga. 744, 462 S.E.2d 374 (1995) (decided under former § 18-2-22).

Evidence of general character of alleged fraud perpetrator. — When conveyance between near relatives is attacked upon ground of fraud, the law requires jury to examine every circumstance with care and caution, and one who is charged with defrauding honest creditors should be allowed to introduce evidence concerning one's general character. *Wimberly v. Toney*, 175 Ga. 416, 165 S.E. 257 (1932) (decided under former law).

Evidence of indebtedness. — Testamentary trust created by a wife in favor of her husband was not a fraudulent transfer against a judgment creditor since the wife had been released from liability on the judgment by virtue of a settlement agreement executed in bankruptcy court and, thus, creation of the trust was not a debtor's act that could be deemed fraudulent against the creditor under former O.C.G.A. § 18-2-22. *Jordan v. Caswell*, 264 Ga. 638, 450 S.E.2d 818 (1994) (decided under former § 18-2-22).

Proof of suits against defendant at time of allegedly fraudulent conveyance. — On trial of issue whether conveyance is fraudulent against creditors, the

plaintiff may prove pendency of suits against the debtor at the time of execution of the deed. *Barber v. Terrell*, 54 Ga. 146 (1875) (decided under former Civil Code 1863, § 1952).

Unexplained agreement that grantor retain possession. — Agreement between a grantor and grantee that property shall remain in possession of vendor, if not satisfactorily explained, is a badge of fraud; and when such continued possession in vendor is shown, the burden of proof shifts to grantee. *State Housecraft, Inc. v. Jones*, 96 Ga. App. 182, 99 S.E.2d 701 (1957) (decided under former Code 1933, § 28-201).

Proof required to overcome prima facie case. — If after conveyance of property grantor was allowed to retain and remain in possession, this was sufficient prima facie evidence to establish fraud under paragraphs (2) and (3) of former Code 1933, § 28-201, and it was then incumbent upon grantee claiming under conveyance to establish that grantor's possession was not by any right of ownership or that grantor was not insolvent at time of such conveyance, and that, even if solvent, any intention of grantor to delay or defraud grantor's creditors was unknown to the grantee at the time of conveyance. *Glenn v. Tankersley*, 187 Ga. 129, 200 S.E. 709 (1938), later appeal sub nom. *Bussell v. Glenn*, 197 Ga. 816, 30 S.E.2d 617 (1944) (decided under former Code 1933, § 28-201).

Rebuttal of presumption of fraud arising from seller's continued possession. — Proof of payment of valuable consideration rebuts presumption of fraud arising from seller's continued possession. *Scott v. Winship*, 20 Ga. 429 (1856) (decided under former law); *Scruggs v. Blackshear Mfg. Co.*, 45 Ga. App. 855, 166 S.E. 249 (1932) (decided under former Civil Code 1910, § 3224).

Admissibility of writs of fieri facias against defendant. — See *Buttram v. Jackson*, 32 Ga. 409 (1861) (decided under former law).

When question of defendant's solvency is involved, fieri facias against defendant with entry of nulla bona thereon is admissible in evidence. *Lawson v. Wright*, 21 Ga. 242 (1857) (decided under former law).

Proof required by plaintiff in fieri facias to invalidate conveyance. — See *Glenn v. Tankersley*, 187 Ga. 129, 200 S.E. 709 (1938), later appeal sub nom. *Bussell v. Glenn*, 197 Ga. 816, 30 S.E.2d 617 (1944) (decided under former Code 1933, § 28-201).

Without standing to allege fraud. — When plaintiffs were not creditors of the creator of a trust, plaintiffs could not argue that the plaintiffs were defrauded by the plaintiffs transfer of patents to the trust. *Beeson v. Crouch*, 227 Ga. App. 578, 490 S.E.2d 118 (1997).

Jury/Court Issues

Whether deed was made with intent to delay or defraud creditors is question of fact for jury to decide from all of the circumstances of the case, and whether the debtor is so solvent or insolvent is a question of fact for the jury. *Goodman v. Lewis*, 247 Ga. 605, 277 S.E.2d 908 (1981) (decided under former Code 1933, § 28-201).

Questions of fraud and bad faith are ordinarily for jury. *Mercantile Nat'l Bank v. Aldridge*, 233 Ga. 318, 210 S.E.2d 791 (1974) (decided under former Code 1933, § 28-201).

Issues of good faith and grantee's notice. — Whether there has been sufficient proof of good faith of transaction or of spouse's lack of knowledge of the other spouse's business affairs or debts is a question for determination by jury. *Cotton v. John W. Eshelman & Sons*, 137 Ga. App. 360, 223 S.E.2d 757 (1976) (decided under former Code 1933, § 28-201).

Issues of fraudulent intent of grantor and notice of grantee. — Whether conveyance to spouse was made with intent to delay or defraud creditors, and whether such intent was known to party taking, were all questions for jury, under the evidence and a proper charge. *Primrose v. Browning*, 59 Ga. 69 (1877) (decided under former Civil Code 1863, § 1952).

Whether deed was executed by grantor with intention to delay or defraud grantor's spouse in collection of alimony and such intention was known to grantee or whether transaction was bona fide and for valuable consideration and without notice

Jury/Court Issues (Cont'd)

or ground for reasonable suspicion is ordinarily question for determination by jury. *Lewis v. Lewis*, 210 Ga. 330, 80 S.E.2d 312 (1954) (decided under former Code 1933, § 28-201).

Whether grantee chargeable with notice of grantor's fraudulent intention. — It is a jury question whether grantee is chargeable with notice or ground for reasonable suspicion of grantor's intention to delay or defraud creditors. *Mercantile Nat'l Bank v. Aldridge*, 233 Ga. 318, 210 S.E.2d 791 (1974) (decided under former Code 1933, § 28-201).

When circumstances, if not satisfactorily explained, indicate fraud. — When transaction between brothers-in-law is attacked by creditor as fraudulent and there are other circumstances besides relationship which, if not satisfactorily explained, may be regarded as badges of fraud, issues are matters to be determined by jury. *Hilburn v. Hightower*, 178 Ga. 534, 173 S.E. 389 (1934) (decided under former Civil Code 1910, § 3224).

Allegations of fraudulent intent and notice to grantee. — Petition of wife against husband which alleges that husband executed deed to his attorney, conveying property occupied by wife and children, for purpose of hindering, delaying, or defrauding her in collection of alimony for support of herself and children, and raises question as to whether defendant attorney knew or had reasonable ground to suspect such intention, was sufficient to raise an issue for determination by jury, and it was error for court to grant nonsuit. *Lewis v. Lewis*, 210 Ga. 330, 80 S.E.2d 312 (1954) (decided under former Code 1933, § 28-201).

Issues regarding execution of release. — When the exclusion in a liability policy for injuries or death caused by assault or battery applied to a claim against the insured arising from an assault and battery caused by its employee, there was no coverage under the policy, and a release by the insured of any claims it might have against the insurer did not transfer a valuable asset to the insurer in violation of this statute. *Jefferson Ins. Co. v. Dunn*,

269 Ga. 213, 496 S.E.2d 696 (1998) (decided under former § 18-2-22).

Whether tortfeasor was solvent at time of voluntary conveyance. — If tortfeasor was insolvent, or left insolvent, when tortfeasor made voluntary conveyance, it was void as against party damaged; and whether insolvent or not, was question for jury. *Westmoreland v. Powell*, 59 Ga. 256 (1877) (decided under former Code 1873, §§ 1944 and 1952). See also *Primrose v. Browning*, 59 Ga. 69 (1877) (decided under former Code 1873, §§ 1944 and 1952).

Evidence that deed was voluntary and intended to defeat claim for alimony. — Evidence that deed executed by the debtor to the testatrix was fraudulent and void because the deed was without consideration and based on a collusive transaction between them, for the sole purpose of defeating the claim of the debtor's spouse for support and alimony, was sufficient to carry the case upon this question to the jury. *Blevins v. Pittman*, 189 Ga. 789, 7 S.E.2d 662 (1940) (decided under former law).

Nature and adequacy of consideration for mortgage. — Whether the consideration for which a mortgage is alleged to have been executed is bona fide, or merely colorable to defraud creditors or so inadequate as to constitute a badge of fraud, is a question of fact for the jury. *Williams v. C. & G.H. Kelsey & Halsted*, 6 Ga. 365 (1849) (decided under former law).

Inconsistent jury findings. — When a jury's finding of fraudulent conveyance constituted a finding that the defendant's capital was impaired by a stock redemption, that there was a specific intent to cause harm to the plaintiff, the defendant's vendor, and that punitive damages should be awarded against the directors and shareholders, these findings were wholly inconsistent and irreconcilable with the jury's finding against the defendant on its cross-claim, which required a finding either that no unlawful stock redemption occurred or that the stockholders lacked knowledge of its unlawfulness, and the trial court erred in denying the parties' motions for new trial. *Docutronics, Inc. v. Reitman*, 235 Ga. App.

268, 509 S.E.2d 348 (1998) (decided under former § 18-2-22).

Effect of Invalidating Conveyance

Title to property fraudulently conveyed. — Fraudulent conveyances are declared void, and title to property so conveyed remains in judgment debtors subject to judgments subsequently obtained. *Coleman v. Law*, 170 Ga. 906, 154 S.E. 445 (1930) (decided under former Civil Code 1910, § 3224).

Duty of grantee of fraudulently conveyed property to hold in trust. — When a debtor makes a fraudulent transfer of property or chases in action, which is voidable as to creditors, property in hands of a fraudulent grantee is held by a debtor in trust for creditors of a fraudulent grantor; and if it has been converted into money, the money is impressed with same trust, and the fraudulent grantee will be compelled in equity to account for the

money. *Edwards v. United Food Brokers, Inc.*, 195 Ga. 1, 22 S.E.2d 812 (1942) (decided under former Code 1933, § 28-201).

Judgment of creditor rendered after conveyance. — If a debtor conveys the debtor's property with intent to delay or defraud the debtor's creditors, and grantee takes with knowledge of such intent, the land can be subjected to judgment of one of such creditors rendered after conveyance. *Horton v. Black*, 137 Ga. 577, 73 S.E. 833 (1912) (decided under former Civil Code 1910, § 3224).

Effect of setting aside fraudulent transfer. — *Edwards v. United Food Brokers, Inc.*, 195 Ga. 1, 22 S.E.2d 812 (1942) (decided under former Code 1933, § 28-201).

Effect of fraudulent conveyance on rights of subsequent creditors. — *Roach v. Roach*, 212 Ga. 40, 90 S.E.2d 423 (1955) (decided under former law).

RESEARCH REFERENCES

Am. Jur. 2d. — 37 Am. Jur. 2d, Fraudulent Conveyances and Transfers, § 1 et seq.

C.J.S. — 37 C.J.S., Fraudulent Conveyances, §§ 6, 7. 79 C.J.S., Second Transactions, § 20 et seq.

ALR. — Conveyance in consideration of future support as fraudulent against creditors, 2 ALR 1438; 23 ALR 584.

Right of grantee or transferee to be reimbursed for expenditures in payment of taxes or encumbrances on property where conveyance or transfer is in fraud of creditors, 8 ALR 527.

Right of creditors as against directors or officers to whom property of a corporation has been transferred for a consideration other than payment of debts due them, 9 ALR 1447.

Right of insolvent to insure life for benefit of relatives, 31 ALR 51; 34 ALR 838.

Preference in event of debtor's insolvency in respect of funds designated or set apart by him for payment of specified obligations, 32 ALR 950.

Right of parent as against creditor or lienor to make gift to minor child of latter's own services, 44 ALR 876.

Delivery of key as satisfying condition of

immediate delivery and actual or continued change of possession to uphold sale of personal property against subsequent purchaser or third persons generally, 56 ALR 518.

What constitutes a "general assignment for the benefit of creditors" within provisions of the Bankruptcy Act which make such an assignment an act of bankruptcy, 57 ALR 859.

Validity, as against creditors of trustee or one deriving his right from trustee, of conveyance or transfer to carry out terms of unenforceable parol trust, 64 ALR 576.

Admissibility of subsequent declarations of vendor on issue of whether sale was in fraud of creditors, 64 ALR 797.

Remedy of general creditor or judgment creditor as affected by Uniform Fraudulent Conveyance Act, 65 ALR 251; 119 ALR 949.

Absolute conveyance or transfer with secret reservation as fraudulent per se as against creditors, 68 ALR 306.

Effect of payment to subcontractors or materialmen by owner or contractor, or by sureties on contractor's bond, within four months of principal contractor's bank-

ruptcy, as a voidable preference, 70 ALR 983.

Right of surety or one secondarily liable to bring an action before payment of obligation to set aside fraudulent conveyances by principal, 71 ALR 354.

When statute of limitations or laches commences to run against action to set aside conveyance or transfer in fraud of creditors, 76 ALR 864; 100 ALR 1094.

Right of grantee, mortgagee, or transferee in instrument fraudulent as to creditors to protection to extent of consideration paid by him, 79 ALR 132.

Transfer of property by debtor to corporation, in consideration of its stock, as a fraud on creditors, 85 ALR 133.

Pledge of accounts as affected by pledgor's reservation of partial dominion or control, 85 ALR 222.

Right and remedy as regards application of debt due from insolvent as between debts owed by creditor to insolvent, 86 ALR 993.

Right of creditor to benefit of redemption from, acquisition or extinction of, outstanding right, title, or interest, by grantee or transferee in fraud of creditors, 87 ALR 830.

Persons asserting claim on theory of agency or trust as within term "creditors" in statutes relating to proof of claims against insolvent bank, 89 ALR 383.

Right of executor or administrator to attack conveyance or transfer by decedent as a fraud upon his creditors, or to the benefit of a successful attack by one or more of the creditors, 91 ALR 133.

Uniform Fraudulent Conveyance Act as applied to conveyance between third persons, upon consideration furnished by debtor, 91 ALR 741.

Reservation to settlor of trust or other grantor of right to revoke or change the same, or to withdraw securities or other property items and substitute others, as affecting its validity as against his creditors, 92 ALR 282.

Debtor's intent to defraud or delay creditors within contemplation of attachment statute as inferable as matter of law from fact that he has removed or is about to remove property from the state without making adequate provision for his creditors, 92 ALR 966.

Validity as against creditors of conveyance in trust for settlor for life with remainder to his appointees, 93 ALR 1211.

Right of creditor of decedent, before perfecting his claim or after loss of recourse against decedent's estate, to pursue remedy against property conveyed by the decedent in fraud of his creditors, 103 ALR 555.

Fraud of judgment debtor in concealing assets or misrepresenting his financial condition as affecting failure to issue execution or revive judgment within statutory period or as ground of action for fraud and deceit causing loss of legal remedy on judgment, 104 ALR 214.

Validity and effect as against creditors of change of beneficiary or assignment of insurance policy from estate to individual, 106 ALR 596.

Succession, estate, or gift tax in respect of or as affected by conveyance or transfer restoring to original owner property transferred by him to defraud or delay creditors, 108 ALR 1508.

Fact that debt to pay or secure which conveyance was made was barred by limitation as affecting attack made upon it as a fraud upon creditors, 109 ALR 1220.

Time when limitation commences to run against action at law or in equity based on fraud inducing execution of contract or conveyance as affected by time when actual damages resulted, 110 ALR 1178.

Conflict of laws as regards validity of fraudulent and preferential transfers and assignments, 111 ALR 787.

Liability of one who assists or encourages the making of conveyance or preference in fraud of creditors, by debtor to a third person, 112 ALR 1250.

Right of creditors, or of trustee in bankruptcy, of grantor in conveyance fraudulent as against creditors, in respect of proceeds of insurance upon property, 114 ALR 1374.

Right to attack and conditions of attack upon conveyance, mortgage, or transfer as fraudulent as against creditors as affected by mortgage or other security for indebtedness to attacking creditor, 116 ALR 1048.

Death of grantee or transferee of property conveyed or transferred in fraud of creditors as affecting rights of creditors of

grantor or transferor to attach same, 116 ALR 1196.

Complainant's purpose to defraud creditors as defense to suit to recover property paid for him but conveyed to defendant, 117 ALR 1464.

Right of creditors of one spouse, either before or after death of other spouse, to attack conveyance or encumbrance of estate by entirety by both spouses as in fraud of creditors, 121 ALR 1028.

Right of grantee, or his privies, to maintain suit or proceeding for affirmative relief, where claim is made or anticipated that conveyance was made with intention on part of grantor, but without actual fraud by grantee, to defraud former's creditors, 128 ALR 1504.

Conditions of creditor's bill or suit to avoid conveyance as a fraud on creditors where creditor has recovered foreign judgment, 129 ALR 506.

Remedy of general creditor or judgment creditor as affected by Uniform Fraudulent Conveyance Act, 129 ALR 949.

Jurisdiction, and propriety of its exercise, to require real property in another state or country to be applied in satisfaction of debt (including the setting aside of a fraudulent conveyance thereof), 144 ALR 646.

Right to set aside, for benefit of heirs and distributees, a conveyance or transfer by decedent in fraud of his creditors, 148 ALR 230.

Rights as between creditors of grantor or transferor and those of grantee or transferee in respect of property conveyed or transferred in fraud of creditors, 148 ALR 520.

Assignability of executor's or administrator's right to attack conveyance or transfer by decedent as fraud upon his creditors, 150 ALR 508.

Purchase of homestead as fraud on creditors, 161 ALR 1287.

Right of wife or child by virtue of right to support to maintain actions to set aside conveyance by husband or parent as fraudulent, without reducing claim to judgment, 164 ALR 524.

Use of debtor's individual funds or property for acquisition, improvement of, or discharge of, liens on, property held in estate by entirety as a fraud upon creditors, 7 ALR2d 1104.

Rule denying relief to one who conveyed his property to defraud his creditors as applicable where the claim which motivated the conveyance was never established, 21 ALR2d 589; 6 ALR4th 862.

Necessary parties defendant to action to set aside conveyance in fraud of creditors, 24 ALR2d 395.

Right of creditors to attack as fraudulent a conveyance by third person to debtor's spouse, 35 ALR2d 8.

Admissibility of testimony of transferee as to his knowledge, purpose, intention, or good faith on issue whether conveyance was in fraud of transferor's creditors, 52 ALR2d 418.

Admissibility, in prosecution for criminal burning of property, or for maintaining fire hazard, of evidence of other fires, 87 ALR2d 891.

When statute of limitations or laches commences to run against action to set aside fraudulent conveyance or transfer in fraud of creditors, 100 ALR2d 1094.

Debtor's transfer of assets to representative of creditors as effectuating release of unsecured claims, in absence of express agreement to that effect, 8 ALR3d 903.

Conveyance as fraudulent where made in contemplation of possible liability for future tort, 38 ALR3d 597.

Right of secured creditor to have set aside fraudulent transfer of other property by his debtor, 8 ALR4th 1123.

Right of creditor to recover damages for conspiracy to defraud him of claim, 11 ALR4th 345.

18-2-70. Short title.

This article, which was formerly known and cited as the "Uniform Fraudulent Transfers Act," shall be known and may be cited as the "Uniform Voidable Transactions Act." (Code 1981, § 18-2-70, enacted by Ga. L. 2002, p. 141, § 3; Ga. L. 2015, p. 996, § 4A-1/SB 65.)

The 2015 amendment, effective July 1, 2015, substituted the present provisions of this Code section for the former provisions which read: “This article shall be known and may be cited as the ‘Uniform Fraudulent Transfers Act.’ See editor’s note under this article for applicability.

Law reviews. — For survey article on cases in the areas of corporate, securities, partnership, and banking law for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 55 (2003). For annual survey of law on business associations, see 62 Mercer L. Rev. 41 (2010).

JUDICIAL DECISIONS

Claims under O.C.G.A. § 18-2-22 not extinguished. — O.C.G.A. § 18-2-22 was repealed on July 1, 2002, when Georgia enacted the Uniform Fraudulent Transfers Act (now Uniform Voidable Transactions Act), O.C.G.A. § 18-2-70 et seq., but this repeal does not extinguish causes of action that arose under former O.C.G.A. § 18-2-22 before that date. *Gerschick v. Pounds*, 281 Ga. App. 531, 636 S.E.2d 663 (2006), cert. denied, 2007 Ga. LEXIS 95 (Ga. 2007).

Conveyance at issue took place in September 2001 and needed to be construed under former O.C.G.A. § 18-2-22 (repealed) even though the statute was repealed when the legislature adopted the Uniform Fraudulent Transfer Act (now Uniform Voidable Transactions Act), O.C.G.A. § 18-2-70 et seq. *Flatau v. Smith* (In re Smith), No. 07-50410-JDW, 2007 Bankr. LEXIS 3825 (Bankr. M.D. Ga. Oct. 30, 2007).

Defendant did not have to be indebted to plaintiff. — Read and considered as a whole, a jury charge was an accurate statement of the law and was authorized by the evidence in an action in which the jury was instructed that it was not necessary for a defendant to be indebted to a plaintiff at the time of a transfer for former O.C.G.A. § 18-2-22 to apply and there was evidence that an attorney made a conveyance with actual intent to defraud a future creditor, a client; moreover, the trial court fully and completely charged the law on fraudulent conveyances, including former O.C.G.A. § 18-2-22(2). *Gerschick v. Pounds*, 281 Ga. App. 531, 636 S.E.2d 663 (2006), cert. denied, 2007 Ga. LEXIS 95 (Ga. 2007).

Aiding and abetting. — Although Georgia courts had not yet had an opportunity to address the issue of whether

there was a cause of action for aiding and abetting a fraudulent transfer when the alleged aider-abetter was not a debtor or a transferee, the instant court concluded that Georgia courts were not likely to recognize such an action; the Uniform Fraudulent Transfer Act (UFTA) (now Uniform Voidable Transactions Act), O.C.G.A. § 18-2-70 et seq., did not refer to parties other than debtors, creditors, and transferees, and further there was no language in UFTA that suggested the creation of a distinct cause of action for aiding and abetting claims against non-transferees. *Hays v. Paul, Hastings, Janofsky & Walker LLP*, No. 1:06-CV-754-CAP, 2006 U.S. Dist. LEXIS 95849 (N.D. Ga. Sept. 14, 2006).

No-action clause. — Claims by noteholders under the Uniform Fraudulent Transfers Act (now Uniform Voidable Transactions Act), O.C.G.A. § 18-2-70 et seq., against a corporation and the corporate directors and officers should have been dismissed by the district court because a no-action clause in trust indentures that governed the notes barred the noteholders’ claims since the noteholders did not fall within any exception to the rule that no-action clauses barred fraudulent conveyance claims; the appellate court had jurisdiction to grant permission to appeal to all appellants because both prongs of 28 U.S.C. § 1292(b) had been satisfied, which was that the district court had stated the required language in the court’s order and the appellants had then filed an application for interlocutory appeal within ten days of that statement. *Akanthos Capital Mgmt., LLC v. CompuCredit Holdings Corp.*, 677 F.3d 1286 (11th Cir. 2012).

Motion for summary judgment denied. — Summary judgment motion filed

by an insurer in response to a Chapter 7 trustee's complaint charging that certain premiums paid to the insurer by a debtor were fraudulent conveyances that were recoverable under 11 U.S.C. § 548 and/or under Georgia's Uniform Fraudulent Transfers Act (now Uniform Voidable Transactions Act), O.C.G.A. § 18-2-70 et seq., was denied because the case presented significant factual issues concerning the legal relationships between the debtor and the entities on behalf of which the debtor had paid the premiums and the presence of such issues foreclosed summary judgment. *Coleman v. Zurich Am. Ins. Co. (In re Darrow Auto. Group, Inc.)*, No. 09-11228, 2011 Bankr. LEXIS 5253 (Bankr. S.D. Ga. Mar. 29, 2011).

Trial court erred by denying an insurance company's motion for summary judgment on a claim that the company engaged in a conspiracy which violated the Uniform Fraudulent Transfers Act (now Uniform Voidable Transactions Act), O.C.G.A. § 18-2-70 et seq., by a conspiracy to settle a bad faith/negligence claim possessed by an estate for less than the claim's true value because the insurer was found not to have engaged in fraudulent conduct. *Baker v. Huff*, 323 Ga. App. 357, 747 S.E.2d 1 (2013).

Motion for directed verdict properly denied. — Attorney and a wife's motion for a directed verdict was properly denied as a party bringing a fraudulent conveyance action under former O.C.G.A. § 18-2-22 did not have to be a creditor; the circumstances and the timing of the transfer showed the attorney's intent to defraud as a quitclaim deed from the attorney to the wife was "rush recorded" two days after the attorney received a draft order for the underlying judgment, no valuable consideration was given for the transfer, and the attorney was an expert in estate planning, including the protection of assets from the claims of creditors. *Gerschick v. Pounds*, 281 Ga. App. 531, 636 S.E.2d 663 (2006), cert. denied, 2007 Ga. LEXIS 95 (Ga. 2007).

Transfer to avoid bankruptcy ramifications. — Under former O.C.G.A. § 18-2-22 (repealed), a wife's motion to dismiss a claim brought by a Chapter 7 trustee to avoid a transfer made to her by

a debtor husband was denied because the trustee, through the complaint and use of a quitclaim deed, provided a factual basis sufficient to state a claim including some evidence that the transfer was made for no consideration, that the transfer was voluntary, and that the wife knew of the debtor's insolvency at the time the transfer was made. *Flatau v. Smith (In re Smith)*, No. 07-50410-JDW, 2007 Bankr. LEXIS 3825 (Bankr. M.D. Ga. Oct. 30, 2007).

Transfer was not fraudulent. — When a corporation paid a dividend to a shareholder pursuant to a shareholders agreement after designating itself an S corporation, it was not a fraudulent transfer because it was not error to find that the transfer was made in exchange for reasonably equivalent value since the shareholders agreement provided the corporation with valuable benefits by virtue of its S-corporation election. *Crumpton v. McGarrity (In re Northlake Foods, Inc.)*, No. 12-15604, 2013 U.S. App. LEXIS 7578 (11th Cir. Apr. 16, 2013) (Unpublished).

No fraud shown by developer. — In an action brought by the purchasers of a lot seeking to cancel the developer's security deed based upon alleged fraud, the trial court properly granted summary judgment to the developer as, even if the developer knew of the sale of the lot to the purchasers, such sale did not estop the developer from the developer's claim against the lot pursuant to the developer's security deed; however, the trial court did err by denying the equitable subrogation claim asserted by the purchasers' lender since exercising subrogation did not prejudice the developer in any manner. *Byers v. McGuire Props.*, 285 Ga. 530, 679 S.E.2d 1 (2009).

Fraudulent conveyance claim not stated. — Administrator failed to state a claim under the Georgia Uniform Fraudulent Transfer Act, O.C.G.A. (now Uniform Voidable Transactions Act). § 18-2-70 et seq., against group three when the administrator alleged that defendant one held title to the property when the suit was filed, and claimed that the administrator was entitled to recover the property from defendant one and to set aside the lien to defendant two; the administrator ac-

knowledge that defendants three, four, and five denied any knowledge of the administrator's lien on the property when they purchased the property, and that therefore no one disclosed the lien to the closing attorney or defendants three, four, and five, despite certain parties' knowledge and affirmative duty to disclose the existence of the writ as constituting a lien on the property. *Huggins v. Powell*, 315 Ga. App. 599, 726 S.E.2d 730 (2012).

Choice of law. — In a fraudulent conveyance action transferred from the

Northern District of Texas, Georgia's former fraudulent conveyance law, former O.C.G.A. § 18-2-22, which was in force at the time the actions in question occurred, was the applicable state law under Texas choice of law principles because Georgia had the most significant relationship to the issues raised in the lawsuit. *MC Asset Recovery v. Southern Co.*, No. 1:06-CV-0417-BBM, 2008 U.S. Dist. LEXIS 123609 (N.D. Ga. Apr. 1, 2008).

Cited in *Bishop v. Patton*, 288 Ga. 600, 706 S.E.2d 634 (2011).

RESEARCH REFERENCES

Am. Jur. 2d. — 37A Am. Jur. 2d, Fraudulent Conveyances and Transfers, § 2.

18-2-71. Definitions.

As used in this article, the term:

(1) "Affiliate" means:

(A) A person who directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) As a fiduciary or agent without sole discretionary power to vote the securities; or

(ii) Solely to secure a debt, if the person has not exercised the power to vote;

(B) A corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the debtor or a person who directly or indirectly owns, controls, or holds with power to vote 20 percent or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) As a fiduciary or agent without sole power to vote the securities; or

(ii) Solely to secure a debt, if the person has not in fact exercised the power to vote;

(C) A person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(D) A person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but the term does not include:

(A) Property to the extent it is encumbered by a valid lien;

(B) Property to the extent it is generally exempt under nonbankruptcy law; or

(C) An interest in property held in tenancy by the entirety to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim," except for claim for relief, means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim, regardless of when the person acquired the claim, together with any successors or assigns.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(8) "Insider" includes:

(A) If the debtor is an individual:

- (i) A relative of the debtor or of a general partner of the debtor;
- (ii) A partnership in which the debtor is a general partner;
- (iii) A general partner in a partnership described in division (ii) of this subparagraph; or
- (iv) A corporation of which the debtor is a director, officer, or person in control;

(B) If the debtor is a corporation:

- (i) A director of the debtor;
- (ii) An officer of the debtor;
- (iii) A person in control of the debtor;
- (iv) A partnership in which the debtor is a general partner;

(v) A general partner in a partnership described in division (iv) of this subparagraph; or

(vi) A relative of a general partner, director, officer, or person in control of the debtor;

(C) If the debtor is a partnership:

(i) A general partner in the debtor;

(ii) A relative of a general partner in, or a general partner of, or a person in control of the debtor;

(iii) Another partnership in which the debtor is a general partner;

(iv) A general partner in a partnership described in division (iii) of this subparagraph; or

(v) A person in control of the debtor;

(D) An affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(E) A managing agent of the debtor.

(9) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(10) "Organization" means a person other than an individual.

(11) "Person" means an individual, public corporation, government or governmental subdivision agency or instrumentality, business or nonprofit entity, estate, or other legal entity.

(12) "Property" means anything that may be the subject of ownership.

(13) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(14) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined and includes an individual in an adoptive relationship within the third degree.

(15) "Sign" means, with present intent to authenticate or adopt a record:

(A) To execute or adopt a tangible symbol; or

(B) To attach to or logically associate with the record an electronic symbol, sound, or process.

(16) “Transfer” means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(17) “Valid lien” means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings. (Code 1981, § 18-2-71, enacted by Ga. L. 2002, p. 141, § 3; Ga. L. 2003, p. 140, § 18; Ga. L. 2015, p. 996, § 4A-1/SB 65.)

The 2015 amendment, effective July 1, 2015, rewrote this Code section. See editor’s note under this article for applicability.

JUDICIAL DECISIONS

Transfer. — Definition of a “transfer” is broad enough to encompass a co-owner’s withdrawal of funds from a joint bank account. *Bishop v. Patton*, 288 Ga. 600, 706 S.E.2d 634, overruled on other grounds by *SRB Inv. Servs., LLLP v. Branch Banking & Trust Co.*, 289 Ga. 1, 709 S.E.2d 267 (2011).

Property. — Defendants’ transferring of corporate goodwill, or “book of business,” to another entity was transfer of property under the broad definition of property in Georgia’s fraudulent transfer law. *Jones v. Tauber & Balser, P.C.*, 503 B.R. 162 (N.D. Ga. 2013).

Summary judgment improper. — Trial court erred by granting summary judgment to a creditor because under O.C.G.A. § 18-2-75(b), the questioned real estate transfer involved the debtor purchasing the property for the debtor’s mother because the debtor had the right to purchase the property and it was only deeded to the debtor briefly the same day, which transfer was not to satisfy an antecedent debt, thus, no fraudulent transfer

occurred. *Truelove v. Buckley*, 318 Ga. App. 207, 733 S.E.2d 499 (2012).

Transferees were not entitled to summary judgment on a Chapter 7 trustee’s claim to avoid transfers as actually fraudulent under the Bankruptcy Code and Georgia law as the transferees failed to demonstrate by either affirmative evidence or by pointing to lack of evidence that the trustee could not carry the trustee’s burden at trial regarding the debtor’s intent to transfer the debtor’s assets. Rather, several badges of fraud existed, including that the debtor made the transfer to an insider (a company wholly owned by a director of the debtor who owned more than 20 percent of the stock of the debtor) and that the transfer was made for the purpose of satisfying an antecedent debt owed to an insider. *Howell v. Fulford (In re Southern Home & Ranch Supply, Inc.)*, 515 B.R. 699 (Bankr. N.D. Ga. 2014).

Cited in *Ralls Corp. v. Huerfano River Wind, LLC*, 27 F. Supp. 3d 1303 (N.D. Ga. 2014).

RESEARCH REFERENCES

C.J.S. — 37 C.J.S., Fraudulent Conveyances, §§ 6, 7.

18-2-72. Determining insolvency.

(a) A debtor is insolvent if, at a fair valuation, the sum of the debtor's debts is greater than the sum of the debtor's assets.

(b) A debtor who is generally not paying his or her debts as they become due other than as a result of a bona fide dispute is presumed to be insolvent. The presumption imposes on the party against which the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence.

(c) Assets under this Code section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this article.

(d) Debts under this Code section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset. (Code 1981, § 18-2-72, enacted by Ga. L. 2002, p. 141, § 3; Ga. L. 2015, p. 996, § 4A-1/SB 65.)

The 2015 amendment, effective July 1, 2015, substituted “if, at a fair valuation, the sum of the debtor's debts is greater than the sum of the debtor's assets” for “if the sum of the debtor's debts is greater than all of the debtor's assets, at a fair valuation” in subsection (a); in subsection (b), inserted “other than as a result of a bona fide dispute” in the first sentence and added the second sentence; deleted former subsection (c), which read: “A partnership is insolvent under subsection (a) of this

Code section if the sum of the partnership's debts is greater than the aggregate of all of the partnership's assets, at a fair valuation, and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.”; and redesignated former subsections (d) and (e) as present subsections (c) and (d), respectively. See editor's note under this article for applicability.

JUDICIAL DECISIONS

Insolvency resulting in constructive fraud pled. — Actual fraud was adequately pled by alleging badges of fraud sufficient to infer the fraudulent nature of transfers to insiders; moreover, insolvency resulting in constructive fraud also was adequately pled. *Ralls Corp. v. Huerfano River Wind, LLC*, 27 F. Supp. 3d 1303 (N.D. Ga. 2014).

Judgment against debtor. — Debtor's transfer of real property to the debtor's spouse, a default judgment in a lawsuit, which the trustee claimed rendered

the debtor insolvent, in which the spouse did not participate and which was filed after the transfer did not prove the debtor's insolvency at the time of the transfer for purposes of former O.C.G.A. § 18-2-22(3); the spouse's status as the debtor's spouse, standing alone, did not establish privity with the debtor, and the judgment against the debtor did not bind the spouse. *Thurmond v. Turner* (In re Turner), No. 00-72597-PWB, 2006 Bankr. LEXIS 2745 (Bankr. N.D. Ga. Sept. 19, 2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 37 Am. Jur. 2d, Fraudulent Conveyances and Transfers, § 18 et seq.

C.J.S. — 37 C.J.S., Fraudulent Conveyances, § 66 et seq.

18-2-73. Value given for transfer.

(a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(b) For the purposes of paragraph (2) of subsection (a) of Code Section 18-2-74 and Code Section 18-2-75, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(c) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous. (Code 1981, § 18-2-73, enacted by Ga. L. 2002, p. 141, § 3; Ga. L. 2015, p. 996, § 4A-1/SB 65.)

Editor's notes. — Ga. L. 2015, p. 996, § 4A-1/SB 65, effective July 1, 2015, reenacted this Code section without change.

RESEARCH REFERENCES

Am. Jur. 2d. — 37 Am. Jur. 2d, Fraudulent Conveyances and Transfers, § 25 et seq.

C.J.S. — 37 C.J.S., Fraudulent Conveyances, § 94 et seq.

18-2-74. Voidable transfer; determination of actual intent.

(a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(b) In determining actual intent under paragraph (1) of subsection (a) of this Code section, consideration may be given, among other factors, to whether:

(1) The transfer or obligation was to an insider;

(2) The debtor retained possession or control of the property transferred after the transfer;

(3) The transfer or obligation was disclosed or concealed;

(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) The transfer was of substantially all the debtor's assets;

(6) The debtor absconded;

(7) The debtor removed or concealed assets;

(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

(c) If a creditor is a successor or assignee, a right of action under subsection (a) of this Code section is automatically assigned to such successor or assignee.

(d) A creditor making a claim for relief under subsection (a) of this Code section has the burden of proving the elements of the claim for relief by a preponderance of the evidence. (Code 1981, § 18-2-74, enacted by Ga. L. 2002, p. 141, § 3; Ga. L. 2015, p. 996, § 4A-1/SB 65.)

The 2015 amendment, effective July 1, 2015, substituted "voidable" for "fraudulent" near the beginning of subsection (a); and added subsections (c) and (d). See editor's note under this article for applicability.

JUDICIAL DECISIONS

Transfers of assets before death. — Before decedent died, a decedent's gifts to the decedent's spouse, the decedent's subsequent purchase of land and deeding of the land in a corporate entity's name without documented consideration from the entity, and the decedent's involvement in the capitalization of the entity with purported funds from the spouse could all be found to constitute transfers made with the intent to fraudulently defeat claims of the decedent's ex-spouse under the terms of a settlement agreement the decedent had with the decedent's ex-spouse, and could constitute fraud under the statute. *Miller v. Lomax*, 266 Ga. App. 93, 596 S.E.2d 232 (2004).

Badges of fraud identified by federal court applicable. — O.C.G.A. § 18-2-74 permits the trustee to avoid a transfer made with the actual intent to hinder, delay or defraud any creditor of the debtor. Subsection (b) states that, in determining actual intent, the court could consider a specified list of factors among other factors, which track the badges of fraud identified by the United States Court of Appeals for the Eleventh Circuit. *Scarver v. M. Abuhab Participacoes S.A. (In re Moskowitz)*, No. 10-6650-WLH, 2011 Bankr. LEXIS 4800 (Bankr. N.D. Ga. Nov. 28, 2011).

Intentional fraud. — Plaintiff established prima facie case of intentional fraud sufficient to trigger Georgia's fraudulent transfer law because the plaintiff provided evidence showing that the transaction resulted in transfer of substantially all assets, transferring company became insolvent shortly after transfer, transfer occurred just before potential lawsuit against transferring company became known, shareholders of transferring company simply switched over to company to whom assets transferred, and some evidence existed that efforts were made to conceal the nature of the transfer. *Jones v. Tauber & Balser, P.C.*, 503 B.R. 162 (N.D. Ga. 2013).

Insider. — Certain individuals and entities were insiders of the debtor, including officers and persons in control of the debtor, their spouses, the owner of 66

percent of the debtor, and indirect owners of 20 percent or more of the debtor. *Watts v. MTC Dev., LLC (In re Palisades at W. Paces Imaging Ctr., LLC)*, 501 B.R. 896 (Bankr. N.D. Ga. 2013).

Pleading requirements. — Special pleading requirements of Fed. R. Civ. P. 9(b) did not apply to an action for fraudulent conveyance under Georgia Uniform Fraudulent Transfers Act (now Uniform Voidable Transactions Act), O.C.G.A. § 18-2-70 et seq. *Nesco, Inc. v. Fairley Cisco*, NO. CV205-142, 2005 U.S. Dist. LEXIS 36189 (S.D. Ga. Oct. 7, 2005).

Trustee's pleadings that alleged that the investors used the debtors as part of a Ponzi scheme and that the money transferred to the limited liability company amounted to a fraudulent transfer was sufficient to meet the pleading requirements of Fed. R. Civ. P. 8, Fed. R. Bankr. 7008, the heightened pleading requirements of Fed. R. Civ. P. 9(b), and to state a claim under 11 U.S.C. § 548 and O.C.G.A. § 18-2-75(a). *Perkins v. Crown Fin., LLC (In re Int'l Mgmt. Assocs. LLC)*, No. A06-62966-PWB, 2007 Bankr. LEXIS 1566 (Bankr. N.D. Ga. Mar. 6, 2007).

Defendant LLC did not establish that a more definite statement was required for the trustee's allegations under 11 U.S.C. § 548 and O.C.G.A. § 18-2-74 because the trustee's complaint was not unintelligible and provided sufficient information to the LLC so it could frame a response; the complaint named only the LLC as a defendant and alleged that the transfer made pursuant to a settlement agreement was fraudulent. *Perkins v. Crown Fin., LLC (In re Int'l Mgmt. Assocs. LLC)*, No. A06-62966-PWB, 2007 Bankr. LEXIS 1566 (Bankr. N.D. Ga. Mar. 6, 2007).

Chapter 7 trustee's allegations were sufficient to survive a creditor's motion to dismiss the trustee's complaint seeking to avoid and recover transfers pursuant to 11 U.S.C. §§ 544(b)(1) and 550 when the trustee alleged sufficient facts to suggest that, pursuant to O.C.G.A. § 18-2-74(b), the creditor received avoidable fraudulent transfers from the debtor. The trustee alleged that all of the transfers were made within four years of the petition date, that

the transfers were from the debtors' bank account, and that several badges of fraud indicated the debtors' actual intent to hinder, delay, or defraud including the fact that the transfers occurred when the debtors were insolvent, the creditor was an insider of the debtors at the time of the transfers, and the creditor knew or should have known that the debtors were involved in an unlawful scheme to defraud investors. *Gordon v. Graybeal* (In re CM Vaughn, LLC), No. 10-06105-MGD, 2010 Bankr. LEXIS 2547 (Bankr. N.D. Ga. June 21, 2010).

Court rejected transferees' argument that a Chapter 7 trustee could not plausibly assert the existence of a creditor with an allowed claim that gave the creditor standing under 11 U.S.C. § 544(b)(1) to assert a constructively fraudulent transfer claim under O.C.G.A. § 18-2-74 and Del. Code Ann. tit. 6, § 1304 because the assertion that only an unsecured creditor with a claim arising prior to the transfers could seek their avoidance was legally flawed. Under the state statutes, a transfer for less than reasonably equivalent value was constructively fraudulent as to creditors whose claims arose after the transfers when the debtor was engaged or was about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction. *Watson v. Powell* (In re Atlantis Plastics, Inc.), No. 10-06349, 2011 Bankr. LEXIS 1147 (Bankr. N.D. Ga. Mar. 31, 2011) (Unpublished).

When an investor asserted a fraudulent transfer claim against a bank to which a consultant who allegedly defrauded the investor made a down payment on a house, it was error to dismiss the claim based on the bank's assertion that the bank, under O.C.G.A. § 18-2-74(a)(1), took the consultant's funds in good faith and for a reasonably equivalent value because: (1) the investor's complaint did not admit or otherwise demonstrate such an affirmative defense; and (2) the investor had no obligation to anticipate the affirmative defense. Furthermore, the claims could survive a motion to dismiss because the investor: (1) stated viable claims; (2) did not have to anticipate affir-

mative defenses; and (3) did not admit such defenses. *Speedway Motorsports, Inc. v. Pinnacle Bank*, 315 Ga. App. 320, 727 S.E.2d 151 (2012).

Trustee could not prevail under O.C.G.A. § 18-2-74 because the trustee was not a "creditor" who was able to utilize § 18-2-74. Here, the trustee did not plead that the trustee was moving under 11 U.S.C. § 544; rather, the trustee simply asserted a state law cause of action. *Cooper v. Bullock* (In re Bullock), No. 10-04111-MGD, 2012 Bankr. LEXIS 3268 (Bankr. N.D. Ga. June 12, 2012).

Actual fraud was adequately pled by alleging badges of fraud sufficient to infer the fraudulent nature of transfers to insiders; moreover, insolvency resulting in constructive fraud also was adequately pled. *Ralls Corp. v. Huerfano River Wind, LLC*, 27 F. Supp. 3d 1303 (N.D. Ga. 2014).

Transferees were not entitled to summary judgment on a Chapter 7 trustee's claim to avoid transfers as actually fraudulent under the Bankruptcy Code and Georgia law as the transferees failed to demonstrate by either affirmative evidence or by pointing to lack of evidence that the trustee could not carry the trustee's burden at trial regarding the debtor's intent to transfer the debtor's assets. Rather, several badges of fraud existed, including that the debtor made the transfer to an insider (a company wholly owned by a director of debtor who owned more than 20 percent of the stock of debtor) and that the transfer was made for the purpose of satisfying an antecedent debt owed to an insider. *Howell v. Fulford* (In re Southern Home & Ranch Supply, Inc.), 515 B.R. 699 (Bankr. N.D. Ga. 2014).

Colorable claim in bankruptcy. — When a Chapter 7 debtor failed to list a creditor's claim, the claim was non-dischargeable under 11 U.S.C. § 523(a)(3). Pursuant to the fraudulent transfer elements of O.C.G.A. § 18-2-74, the creditor made the required showing of a colorable claim of non-dischargeability under 11 U.S.C. § 523(a)(6). *D.A.N. Joint Venture III, L.P. v. Wier* (In re Wier), No. 10-6076, 2012 Bankr. LEXIS 5064 (Bankr. N.D. Ga. Sept. 30, 2012).

Property was transferred. — Defendants' argument that transfer of corporate

goodwill, or “book of business,” could not as a matter of law constitute transfer under Georgia’s fraudulent transfer law because goodwill had no value was rejected because the plaintiff produced evidence that the goodwill transferred had substantial value. *Jones v. Tauber & Balser, P.C.*, 503 B.R. 162 (N.D. Ga. 2013).

Fraudulent transfer shown. — Checks payable from a Chapter 7 debtor that were deposited in an insider’s account were avoidable as made with actual intent to defraud a creditor because the deposited checks were not fully disclosed, the debtor received no consideration for the transfer, the debtor was insolvent at the time, and the checks, and any invoices which allegedly supported them, were created in order to defraud a creditor into making advances for expenses not validly incurred. *Watts v. MTC Dev., LLC (In re Palisades at W. Paces Imaging Ctr., LLC)*, 501 B.R. 896 (Bankr. N.D. Ga. 2013).

Father who admitted he caused property to be transferred to his son to shield the property from the father’s creditors was not entitled to judgment against the son because he had unclean hands, under O.C.G.A. § 23-1-10. Under O.C.G.A. § 18-2-74(a)(1), the transfer was fraudulent because the transfer was made with actual intent to hinder, delay, or defraud the father’s creditors. *Roach v. Roach*, 327 Ga. App. 513, 759 S.E.2d 587 (2014).

Chapter 7 debtor’s discharge was denied based on transfer of funds for no consideration shortly after the debtor had been sued from a joint bank account to an account purportedly controlled by the debtor’s spouse because the debtor testified that the funds were transferred to the spouse so that money would not be garnished. *McAfee v. Harman (In re Harman)*, No. 11-5534, 2014 Bankr. LEXIS 4457 (Bankr. N.D. Ga. Sept. 10, 2014).

No fraudulent transfer shown. — When a debtor received valuable consideration or reasonably equivalent value as a result of a creditor bank’s release of the bank’s lien against the debtor’s assets in exchange for the payment of another’s obligation guaranteed by the debtor, no fraudulent transfer occurred under 11 U.S.C. § 548(a)(1)(B) or O.C.G.A.

§ 18-2-74(a). *Hays v. Farmers and Merchants Bank (In re Stewart Fin. Co.)*, 2007 Bankr. LEXIS 2029 (Bankr. M.D. Ga. June 8, 2007).

Transfers from bankruptcy debtors were avoidable as fraudulent under O.C.G.A. § 18-2-74(a)(1) since the transfers made in the course of a Ponzi scheme were deemed to be made with fraudulent intent, and the lack of information from the debtors, the refusal of the debtors to allow transferees to conduct due diligence, and the usurious interest paid by the debtors clearly indicated that the transactions were fraudulent. *Kerr v. Audio Answers, Inc. (In re Christou)*, No. 06-68251-MHM, 2009 Bankr. LEXIS 3291 (Bankr. N.D. Ga. Sept. 28, 2009).

Chapter 7 trustee was not entitled to the recovery of property from the debtor’s property under 11 U.S.C. § 544. Under the fraudulent transfer elements of O.C.G.A. § 18-2-74, the debtor received reasonably equivalent value in exchange for the privilege of living in the property without the payment of rent, taxes, or insurance and in exchange for enjoying the benefit of property improvements. *Pettigrew v. Rollins (In re Rollins)*, No. 09-6054, 2011 Bankr. LEXIS 3742 (Bankr. N.D. Ga. Sept. 29, 2011).

Distributions to the members of a limited liability company did not constitute a fraudulent transfer in violation of O.C.G.A. § 18-2-74(a) because insolvency on the part of the company and an actual intent to hinder, defraud, or delay the creditor’s collection of the creditor’s debt was not shown. *Sun Nurseries, Inc. v. Lake Erma, LLC*, 316 Ga. App. 832, 730 S.E.2d 556 (2012).

No fraudulent transfer when work performed. — Debtor’s twice monthly \$1833 payments to the defendant in exchange for regular, hotel managerial services did not constitute avoidable fraudulent transfers under O.C.G.A. §§ 18-2-74(a)(2)(B) and 18-2-75 because the defendant’s work for the debtor constituted reasonably equivalent value in exchange for the payments. *Anderson v. Patel (In re Diplomat Constr., Inc.)*, No. 11-5611, 2013 Bankr. LEXIS 4297 (Bankr. N.D. Ga. Aug. 6, 2013).

Transfer before a crime was committed. — Although the transfer of a

house was accompanied by some badges of fraud, the trial court abused the court's discretion in enjoining further disposition of the house, pending adjudication of the merits of wrongful death and fraudulent transfer claims, since the transferor gave the house to the transferor's three minor grandchildren in Florida three months before the transferor murdered the decedent. *Bishop v. Patton*, 288 Ga. 600, 706 S.E.2d 634, overruled on other grounds by *SRB Inv. Servs., LLP v. Branch Banking & Trust Co.*, 289 Ga. 1, 709 S.E.2d 267 (2011).

Fraudulent transfer by individual accused of murder. — Court did not abuse the court's discretion in entering an interlocutory injunction barring further disposition of the proceeds from joint bank accounts pending final disposition of fraudulent transfer and wrongful death lawsuits because badges of fraud indicated an actual intent to hinder, delay, or defraud a decedent's estate and heirs of a full recovery. The transferor's adult child came up from Florida to withdraw the funds from joint bank accounts in Georgia three days after the transferor was arrested for the murder of the decedent. *Bishop v. Patton*, 288 Ga. 600, 706 S.E.2d 634, overruled on other grounds by *SRB Inv. Servs., LLP v. Branch Banking & Trust Co.*, 289 Ga. 1, 709 S.E.2d 267 (2011).

Accrual of action for fraudulent conveyance. — In determining when a cause of action accrued for purposes of O.C.G.A. § 9-3-32 it was necessary to ascertain the time when the plaintiff could first have maintained plaintiff's action to a successful result. The relevant date for determining the statute of limitations on a fraudulent conveyance claim, pursuant to O.C.G.A. §§ 18-2-74, 18-2-75, and 18-2-76, was the date that the debtor incurred the obligation to make the transfer. *Kipperman v. Onex Corp.*, 411 B.R. 805 (N.D. Ga. 2009).

Fraudulent conveyance claim time-barred. — Administrator's fraudulent conveyance claims against group one were time-barred under O.C.G.A. §§ 18-2-74(a)(1) and 18-2-79(1), even though the claim was not time-barred under the limitations period in effect

when the claim accrued, as application of § 18-2-79, a procedural law in effect at the time the suit was filed, did not violate the constitutional prohibition against retroactive laws under Ga. Const. 1983, Art. I, Sec. I, Para. X; the administrator also failed to utilize the one-year statute of limitation effective upon discovery of the alleged fraud. *Huggins v. Powell*, 315 Ga. App. 599, 726 S.E.2d 730 (2012).

Since an administrator's fraudulent conveyance claims were time-barred under O.C.G.A. §§ 18-2-74(a)(1) and 18-2-79(1), a limited liability company's (LLC) failure to respond to the administrator's requests for admissions was of no consequence and the trial court's denial of summary judgment to the LLC was improper. *Huggins v. Powell*, 315 Ga. App. 599, 726 S.E.2d 730 (2012).

Margin or settlement payments. — Federal statute, 11 U.S.C. § 546(e), was a defense to the counts of a trustee's avoidance action brought against an investment company under 11 U.S.C. § 544, which incorporated O.C.G.A. §§ 18-2-22(3) and 18-2-74(a)(2), and to the count brought pursuant to 11 U.S.C. § 548(a)(1)(A). *Hayes v. Morgan Stanley DW Inc. (In re Stewart Fin. Co.)*, 367 B.R. 909 (Bankr. M.D. Ga. 2007).

Discovery of attorney-client communications. — Judgment creditor could inquire into attorney-client communications only as the communications were related to the planning or execution of the transition from the limited liability company (LLC) to the other entities. The creditor could not inquire into communications made after these transactions were carried out, even if those communications concern the possible legal implications of the transactions. *Tindall v. H & S Homes, LLC*, No. 5:10-cv-044(CAR), 2011 U.S. Dist. LEXIS 2299 (M.D. Ga. Jan. 10, 2011).

Crime fraud exception to attorney-client privilege triggered. — With respect to documents claimed to be protected by attorney-client privilege, because the plaintiff successfully established a prima facie case of intentional fraud and violation of Georgia's fraudulent transfer law, that was enough to trigger the crime-fraud exception and re-

quire the defendants to produce documents related to the transfer at issue. *Jones v. Tauber & Balser, P.C.*, 503 B.R. 162 (N.D. Ga. 2013).

Interlocutory injunction proper. — Trial court did not abuse the court's discretion in entering an interlocutory injunction to preserve the status quo pending adjudication of the merits of the creditor's action against the debtors alleging breach of contract and fraudulent transfers because the debtors presented no evidence of harm from the creditor's delay in amending the creditor's complaint to seek an interlocutory injunction, and the delay resulted primarily from the debtors' concealment of the debtors' actions and obstruction of the creditor's efforts to discover the details; vague assertions of harm supported by no citation to evidence in the record are insufficient to sustain a defense of laches, and there is a balance between a plaintiff's knowing that a cause of action exists and that interim injunctive relief may be needed and sitting on the plaintiff's rights to the prejudice of the defendant. *SRB Inv. Servs., LLLP v. Branch Banking & Trust Co.*, 289 Ga. 1, 709 S.E.2d 267 (2011).

Trial court did not abuse the court's discretion in entering an interlocutory injunction to preserve the status quo pending adjudication of the merits of the creditor's action against the debtors alleging breach of contract and fraudulent transfers in violation of the Georgia Uniform Fraudulent Transfers Act (UFTA) (now Uniform Voidable Transactions Act), O.C.G.A. § 18-2-70 et seq., because foreclosing on collateral of uncertain remaining value, going through confirmation proceedings, and suing the insolvent debtors to reclaim the deficiency and then having to recover the fraudulently transferred assets to collect on the ensuing judgment was not an adequate remedy at law since it was not nearly as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity enjoining further transfers temporarily so that the creditor could collect a final judgment; when a money judgment is likely to be uncollectible because a debtor has fraudulently moved the debtor's assets in an attempt to dissipate or

conceal the assets from a creditor, Georgia law, both before and under the Georgia UFTA, gives the creditor the right to seek interlocutory relief by freezing the assets where the assets are. *SRB Inv. Servs., LLLP v. Branch Banking & Trust Co.*, 289 Ga. 1, 709 S.E.2d 267 (2011).

Trial court did not abuse the court's discretion in entering an interlocutory injunction to preserve the status quo pending adjudication of the merits of the creditor's action against the debtors alleging breach of contract and fraudulent transfers in violation of the Georgia Uniform Fraudulent Transfers Act (UFTA) (now Uniform Voidable Transactions Act), O.C.G.A. § 18-2-70 et seq., because at least seven statutory badges of fraud listed in the UFTA, O.C.G.A. § 18-2-74(b), were implicated, and the creditor also presented evidence as a non-statutory badge of fraud of the debtors' pattern of maintaining just enough funds in certain accounts to satisfy the debtors' financial covenants at the end of each quarter and then transferring the funds away shortly thereafter; under the UFTA, O.C.G.A. § 18-22-77(a)(3)(A), the trial court was authorized to enter an interlocutory injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property. *SRB Inv. Servs., LLLP v. Branch Banking & Trust Co.*, 289 Ga. 1, 709 S.E.2d 267 (2011).

Summary judgment improper. — On a fraudulent transfer claim brought by the buyers of the assets of a fitness center, it was error to grant summary judgment to the sellers. There was evidence that about seven days after the closing, the sellers' corporation distributed the sales proceeds to the corporation's four shareholders and that this left the corporation with essentially no assets; furthermore, the buyers presented sufficient evidence on each of the elements of fraud so as to survive summary judgment on the buyer's fraud claim. *Kilroy v. Alpharetta Fitness, Inc.*, 295 Ga. App. 274, 671 S.E.2d 312 (2008), cert. denied, *Alpharetta Fitness, Inc., v. Kilroy*, No. S09C0645, 2009 Ga. LEXIS 216 (Ga. 2009).

Based on evidence of the sale of judgment debtors' business to their long-time close friends and evidence that the friends

were aware that the business owed money, a genuine issue of material fact remained as to whether the debtors transferred their assets with actual intent to hinder, delay, or defraud their creditor under O.C.G.A. § 18-2-74(a)(1). Therefore, the trial court's grant of summary judgment was reversed. *Abbott Oil Co. v. Rogers*, 302 Ga. App. 439, 691 S.E.2d 561 (2010), cert. denied, No. S10C1026, 2010 Ga. LEXIS 583 (Ga. 2010).

Bankruptcy court denied a Chapter 7 trustee's motion for summary judgment on the trustee's claim that transfers that were made by a mortgage company to an investor were avoidable under 11 U.S.C. § 544 and the Georgia Uniform Fraudulent Transfer Act (now Uniform Voidable Transactions Act), O.C.G.A. § 18-2-74 et seq., because a person who owned the company used the company to operate a Ponzi scheme. The trustee had the burden of showing that there was no genuine issue of material fact, and there was a genuine dispute regarding whether the investor took the transfers in good faith, or gave reasonably equivalent value in exchange for the transfers; although a significant portion of the uncertainty in the evidence arose from the fact that the investor refused to respond to the trustee's requests for discovery, the trustee had done nothing more than highlight the investor's use of U.S. Const., amend. 5. *Kerr v. Hart (In re Christou)*, No. 08-6420, 2010 Bankr. LEXIS 3432 (Bankr. N.D. Ga. Sept. 23, 2010).

O.C.G.A. § 18-2-74 allows the avoidance of a transfer made without receiving reasonably equivalent value when the debtor was either engaged or about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction, or the debtor intended to incur or believed or reasonably should have believed that he or she would incur debts beyond his or her ability to pay as the debts became due. *Scarver v. M. Abuhab Participacoes S.A. (In re Moskowitz)*, No. 10-6650-WLH, 2011 Bankr. LEXIS 4800 (Bankr. N.D. Ga. Nov. 28, 2011).

Trial court erred by granting summary judgment to a creditor because, under

O.C.G.A. § 18-2-75(b), the questioned real estate transfer involved the debtor purchasing the property for the debtor's mother because the debtor had the right to purchase the property and it was only deeded to the debtor briefly the same day, which transfer was not to satisfy an antecedent debt, thus, no fraudulent transfer occurred. *Truelove v. Buckley*, 318 Ga. App. 207, 733 S.E.2d 499 (2012).

Summary judgment was inappropriate as to a lender's claims under Georgia's Uniform Fraudulent Transfers Act (now Uniform Voidable Transactions Act), O.C.G.A. § 18-2-70 et seq., because the evidence was not undisputed, particularly given the evidence of the guarantor's optimistic efforts to secure additional investors and shore up the financials of the guarantor's businesses during the same approximate time frame. *Nissan Motor Acceptance Corp. v. Sowega Motors, Inc.*, No. (CDL), 2012 U.S. Dist. LEXIS 128854 (M.D. Ga. Sept. 11, 2012).

Trustee's avoidance action alleging fraudulent conveyance could not be resolved on summary judgment because, despite existence of several badges of fraud, the mere fact that the debtor thought the debtor was returning property that was not the debtors was sufficient to preclude avoiding transfers, and what the debtor believed or reasonably should have believed was genuine issues of material fact. *Kelley v. Speciale (In re Gregg)*, No. 11-4047, 2013 Bankr. LEXIS 3285 (Bankr. M.D. Ga. July 2, 2013).

Insufficient basis for actual fraud to go before jury. — Trustee's assertion of seven badges of fraud drawn from O.C.G.A. § 18-2-74(b) and fraudulent transfer case law provided insufficient factual detail to give the court a sufficient basis in the record to allow the issue of actual fraud to go before a jury. *Kipperman v. Onex Corp.*, 411 B.R. 805 (N.D. Ga. 2009).

Defenses. — Bankruptcy court rejected a Chapter 11 trustee's argument that investors who received payments from affiliated businesses that were accused of operating a Ponzi scheme did not give value for the payments and could not assert a defense under 11 U.S.C. § 548(c) or Georgia law against the trustee's action seek-

ing recovery of those payments under 11 U.S.C. §§ 544(b) and 548(a)(1)(A) and (a)(1)(B), and Georgia law, as fraudulent transfers. The investors had a claim for the return of principal the investors invested, based on fraud, the investors gave value for payments the investors received up to the amount of the principal the investors invested because the payments satisfied their claim, and their right to keep the payments did not depend on whether the investments the investors made were characterized as debt or equity. *In re Int'l Mgmt. Assocs., LLC*, No. A06-62966-PWB, 2009 Bankr. LEXIS 4240 (Bankr. N.D. Ga. Dec. 1, 2009), *aff'd* 661 F.3d 623 (11th Cir. 2011) (Unpublished).

Statute mirrors Bankruptcy Code. — As with actual fraud under Georgia law, both O.C.G.A. §§ 18-2-74(a)(2)(B)

and 18-2-75 substantially mirror the constructive fraud claims under the Bankruptcy Code. *Pettie v. Bonertz (In re LendXFinancial, LLC)*, No. 11-05330-MGD, 2012 Bankr. LEXIS 1993 (Bankr. N.D. Ga. Mar. 16, 2012).

Analysis same as under 11 U.S.C. § 548(a)(1)(a). — O.C.G.A. § 18-2-74(a)(1) substantially mirrors 11 U.S.C. § 548(a)(1)(A) of the Bankruptcy Code. The Georgia statutes are different in that a creditor may recover property up to four years after the transfer occurred under O.C.G.A. § 18-2-79. *Pettie v. Bonertz (In re LendXFinancial, LLC)*, No. 11-05330-MGD, 2012 Bankr. LEXIS 1993 (Bankr. N.D. Ga. Mar. 16, 2012).

Cited in *In re Davis*, No. 07-10035-WHD, 2007 Bankr. LEXIS 2977 (Bankr. N.D. Ga. July 9, 2007).

RESEARCH REFERENCES

C.J.S. — 37 C.J.S., Fraudulent Conveyances, § 74 et seq.

18-2-75. Transfer or obligation voidable if incurred without receiving reasonably equivalent value.

(a) A transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

(c) If a creditor is a successor or assignee, a right of action under subsection (a) or (b) of this Code section is automatically assigned to such successor or assignee.

(d) Subject to subsection (b) of Code Section 18-2-72, a creditor making a claim for relief under subsection (a) or (b) of this Code section has the burden of proving the elements of the claim for relief by a preponderance of the evidence. (Code 1981, § 18-2-75, enacted by Ga. L. 2002, p. 141, § 3; Ga. L. 2015, p. 996, § 4A-1/SB 65.)

The 2015 amendment, effective July 1, 2015, substituted “voidable” for “fraudulent” near the beginning of subsections

(a) and (b); and added subsections (c) and (d). See editor’s note under this article for applicability.

JUDICIAL DECISIONS

Transfer of property set aside. — Debtor’s transfer of property to the debtor’s daughter, without consideration, was properly set aside since the deed was recorded nearly 18 months after the deed was signed, recorded the day after the appellate court entered judgment on the case, the debtor continued to occupy the property without paying rent, and the debtor disposed of assets worth at least \$500,000 in the seven months after the deed was recorded, leading to the debtor’s insolvency. *Kent v. A.O. White, Jr., Consulting Eng’r, Inc.*, 279 Ga. App. 563, 631 S.E.2d 782 (2006).

After the debtor transferred funds to the debtor’s sister, who had ownership, dominion and control over the funds, the sister was a transferee under 11 U.S.C. § 550, and the funds were recoverable as a fraudulent conveyance under 11 U.S.C. § 544 and O.C.G.A. § 18-2-75. *Ogier v. Braswell (In re Clark)*, 435 B.R. 753 (Bankr. N.D. Ga. 2009).

When an investor asserted fraudulent transfer and related claims against accounts in the names of the former wife and widow of a consultant who allegedly defrauded the investor, the claims survived a motion to dismiss because the investor: (1) stated viable claims; (2) did not have to anticipate affirmative defenses; and (3) did not admit such defenses. *Speedway Motorsports, Inc. v. Pinnacle Bank*, 315 Ga. App. 320, 727 S.E.2d 151 (2012).

Evidence that a corporation was insolvent at the time the corporation made payments in the amount of \$248,367 to each of two principals, and that the corporation did not receive reasonably equivalent value for the payments, was sufficient to show that the payments were constructively fraudulent and could be recovered for the corporation’s bankruptcy estate under 11 U.S.C. § 544 and O.C.G.A. § 18-2-75; although the principals claimed that the payments were due on a loan the principals made to the corporation and that the principals returned

some payments to the corporation’s accounts, there was no evidence supporting the principal’s claims. *Anderson v. Patel (In re Diplomat Constr., Inc.)*, No. 11-5610, 2013 Bankr. LEXIS 4303 (Bankr. N.D. Ga. Aug. 26, 2013).

Reasonably equivalent value. — Debtor’s twice monthly \$1833 payments to the defendant in exchange for regular, hotel managerial services did not constitute avoidable fraudulent transfers under O.C.G.A. §§ 18-2-74(a)(2)(B) and 18-2-75 because the defendant’s work for the debtor constituted reasonably equivalent value in exchange for the payments. *Anderson v. Patel (In re Diplomat Constr., Inc.)*, No. 11-5611, 2013 Bankr. LEXIS 4297 (Bankr. N.D. Ga. Aug. 6, 2013).

Failure to offer evidence of value. — Transferees were not entitled to summary judgment on a Chapter 7 trustee’s constructive fraud claims under the Bankruptcy Code and Georgia law as the transferees failed to offer any evidence of the value of the collateral at issue and, thus, the trustee’s evidence created a question of fact. *Howell v. Fulford (In re Southern Home & Ranch Supply, Inc.)*, 515 B.R. 699 (Bankr. N.D. Ga. 2014).

Accrual of action for fraudulent conveyance. — In determining when a cause of action accrued for purposes of O.C.G.A. § 9-3-32, it was necessary to ascertain the time when the plaintiff could first have maintained the plaintiff’s action to a successful result. The relevant date for determining the statute of limitations on a fraudulent conveyance claim, pursuant to O.C.G.A. §§ 18-2-74, 18-2-75, and 18-2-76, was the date that the debtor incurred the obligation to make the transfer. *Kipperman v. Onex Corp.*, 411 B.R. 805 (N.D. Ga. 2009).

Claims not subject to arbitration. — When a trustee of a creditor trust under bankruptcy debtors’ confirmed plan alleged that providers of financial services to the debtors were the transferees of fraudulent transfers from the debtors un-

der O.C.G.A. § 18-2-75(a), the claims were not subject to arbitration under arbitration clauses in contracts between the providers and the debtors; the claims were not derived from the rights of the debtors under the contracts since the debtors were the transferors, and the trustee asserted the claims on behalf of the creditors. *Cohen v. Ernst & Young, LLP (In re Friedman's, Inc.)*, 372 B.R. 530 (Bankr. S.D. Ga. 2007).

Summary judgment improper. — Trial court erred by granting summary judgment to a creditor because under O.C.G.A. § 18-2-75(b), the questioned real estate transfer involved the debtor purchasing the property for the debtor's mother because the debtor had the right to purchase the property and the property was only deeded to the debtor briefly the same day, which transfer was not to satisfy an antecedent debt, thus, no fraudulent transfer occurred. *Truelove v. Buckley*, 318 Ga. App. 207, 733 S.E.2d 499 (2012).

Summary judgment was inappropriate as to a lender's claims under Georgia's Uniform Fraudulent Transfers Act (now Uniform Voidable Transactions Act), O.C.G.A. § 18-2-70 et seq., because the evidence was not undisputed, particularly given the evidence of the guarantor's optimistic efforts to secure additional investors and shore up the financials of the guarantor's businesses during the same approximate time frame. *Nissan Motor Acceptance Corp. v. Sowega Motors, Inc.*, No. (CDL), 2012 U.S. Dist. LEXIS 128854 (M.D. Ga. Sept. 11, 2012).

Trustee's avoidance action alleging fraudulent conveyance could not be resolved on summary judgment because genuine issue of material fact existed with respect to the debtor's insolvency. *Kelley v. Speciale (In re Gregg)*, No. 11-4047, 2013 Bankr. LEXIS 3285 (Bankr. M.D. Ga. July 2, 2013).

Dispute over law firm's fees payable by debtor. — In a complaint seeking to recover pre-petition transfers made by a Chapter 11 debtor to a law firm, the law firm's motion for summary judgment was denied as there was a genuine dispute of material fact regarding whether the debtor failed to receive reasonably equiv-

alent value for the transfers as required by either 11 U.S.C. § 548(a)(1)(B)(I) or O.C.G.A. § 18-2-75(a). The law firm contended that the firm's invoices demonstrated that the firm provided substantial legal services to the debtor in exchange for the payments the firm received, while the debtor's responsible officer contended that the descriptions of work in the invoices were too vague and cursory to evaluate whether the services constituted reasonably equivalent value. *Davis v. McDermott Will & Emery LLP (In re Tom's Foods, Inc.)*, No. 07-4012, 2010 Bankr. LEXIS 3720 (Bankr. M.D. Ga. Oct. 20, 2010).

Obligation and payments thereon evaluated separately. — In a fraudulent conveyance action, the need to evaluate a debt separately from the payments thereon was evidenced by 11 U.S.C. § 548 and O.C.G.A. § 18-2-75(a), which permitted the obligation and the payments to be avoided separately or together. *Watts v. Peachtree Tech. Partners, LLC (In re Palisades at West Paces Imaging Ctr., LLC)*, No. 11-5183, 2011 Bankr. LEXIS 3576 (Bankr. N.D. Ga. Sept. 13, 2011).

Fraudulent transfer shown. — One million three hundred forty thousand dollars (\$1,340,000) in payments made by the debtor to an insider, allegedly for a construction management fee, were avoidable because there was no evidence to support any reasonably equivalent value in excess of the \$175,000 contract price since there was no evidence as to what the "extras" were, the cost of the "extras", or even a contractual basis for the extra charges. *Watts v. MTC Dev., LLC (In re Palisades at W. Paces Imaging Ctr., LLC)*, 501 B.R. 896 (Bankr. N.D. Ga. 2013).

Payments made by Chapter 7 debtor to an insider, allegedly for a construction management fee, were avoidable as a transfer made to an insider for an antecedent debt because the insider had reasonable cause to believe the debtor was insolvent at the time the payments were made, and, even under the insider's version of the facts, the payments were for antecedent debt. *Watts v. MTC Dev., LLC (In re Palisades at W. Paces Imaging Ctr., LLC)*, 501 B.R. 896 (Bankr. N.D. Ga. 2013).

Checks payable from a Chapter 7 debtor that were deposited in an insider's account were avoidable because there was no evidence that the debtor, which was insolvent at the time of the transfers, received any value as a result of the checks, nor any evidence that the insider used the funds to pay any valid expenses of the debtor. *Watts v. MTC Dev., LLC (In re Palisades at W. Paces Imaging Ctr., LLC)*, 501 B.R. 896 (Bankr. N.D. Ga. 2013).

Checks payable from a Chapter 7 debtor that were deposited in an insider's account were avoidable because the checks were on account of antecedent debt. *Watts v. MTC Dev., LLC (In re Palisades at W. Paces Imaging Ctr., LLC)*, 501 B.R. 896 (Bankr. N.D. Ga. 2013).

Although transfers by a Chapter 7 debtor to insiders could not be avoided because the debtor received reasonably equivalent value, the transfers were nonetheless avoidable because they were made on account of antecedent debt at a time when the debtor was insolvent. *Watts v. MTC Dev., LLC (In re Palisades at W. Paces Imaging Ctr., LLC)*, 501 B.R. 896 (Bankr. N.D. Ga. 2013).

Actual fraud was adequately pled by alleging badges of fraud sufficient to infer the fraudulent nature of transfers to insiders; moreover, insolvency resulting in constructive fraud also was adequately pled. *Ralls Corp. v. Huerfano River Wind, LLC*, 27 F. Supp. 3d 1303 (N.D. Ga. 2014).

18-2-76. When transfer made.

For the purposes of this article:

(1) A transfer is made:

(A) With respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and

(B) With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this article that is superior to the interest of the transferee;

(2) If applicable law permits the transfer to be perfected as provided in paragraph (1) of this Code section and the transfer is not so perfected before the commencement of an action for relief under this article, the transfer is deemed made immediately before the commencement of the action;

(3) If applicable law does not permit the transfer to be perfected as provided in paragraph (1) of this Code section, the transfer is made when it becomes effective between the debtor and the transferee;

(4) A transfer is not made until the debtor has acquired rights in the asset transferred; and

(5) An obligation is incurred:

(A) If oral, when it becomes effective between the parties; or

(B) If evidenced by a record, when the record signed by the obligor is delivered to or for the benefit of the obligee. (Code 1981, § 18-2-76, enacted by Ga. L. 2002, p. 141, § 3; Ga. L. 2015, p. 996, § 4A-1/SB 65.)

The 2015 amendment, effective July 1, 2015, substituted “record, when the record signed” for “writing, when the writ-

ing executed” in subparagraph (5)(B). See editor’s note under this article for applicability.

JUDICIAL DECISIONS

Accrual of action for fraudulent conveyance. — In determining when a cause of action accrued for purposes of O.C.G.A. § 9-3-32, it was necessary to ascertain the time when the plaintiff could first have maintained the plaintiff’s action to a successful result. The relevant

date for determining the statute of limitations on a fraudulent conveyance claim, pursuant to O.C.G.A. §§ 18-2-74, 18-2-75, and 18-2-76, was the date that the debtor incurred the obligation to make the transfer. *Kipperman v. Onex Corp.*, 411 B.R. 805 (N.D. Ga. 2009).

18-2-77. Relief for creditor against fraudulent transfer or obligation.

(a) In an action for relief against a transfer or obligation under this article, a creditor, subject to the limitations in Code Section 18-2-78, may obtain:

(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor’s claim;

(2) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by Chapter 3 of this title; and

(3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(A) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(B) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(C) Any other relief the circumstances may require.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds. (Code 1981, § 18-2-77, enacted by Ga. L. 2002, p. 141, § 3; Ga. L. 2015, p. 996, § 4A-1/SB 65.)

The 2015 amendment, effective July 1, 2015, added “and” at the end of para-

graph (a)(2). See editor’s note under this article for applicability.

JUDICIAL DECISIONS

Pleadings adequate for fraud. — Actual fraud was adequately pled by alleging badges of fraud sufficient to infer the fraudulent nature of transfers to insiders; moreover, insolvency resulting in constructive fraud also was adequately pled. *Ralls Corp. v. Huerfano River Wind, LLC*, 27 F. Supp. 3d 1303 (N.D. Ga. 2014).

Claims survived motion to dismiss. — When an investor asserted fraudulent transfer and related claims against accounts in the names of the former wife and widow of a consultant who allegedly defrauded the investor, the claims survived a motion to dismiss because the investor: (1) stated viable claims; (2) did not have to anticipate affirmative defenses; and (3) did not admit such defenses. *Speedway Motorsports, Inc. v. Pinnacle Bank*, 315 Ga. App. 320, 727 S.E.2d 151 (2012).

Transfer prior to death. — Although the transfer of a house was accompanied by some badges of fraud, the trial court abused the court’s discretion in enjoining further disposition of the house, pending adjudication of the merits of wrongful death and fraudulent transfer claims since the transferor gave the house to the transferor’s three minor grandchildren in Florida three months before the transferor murdered the decedent. *Bishop*

v. Patton, 288 Ga. 600, 706 S.E.2d 634, overruled on other grounds by *SRB Inv. Servs., LLLP v. Branch Banking & Trust Co.*, 289 Ga. 1, 709 S.E.2d 267 (2011).

Interlocutory injunction proper. — Trial court did not abuse the court’s discretion in entering an interlocutory injunction to preserve the status quo pending adjudication of the merits of the creditor’s action against the debtors alleging breach of contract and fraudulent transfers in violation of the Georgia Uniform Fraudulent Transfers Act (UFTA), O.C.G.A. § 18-2-70 et seq., because at least seven statutory badges of fraud listed in the UFTA (now Uniform Voidable Transactions Act), O.C.G.A. § 18-2-74(b), were implicated, and the creditor also presented evidence as a non-statutory badge of fraud of the debtors’ pattern of maintaining just enough funds in certain accounts to satisfy the debtors’ financial covenants at the end of each quarter and then transferring the funds away shortly thereafter; under the UFTA, O.C.G.A. § 18-22-77(a)(3)(A), the trial court was authorized to enter an interlocutory injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property. *SRB Inv. Servs., LLLP v. Branch Banking & Trust Co.*, 289 Ga. 1, 709 S.E.2d 267 (2011).

RESEARCH REFERENCES

Am. Jur. 2d. — 37 Am. Jur. 2d, Fraudulent Conveyances and Transfers, § 90 et seq.

C.J.S. — 37 C.J.S., Fraudulent Conveyances, § 197 et seq.

18-2-78. Conditions for voidability of transfer or obligation; judgment.

(a) A transfer or obligation is not voidable under paragraph (1) of subsection (a) of Code Section 18-2-74 against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) To the extent a transfer is avoidable in an action by a creditor under paragraph (1) of subsection (a) of Code Section 18-2-77, the following rules apply:

(1) Except as otherwise provided in this Code section, the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c) of this Code section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(A) The first transferee of the asset or the person for whose benefit the transfer was made; or

(B) An immediate or mediate transferee of the first transferee, other than:

(i) A good faith transferee who took for value; or

(ii) An immediate or mediate good faith transferee of a person described in division (i) of this subparagraph.

(2) Recovery pursuant to paragraph (1) of subsection (a) or subsection (b) of Code Section 18-2-77 of or from the asset transferred or its proceeds, by levy or otherwise, is available only against a person described in paragraph (1) of this subsection.

(c) If the judgment under subsection (b) of this Code section is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an obligation under this article, a good faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(1) A lien on or a right to retain any interest in the asset transferred;

(2) Enforcement of any obligation incurred; or

(3) A reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under paragraph (2) of subsection (a) of Code Section 18-2-74 or Code Section 18-2-75 if the transfer results from:

(1) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(2) Enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code, other than acceptance of collateral in full or partial satisfaction of the obligation it secures.

(f) A transfer is not voidable under subsection (b) of Code Section 18-2-75:

(1) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(2) If made in the ordinary course of business or financial affairs of the debtor and the insider; or

(3) If made pursuant to a good faith effort to rehabilitate the debtor and the transfer secured the present value given for that purpose as well as an antecedent debt of the debtor.

(g) The following rules determine the burden of proving matters referred to in this Code section:

(1) A party that seeks to invoke subsection (a), (d), (e), or (f) of this Code section has the burden of proving the applicability of that subsection;

(2) Except as otherwise provided in paragraphs (3) and (4) of this subsection, the creditor has the burden of proving each applicable element of subsection (b) or (c) of this Code section;

(3) The transferee has the burden of proving the applicability to the transferee of subparagraph (b) (1) (B) of this Code section; and

(4) A party that seeks adjustment under subsection (c) of this Code section has the burden of proving the adjustment.

(h) The standard of proof required to establish matters referred to in this Code section is preponderance of the evidence. (Code 1981, § 18-2-78, enacted by Ga. L. 2002, p. 141, § 3; Ga. L. 2015, p. 996, § 4A-1/SB 65.)

The 2015 amendment, effective July 1, 2015, rewrote subsection (b); added “, other than acceptance of collateral in full or partial satisfaction of the obligation it secures” to the end of paragraph (e)(2); and added subsections (g) and (h). See editor’s note under this article for applicability.

Cross references. — Power of person possessing voidable title to transfer goods to good faith purchaser for value, § 11-2-403. Effect of sale to person without notice of equity, § 23-1-19.

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the statutory provisions decisions under former Code 1933, § 28-202 and former § 18-2-23 are included in the annotations for this Code section.

Basis of right to set aside fraudulent transfers. — Former Code 1933, §§ 28-101, 28-102, 28-201 and 28-202 provided creditors with a right to set aside fraudulent transfers, and this remedy was

available to any creditor at time of transfer who thereafter reduced their claim to a judgment lien. *United States v. Hickox*, 356 F.2d 969 (5th Cir. 1966) (decided under former Code 1933, § 28-202).

Construction in pari materia with other statutes. — Former Civil Code 1910, §§ 3224 and 3225, being in pari materia, were to be construed together. *Warren v. Citizens Nat'l Bank*, 145 Ga. 503, 89 S.E. 520 (1916) (decided under former Civil Code 1910, § 3225).

Fraudulent conveyance statute, former §§ 18-2-22 and 18-2-23 should be considered in pari materia. *FDIC v. United States*, 654 F. Supp. 794 (N.D. Ga. 1986) (decided under former § 18-2-23).

One induced to sell goods to a bankrupt by fraud cannot reclaim from trustee. In *re Whatley Bros.*, 199 F. 326 (N.D. Ga. 1912) (decided under former Civil Code 1910, § 3225).

Impoundment of unpaid purchase money from sale. — If the fraudulent grantee sells to an innocent purchaser, any unpaid purchase money due on such sale will be impounded as an equitable asset of the debtor for the distribution to the debtor's creditors. *Beasley v. Smith*, 144 Ga. 377, 87 S.E. 293 (1915) (decided under former Civil Code 1910, § 3225).

Suspicion alone insufficient. — Contrary to the trial court's conclusion, reasonable grounds for suspicion alone do not suffice to render a subsequent purchaser's title void, and when the buyer acquired the automobile for value, and had no notice that the seller's title was obtained through fraud, the buyer received good title. *Hall v. Hidy*, 263 Ga. 422, 435 S.E.2d 215 (1993) (decided under former § 18-2-23).

Charge that grounds to suspect fraud in grantor's acquisition vitiates conveyance. — It was error to charge that purchaser from one who is fraudulent grantee takes no title as against creditors if the individual has grounds to reasonably suspect fraud in conveyance to the grantor. *Hinkle v. James Smith & Son*, 133 Ga. 255, 65 S.E. 427 (1909) (decided under former Civil Code 1895, § 2695).

Protection of trustee and contingent beneficiary. — When it was clearly evident that both the trustee and the

contingent beneficiary of a trust had reasonable grounds to suspect that the purpose of the second security deed against certain property and the assignment thereof to the trust, at least in part, was done with the intent of the assignor to delay or defraud creditors in violation of former § 18-2-22(2), neither the trustee nor the beneficiary was a subsequent purchaser entitled to the protections of former § 18-2-23. *FDIC v. United States*, 654 F. Supp. 794 (N.D. Ga. 1986) (decided under former § 18-2-23).

Reasonably equivalent value. — Bankruptcy court rejected a Chapter 11 trustee's argument that investors who received payments from affiliated businesses that were accused of operating a Ponzi scheme did not give value for the payments and could not assert a defense under 11 U.S.C. § 548(c) or Georgia law against the trustee's action seeking recovery of those payments under 11 U.S.C. §§ 544(b) and 548(a)(1)(A) and (a)(1)(B), and Georgia law, as fraudulent transfers. The investors had a claim for the return of principal the investors invested, based on fraud, the investors gave value for payments the investors received up to the amount of the principal the investors invested because the payments satisfied their claim, and their right to keep the payments did not depend on whether the investments the investors made were characterized as debt or equity. In *re Int'l Mgmt. Assocs., LLC*, No. A06-62966-PWB, 2009 Bankr. LEXIS 4240 (Bankr. N.D. Ga. Dec. 1, 2009), *aff'd* 661 F.3d 623 (11th Cir. 2011) (Unpublished).

When an investor asserted a fraudulent transfer claim against a bank to which a consultant who allegedly defrauded the investor made a down payment on a house, it was error to dismiss the claim based on the bank's assertion that the bank, under O.C.G.A. § 18-2-74(a)(1), took the consultant's funds in good faith and for a reasonably equivalent value because: (1) the investor's complaint did not admit or otherwise demonstrate such an affirmative defense; and (2) the investor had no obligation to anticipate the affirmative defense. *Speedway Motorsports, Inc. v. Pinnacle Bank*, 315 Ga. App. 320, 727 S.E.2d 151 (2012).

Transfers were avoidable. — There was no showing of transferees' good faith in fraudulent transfers from bankruptcy debtors since the lack of information from the debtors, the refusal of the debtors to allow transferees to conduct due diligence, and the usurious interest paid by the debtors clearly indicated that the transactions were fraudulent; thus, the transfers from bankruptcy debtors were avoidable. *Kerr v. Audio Answers, Inc.* (In re Christou), No. 06-68251-MHM, 2009 Bankr. LEXIS 3291 (Bankr. N.D. Ga. Sept. 28, 2009).

Summary judgment improper. — Based on evidence of the sale of judgment debtors' business to their long-time close friends and evidence that the friends were aware that the business owed money, a genuine issue of material fact remained as to whether the debtors transferred their assets with actual intent to hinder, delay, or defraud their creditor under O.C.G.A. § 18-2-74(a)(1). Therefore, the trial court's grant of summary judgment was reversed. *Abbott Oil Co. v. Rogers*, 302 Ga.

App. 439, 691 S.E.2d 561 (2010), cert. denied, No. S10C1026, 2010 Ga. LEXIS 583 (Ga. 2010).

Creditor failed to show good faith under O.C.G.A. § 18-2-78 in receiving fraudulent transfers from a bankruptcy debtor as returns on the creditor's investments in the debtor's Ponzi scheme, and thus the creditor was not entitled to summary judgment; the creditor was an educated and sophisticated businessman and, despite the creditor's assertion that the creditor had no reason to doubt the debtor who previously brokered mortgages for the creditor, the facts that the creditor invested substantial funds, received no promissory notes, and was paid no interest were sufficient to indicate that the creditor should have been suspicious of the nature of the transactions. In *re Christou v. Cressaty Metals, Inc.*, No. 08-6402, 2010 Bankr. LEXIS 3430 (Bankr. N.D. Ga. Sept. 23, 2010).

Cited in *Dime Savs. Bank v. Sandy Springs Assocs.*, 261 Ga. 485, 405 S.E.2d 491 (1991).

RESEARCH REFERENCES

Am. Jur. 2d. — 37 Am. Jur. 2d, Fraudulent Conveyances and Transfers, § 92.

C.J.S. — 37 C.J.S., Fraudulent Conveyances, § 189.

ALR. — Right of grantee or transferee to be reimbursed for expenditures in payment of taxes or encumbrances on property where conveyance or transfer is in fraud of creditors, 8 ALR 527.

Delivery of key as satisfying condition of immediate delivery and actual or continued change of possession to uphold sale of personal property against subsequent purchaser or third persons generally, 56 ALR 518.

Persons asserting claim on theory of agency or trust as within term "creditors" in statutes relating to proof of claims against insolvent bank, 89 ALR 383.

Right to set aside, for benefit of heirs and distributees, a conveyance or transfer by decedent in fraud of his creditors, 148 ALR 230.

Rule denying relief to one who conveyed his property to defraud his creditors as applicable where the threatened claim which occasioned the conveyance was never established, 21 ALR2d 589; 6 ALR4th 862.

Right of creditors to attack as fraudulent a conveyance by third person to debtor's spouse, 35 ALR2d 8.

Right of secured creditor to have set aside fraudulent transfer of other property by his debtor, 8 ALR4th 1123.

18-2-79. Time for commencement of action.

A cause of action with respect to a fraudulent transfer or obligation under this article is extinguished unless action is brought:

(1) Under paragraph (1) of subsection (a) of Code Section 18-2-74, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(2) Under paragraph (2) of subsection (a) of Code Section 18-2-74 or subsection (a) of Code Section 18-2-75, within four years after the transfer was made or the obligation was incurred; or

(3) Under subsection (b) of Code Section 18-2-75, within one year after the transfer was made or the obligation was incurred. (Code 1981, § 18-2-79, enacted by Ga. L. 2002, p. 141, § 3; Ga. L. 2015, p. 996, § 4A-1/SB 65.)

Editor's notes. — Ga. L. 2015, p. 996, § 4A-1/SB 65, effective July 1, 2015, reenacted this Code section without change.

JUDICIAL DECISIONS

In light of the similarity of the statutory provisions, decisions under former § 18-2-22 are included in the annotations for this Code section.

Limitations on actions. — U.S. Bankruptcy Court determined appropriate limitations periods for claims for alleged fraudulent conveyances of real property (seven years) and personal property (four years) by analogy to adverse possession and conversion, respectively, in the absence of an express limitations period in former O.C.G.A. § 18-2-22. *Broadfoot v. Hunerwadel* (In re Dulock), 282 B.R. 54 (Bankr. N.D. Ga. 2002) (decided under former O.C.G.A. § 18-2-22).

Trial court improperly granted summary judgment to judgment debtors on a judgment creditor's claim under O.C.G.A. § 14-8-28 upon finding that the limitations period under O.C.G.A. § 18-2-79 barred the claim as there was no legal basis to conclude that the limitation period in § 18-2-79 was applicable to the creditor's claim. *Morris v. Nexus Real Estate Mortg. & Inv. Co.*, 296 Ga. App. 477, 675 S.E.2d 511 (2009).

Chapter 7 trustee was not barred by the statute of limitations under O.C.G.A. § 18-2-79 or under 11 U.S.C. § 546 from pursuing a cause of action under 11 U.S.C. § 544 because the debtor filed the debtor's petition before the state statute of limitations expired, but was barred from pursu-

ing avoidance under 11 U.S.C. § 548 of any transfer occurring prior to two years before the petition was filed. *Watts v. Peachtree Tech. Partners, LLC* (In re Palisades at West Paces Imaging Ctr., LLC), No. 11-5183, 2011 Bankr. LEXIS 3576 (Bankr. N.D. Ga. Sept. 13, 2011).

As an administrator's fraudulent conveyance claims were time-barred under O.C.G.A. §§ 18-2-74(a)(1) and 18-2-79(1), a limited liability company's (LLC) failure to respond to the administrator's requests for admissions was of no consequence and the trial court's denial of summary judgment to the LLC was improper. *Huggins v. Powell*, 315 Ga. App. 599, 726 S.E.2d 730 (2012).

Administrator's fraudulent conveyance claims against group one were time-barred under O.C.G.A. §§ 18-2-74(a)(1) and 18-2-79(1), even though the claim was not time-barred under the limitations period in effect when the claim accrued, as application of § 18-2-79, a procedural law in effect at the time the suit was filed, did not violate the constitutional prohibition against retroactive laws under Ga. Const. 1983, Art. I, Sec. I, Para. X; the administrator also failed to avail the administrator of the one-year statute of limitation effective upon discovery of the alleged fraud. *Huggins v. Powell*, 315 Ga. App. 599, 726 S.E.2d 730 (2012).

Action to set aside fraudulent transfer timely filed. — Fraudulent transfer occurred on the date the deed was recorded, even though the deed was signed nearly 18 months earlier, and the creditor timely filed the creditor's complaint and action to set aside the fraudulent transfer approximately six months before the four-year statute of limitation would have run. *Kent v. A.O. White, Jr., Consulting Eng'r, Inc.*, 279 Ga. App. 563, 631 S.E.2d 782 (2006).

Fraudulent transfer claim was time-barred. — Former director's puta-

tive transferee met the transferee's burden for summary judgment purposes of asserting that a fraudulent transfer claim was time-barred, but the creditor failed to point to specific evidence that gave rise to a triable issue with respect to whether the limitation period did not bar the claim. *Am. Nat'l Holding Corp. v. EMM Credit, LLC*, 323 Ga. App. 655, 748 S.E.2d 683 (2013).

Cited in *Bishop v. Patton*, 288 Ga. 600, 706 S.E.2d 634 (2011).

RESEARCH REFERENCES

Am. Jur. 2d. — 37 Am. Jur. 2d, Fraudulent Conveyances and Transfers, § 152 et seq.

C.J.S. — 37 C.J.S., Fraudulent Conveyances, § 157 et seq.

18-2-80. Definitions; venue.

(a) In this Code section, the following rules determine a debtor's location:

(1) A debtor who is an individual is located at the individual's principal residence;

(2) A debtor that is an organization and has only one place of business is located at its place of business; and

(3) A debtor that is an organization and has more than one place of business is located at its chief executive office.

(b) A cause of action in the nature of a claim for relief under this article is governed by the law of the jurisdiction in which the debtor is located when the transfer is made or the obligation is incurred. (Code 1981, § 18-2-80, enacted by Ga. L. 2015, p. 996, § 4A-1/SB 65.)

Effective date. — This Code section became effective July 1, 2015. See editor's note under this article for applicability.

Editor's notes. — Ga. L. 2015, p. 996,

§ 4A-1/SB 65, effective July 1, 2015, redesignated former Code Section 18-2-80 as present Code Section 18-2-82.

RESEARCH REFERENCES

Am. Jur. 2d. — 37 Am. Jur. 2d, Fraudulent Conveyances and Transfers, § 126 et seq.

18-2-81. Series organization and determinations.

(a) As used in this Code section, the term:

(1) “Protected series” means an arrangement, however denominated, created by a series organization that, pursuant to the law under which the series organization is organized, has the characteristics set forth in paragraph (2) of this subsection.

(2) “Series organization” means an organization that, pursuant to the law under which it is organized, has the following characteristics:

(A) The organic record of the organization provides for creation by the organization of one or more protected series, however denominated, with respect to specified property of the organization, and for records to be maintained for each protected series that identify the property of or associated with the protected series;

(B) Debt incurred or existing with respect to the activities of, or property of or associated with, a particular protected series is enforceable against the property of or associated with the protected series only, and not against the property of or associated with the organization or other protected series of the organization; or

(C) Debt incurred or existing with respect to the activities or property of the organization is enforceable against the property of the organization only, and not against the property of or associated with a protected series of the organization.

(b) A series organization and each protected series of the organization is a separate person for purposes of this article, even if for other purposes a protected series is not a person separate from the organization or other protected series of the organization. (Code 1981, § 18-2-81, enacted by Ga. L. 2015, p. 996, § 4A-1/SB 65.)

Effective date. — This Code section became effective July 1, 2015. See editor’s note under this article for applicability.

§4A-1/SB 65, effective July 1, 2015, redesignated former Code Section 18-2-81 as present Code Section 18-2-85.

Editor’s notes. — Ga. L. 2015, p. 996,

18-2-82. Principles of law and equity remain applicable.

Unless displaced by the provisions of this article, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions. (Code 1981, § 18-2-80, enacted by Ga. L. 2002, p. 141, § 3; Code 1981, § 18-2-82, as redesignated by Ga. L. 2015, p. 996, § 4A-1/SB 65.)

The 2015 amendment, effective July 1, 2015, redesignated former Code Section 18-2-80 as present Code Section 18-2-82; deleted the subsection (a) designation; and deleted former subsection (b), which read: “The provisions of this article do not create a cause of action for a governmental entity or its agent or assignee with

respect to a transaction which may otherwise constitute a fraudulent transfer or obligation under this article if the transaction complies with the applicable state and federal laws concerning transfers of property in the determination of eligibility for public benefits.” See editor’s note under this article for applicability.

JUDICIAL DECISIONS

Cited in Bishop v. Patton, 288 Ga. 600, 706 S.E.2d 634 (2011).

RESEARCH REFERENCES

Am. Jur. 2d. — 37 Am. Jur. 2d, Fraudulent Conveyances and Transfers, § 152 et seq.

C.J.S. — 37 C.J.S., Fraudulent Conveyances, § 216 et seq.

18-2-83. Uniformity with laws of other states.

This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting the “Uniform Voidable Transactions Act.” (Code 1981, § 18-2-83, enacted by Ga. L. 2015, p. 996, § 4A-1/SB 65.)

Effective date. — This Code section became effective July 1, 2015. See editor’s note under this article for applicability.

18-2-84. Construction with federal provisions.

This article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but shall not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b). (Code 1981, § 18-2-84, enacted by Ga. L. 2015, p. 996, § 4A-1/SB 65.)

Effective date. — This Code section became effective July 1, 2015. See editor’s note under this article for applicability.

18-2-85. Transfers to charitable organizations; statute of limitations.

(a) As used in this Code section, the term:

(1) “Charitable organization” means an organization which has qualified as tax-exempt under Section 501(c) (3) of the federal Internal Revenue Code of 1986 and has been so qualified for not less than two years preceding any transfer pursuant to this Code section, other than a private foundation or family trust.

(2) “Private foundation” shall have the same meaning as set forth in 26 U.S.C. Section 509(a).

(b) A transfer made to a charitable organization shall be considered voidable only if it is established that a voidable transfer has occurred as described in Code Section 18-2-74 or 18-2-75, and such charitable organization had actual or constructive knowledge of the voidable nature of the transfer.

(c) The statute of limitations for a civil action with respect to a voidable transfer to a charitable organization under this Code section shall be within two years after such transfer was made. (Code 1981, § 18-2-81, enacted by Ga. L. 2013, p. 1045, § 1/SB 105; Code 1981, § 18-2-85, as redesignated by Ga. L. 2015, p. 996, § 4A-1/SB 65.)

The 2015 amendment, effective July 1, 2015, redesignated former Code Section 18-2-81 as present Code Section 18-2-85; substituted the present provisions of subsection (b) for the former provisions, which read: “A transfer made to a charitable organization shall be considered complete unless it is established that a

fraudulent transfer has occurred as described in Code Section 18-2-74 or 18-2-75, and such charitable organization had knowledge of the fraudulent nature of the transfer.”; and inserted “voidable” near the beginning of subsection (c). See editor’s note under this article for applicability.

CHAPTER 3

ATTACHMENT PROCEEDINGS

Article 1		Sec.	
General Provisions			
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18-3-1.	Grounds for attachment.		
18-3-2.	Right to seek attachment on money demands generally.		
18-3-3.	Issuance of attachment prior to debt becoming due; stay of execution on judgment where debt not due before final judgment.	18-3-14.	bond; failure to give additional security or new bond.
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Cross references. — Executions and judicial sales, T. 9, C. 13. Attachment of goods covered by negotiable document of title, § 11-7-602. Issuance of writ of ne exeat to restrain person from leaving jurisdiction of state, § 23-3-20 et seq. Jeopardy assessments by state revenue commissioner in situations where taxpayer gives evidence of intention to leave state, to remove property from state, or other actions to avoid collection of state tax, § 48-2-51. Attachment of property by state revenue commissioner, § 48-2-55.

Law reviews. — For article critically analyzing the various elements constitutionally required for prejudgment seizure of a debtor's property, focusing on § 9-503 of the U.C.C., see 28 Mercer L. Rev. 665 (1977).
For note discussing implications for other postjudgment collection devices of developments in postjudgment garnishment law in Georgia, see 12 Ga. L. Rev. 60 (1977). For note discussing constitutional issues affecting attachment procedures, see 12 Ga. L. Rev. 814 (1978).

JUDICIAL DECISIONS

For discussion of constitutionality of attachment proceeding prior to 1980 revision. — See *Kitson v. Hawke*, 231 Ga. 157, 200 S.E.2d 703 (1973).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Wrongful Attachment, 36 POF2d 149.
ALR. — Exemption from attachment or execution of property brought by nonresident witness or litigant who comes into state in connection with the litigation, 13 ALR 368.
Attachment in alienation of affections or criminal conversation case, 67 ALR2d 527.

Necessity and sufficiency, in order to toll statute of limitations as to debt, of statement of amount of debt in acknowledgment or new promise to pay, 21 ALR4th 1121.
Liquor license as subject to execution or attachment, 40 ALR4th 927.

ARTICLE 1

GENERAL PROVISIONS

Law reviews. — For article surveying judicial developments in Georgia's trial practice and procedure laws, see 31 Mercer L. Rev. 249 (1979).

For note discussing grounds and proceedings for attachment, see 12 Ga. L. Rev. 814 (1978).

JUDICIAL DECISIONS

Cited in *Outlaw v. Premium Distrib. Co.*, 83 Ga. App. 198, 63 S.E.2d 260 (1951).

RESEARCH REFERENCES

ALR. — Attachment for goods or money embezzled, stolen, or converted, 4 ALR 832.

What are "tools," "implements," "instruments," "utensils," or "apparatus" within the meaning of debtor's exemption laws, 9 ALR 1020; 36 ALR 669; 52 ALR 826.

Seat in chamber of commerce, board of trade, or stock exchange as subject of attachment, garnishment, or execution, 14 ALR 284.

Attachment or garnishment of goods covered by negotiable warehouse receipt, 40 ALR 969.

Right of state court, in enforcing rights under federal statute, to obtain jurisdiction by means not available in federal court, 42 ALR 1236.

Action based on statute as one in which attachment will lie, 51 ALR 1386.

What amounts to an attachment or levy within provision of the Uniform Conditional Sales Act avoiding reservation of title by unfiled contract, 54 ALR 269.

Validity and construction of statute requiring statement of account due one having special or limited interest in property seized under attachment or execution against another, 63 ALR 575.

What constitutes an action for recovery of money only within statute as to the character of actions in which attachment may issue, 76 ALR 1446.

Attachment or garnishment as interference with foreign or interstate commerce, 85 ALR 1395.

Action based on rescission of contract as one arising on contract, express or implied, within the meaning of attachment statute, 95 ALR 1028.

Local property of insolvent foreign corporation for which a liquidator or receiver has been appointed in another state as subject to sequestration or seizure under execution or attachment, 98 ALR 351.

Attachment or garnishment with respect to award (or judgment thereon) under Workmen's Compensation Act, 126 ALR 150.

Pledgor's interest as subject to attachment by pledgee for another debt, and effect of the attachment upon the pledge, 126 ALR 188.

Bankruptcy of debtor as affecting necessity of compliance with conditions precedent to enforcement of bond in attachment or other judicial proceeding, 130 ALR 1162.

Residence of partnership for purposes of statutes authorizing attachment or garnishment on ground of nonresidence, 9 ALR2d 471.

What is an action for "debt" within attachment or garnishment statute, 12 ALR2d 787.

Recovery of damages for mental anguish, distress, suffering, or the like, in action for wrongful attachment, garnishment, sequestration, or execution, 83 ALR3d 598.

18-3-1. Grounds for attachment.

Attachments may issue when the debtor:

- (1) Resides out of the state;
- (2) Moves or is about to move his domicile outside the limits of the county;
- (3) Absconds;
- (4) Conceals himself;
- (5) Resists legal arrest; or
- (6) Is causing his property to be removed beyond the limits of the state. (Laws 1799, Cobb’s 1851 Digest, p. 69; Ga. L. 1855-56, p. 25, § 1; Code 1863, § 3188; Code 1868, § 3199; Code 1873, § 3264; Code 1882, § 3264; Civil Code 1895, § 4510; Civil Code 1910, § 5055; Code 1933, § 8-101.)

Law reviews. — For note discussing notice and judicial supervision in post-judgment garnishment in Georgia, see 26 Emory L.J. 597 (1977).

For comment on *Reeves v. Motor Contract Co.*, 324 F. Supp. 1011 (N.D. Ga. 1971), see 23 Mercer L. Rev. 369 (1972).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- NONRESIDENT DEBTORS
- REMOVAL OF DOMICILE
- DEBTOR’S CONCEALMENT
- REMOVAL OF PROPERTY

General Consideration

Construction of attachment law. — Attachment proceedings were unknown at common law and are to be strictly construed, especially as to nonresident debtors. *Mills v. Findlay*, 14 Ga. 230 (1853).

Rights of out-of-state creditors. — In absence of statute or decision, the right to proceed by attachment is not limited to citizens or residents of the state, and “it is generally immaterial that the attaching creditor is a nonresident.” *Harmon v. Wiggins*, 48 Ga. App. 469, 172 S.E. 847 (1934).

Debtor removing property out of state. — Creditor’s rights under paragraph (6) of former Civil Code 1910, § 5055 were not affected by the fact that the debtor has other property which might

be subjected to the payment of the debtor’s debts. *Bush v. Dean*, 17 Ga. App. 364, 86 S.E. 1075 (1915).

Absent allegations of property in Georgia, there was no basis for the issuance of a writ of attachment, although the defendants resided outside of Georgia. *Ralls Corp. v. Huerfano River Wind, LLC*, 27 F. Supp. 3d 1303 (N.D. Ga. 2014).

Plaintiff in attachment must prove demand before taking a judgment against attached property, although declaration in attachment sets forth demand in orderly and distinct paragraphs, consecutively numbered. *Walden v. Barwick*, 72 Ga. App. 508, 34 S.E.2d 551 (1945).

Remedy when in personam jurisdiction unavailable. — When no jurisdiction is obtained over the debtor’s per-

General Consideration (Cont'd)

son, the remedy is a proceeding in rem, in that it proceeds against property in custody of court and the judgment binds such property only; but when jurisdiction of debtor's person is obtained, either by personal service or appearance, proceeding is ordinarily in personam, and a personal judgment is rendered without regard to the attachment. *Harmon v. Wiggins*, 48 Ga. App. 469, 172 S.E. 847 (1934).

Applicability to corporate debtors.

— Corporation is an artificial person, and provisions of former Code 1933, § 8-101 were applicable to corporate debtor as well as to individual debtors. *Lawrence v. Lee's Dep't Store*, 48 Ga. App. 271, 172 S.E. 471 (1934).

Effect of codefendant. — Defendant in attachment can be garnished as to a codefendant's property or money in the codefendant's hands. *Kibbler v. James*, 75 Ga. App. 852, 44 S.E.2d 910 (1947).

Applicability of § 18-3-4. — Provisions of former Code 1933, § 8-104 (see now O.C.G.A. § 18-3-4) were applicable to attachments under former Code 1933, § 8-101 (see now O.C.G.A. § 18-3-1). *Threlkeld v. Whitehead*, 95 Ga. App. 378, 98 S.E.2d 76 (1957).

Invocation of equitable remedies.

— Declaration in attachment may invoke equitable remedies and relief under former Civil Code 1910, § 5406 (see now O.C.G.A. § 23-3-1). *Coral Gables Corp. v. Hamilton*, 168 Ga. 182, 147 S.E. 494 (1929).

Cited in *Levy v. Millman*, 7 Ga. 167 (1849); *Brown & Sanford v. McCluskey*, 26 Ga. 577 (1858); *Stowers v. Carter*, 28 Ga. 351 (1859); *Oliver v. Wilson*, 29 Ga. 642 (1859); *Irvin v. Howard*, 37 Ga. 18 (1867); *Mississippi Cent. R.R. Co. v. Plant*, 58 Ga. 167 (1877); *Brooks v. Hutchinson*, 122 Ga. 838, 50 S.E. 926 (1905); *Forrester v. Forrester*, 155 Ga. 722, 118 S.E. 373 (1923); *Dulion v. S.A. Lynch Enter. Fin. Corp.*, 53 F.2d 568 (5th Cir. 1931); *Barnett v. Findley*, 44 Ga. App. 610, 162 S.E. 288 (1932); *Gaston v. Jackson Nat'l Bank*, 45 Ga. App. 106, 163 S.E. 265 (1932); *Isaac Silver & Bros. Co. v. Kalmon*, 175 Ga. 244, 165 S.E. 434 (1932); *Pere Marquette Ry. v. Tifton Produce Co.*, 48 Ga. App. 286, 172

S.E. 727 (1934); *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937); *Lawrence v. Lawrence*, 196 Ga. 204, 26 S.E.2d 283 (1943); *Irwin v. Griffin*, 202 Ga. 456, 43 S.E.2d 687 (1947); *Smith v. R.F. Brodegaard & Co.*, 77 Ga. App. 661, 49 S.E.2d 500 (1948); *Tennessee-Virginia Constr. Co. v. Willingham*, 115 Ga. App. 90, 153 S.E.2d 627 (1967); *Multiple Realty, Inc. v. Walker*, 119 Ga. App. 393, 167 S.E.2d 380 (1969); *Reeves v. Motor Contract Co.*, 324 F. Supp. 1011 (N.D. Ga. 1971); *Coursin v. Harper*, 144 Ga. App. 4, 240 S.E.2d 565 (1977); *Johnson v. American Credit Co.*, 581 F.2d 526 (5th Cir. 1978); *Renfro Corp. v. McLarty Indus., Inc.*, 2 Bankr. 68 (Bankr. N.D. Ga. 1979).

Nonresident Debtors**Effect of nature of money demand.**

— Attachment may issue when debtor resides out of state in all cases of money demands, whether arising ex contractu or ex delicto. *Benefield v. Radiator Specialty Co.*, 116 Ga. App. 588, 158 S.E.2d 423 (1967).

Fact of nonresidence. — Mere fact of nonresidence subjects one to attachment for one's debts under former Code 1873, § 3264. *Charles v. Foster*, 56 Ga. 612 (1876).

Fact of nonresidence subjects one to attachment, provided nonresidence is distinctly averred. *DeLeon v. Heller, Hirsch & Co.*, 77 Ga. 740 (1886); *Wilson v. Park View Sanitarium*, 135 Ga. 471, 69 S.E. 741 (1910).

Applicability of paragraph (2).

— Paragraph (2) of former Code 1873, § 3264 was applicable to nonresident debtor passing through county with the debtor's goods. *Johnson v. Lowry*, 47 Ga. 560, 15 Am. R. 655 (1873).

Paragraph (2) of former Civil Code 1855, § 4510 was applicable to member of partnership failing to pay that partner's share of debts in dissolution; thus, other partner may institute attachment proceeding. *Tucker v. Murphey*, 114 Ga. 662, 40 S.E. 836 (1902).

Nonresident lessee of domestic corporation is subject to attachment. *Breed v. Mitchell*, 48 Ga. 533 (1873).

Proof under paragraph (2). — Acts and intentions of defendant at time of

attachment under paragraph (2) of former Code 1863, § 3188 must be shown. *Louis Stix & Co. v. S. Pump & Co.*, 36 Ga. 526 (1867); *Nicols v. Ward*, 27 Ga. App. 501, 108 S.E. 832 (1921).

When intent to remove exists, chattel mortgage may be foreclosed prior to maturity. *Perryman v. Pope*, 102 Ga. 502, 31 S.E. 37 (1897).

Recitation as to joint indebtedness in affidavit. — When both joint-debtors are nonresidents, affidavit of attachment need not recite that indebtedness is joint. *Dobbs v. Justices of Inferior Court*, 17 Ga. 624 (1855).

Attachment against nonresident, executed by levy. — In case of attachment against nonresident debtor executed by levy, jurisdiction of a court of this state attaches by virtue of the seizure of property of such nonresident, and when the officer executing the levy seizes certain property as property of such nonresident debtor, and so makes the debtor's return to the court, it acquires such jurisdiction as will enable the court to proceed to judgment subjecting the debtor's interest in the property to the payment of the debt. *Harmon v. Wiggins*, 48 Ga. App. 469, 172 S.E. 847 (1934).

Only lien foreclosed in attachment against nonresident is that created by seizure of the property. *Owens v. Atlanta Trust & Banking Co.*, 119 Ga. 924, 47 S.E. 215 (1904).

Plaintiff without perfect right to sue cannot proceed in attachment against nonresident but must resort to equity. *Tennessee Fertilizer Co. v. Hand*, 147 Ga. 588, 95 S.E. 81 (1918).

Removal of Domicile

When debtor is about to move beyond limits of county, attachment may issue against the debtor. *Lawrence v. Lee's Dep't Store*, 48 Ga. App. 271, 172 S.E. 471 (1934).

Paragraph (2) referred to removal of domicile of debtor, and not merely removal of debtor property from county of debtor domicile. This ground differs from

that set forth in paragraph (6) which contemplated removal of property "beyond the limits" of the state. *United States Fid. & Guar. Co. v. Lawrence*, 184 Ga. 83, 190 S.E. 346 (1937).

Whether one is about to remove must be shown by acts and conduct. — Whether one is about to remove is a matter of intent, but it must be shown by acts and conduct. *Patne v. Oliver*, 96 Ga. App. 644, 101 S.E.2d 154 (1957).

Defendants commencing removal pending bill in equity. — When, pending a bill in equity to collect indebtedness, defendants removed out of state and were proceeding to remove all of the defendants' property, attachment would lie in favor of the complainant. *Epping v. Aiken*, 71 Ga. 600 (1883).

Debtor's Concealment

Affidavit to obtain attachment against partnership, alleging that the partnership "conceal themselves" is sufficient. *Guckenheimer & Son v. Day & Higgs*, 74 Ga. 1 (1884).

Removal of Property

Executor de son tort, removing assets of deceased from county, is liable to be attached, and the assets levied on. *Cox v. Felder*, 36 Ga. 597 (1867).

Proof of removal under paragraph (6). — Fact that one was causing something to be done under paragraph (6) was more than a matter of intent and some overt preparatory act at least should be taken to carry burden of proving this fact. *Patne v. Oliver*, 96 Ga. App. 644, 101 S.E.2d 154 (1957).

Burden of proving debtor removing "his property." — Sixth ground enumerated in O.C.G.A. § 18-3-1 requires a showing that the defendant "is causing his property" to be removed, which places the burden upon the plaintiff to show the alleged debtor was removing "his property." *Trax, Inc. v. Pentagon Aero-Marine Corp.*, 162 Ga. App. 276, 290 S.E.2d 196 (1982).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2B Am. Jur. Pleading and Practice Forms, Attachment and Garnishment, § 91. 2C Am. Jur. Pleading and Practice Forms, Attachment and Garnishment, §§ 340, 494.

ALR. — What constitutes nonresidence for purpose of attachment, 26 ALR 180.

Action based on statute as one in which attachment will lie, 26 ALR 563; 51 ALR 1386.

Right of creditor to attach bankrupt's exempt property after discharge in bankruptcy, 55 ALR 303.

Nature and extent of relief of successful intervenor or interpleader in attachment, 66 ALR 908.

Property of incompetent or infant under guardianship as subject of execution, attachment, or garnishment, 92 ALR 919.

Debtor's intent to defraud or delay creditors within contemplation of attachment statute as inferable as matter of law from fact that he has removed or is about to remove property from the state without

making adequate provision for his creditors, 92 ALR 966.

Foreign corporation as a nonresident for purposes of attachment law of the state in which it is doing business or is domesticated, 114 ALR 1378.

Attachment as affected by release or modification of lien to which property was subject when attachment was levied, 128 ALR 1392.

Right of creditors to reach, by garnishment or other process, commissions of debtor, as executor, administrator, or trustee, 143 ALR 190.

Money or other property taken from prisoner as subject of attachment, garnishment, or seizure under execution, 154 ALR 758.

Foreign attachment or garnishment as available in action by nonresident against nonresident or foreign corporation upon a foreign cause of action, 14 ALR2d 420.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one joint depositor, 86 ALR5th 527.

18-3-2. Right to seek attachment on money demands generally.

In all cases of money demands, whether arising ex contractu or ex delicto, the plaintiff shall have the right to seek attachment when the defendant places himself in such situation as will authorize a plaintiff to seek attachment. (Ga. L. 1857, p. 23, § 1; Code 1863, § 3199; Code 1868, § 3210; Code 1873, § 3278; Code 1882, § 3278; Civil Code 1895, § 4524; Civil Code 1910, § 5069; Code 1933, § 8-102.)

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Statute embraced all money demands, whether resting in tort or contract. Walker v. Zorn, 56 Ga. 35 (1876).

Attachment may issue when debtor resides out of state in all cases of money demands, whether arising ex contractu or ex delicto. Benefield v. Radiator Specialty Co., 116 Ga. App. 588, 158 S.E.2d 423 (1967).

Extent of judgment creditor's lien. — Lien of judgment creditor is not a lien acquired by contract, but is given by law;

consequently, a lienor is not in the position of a bona fide purchaser, and a lien extends only to property levied upon which actually belongs to the defendant in attachment. Parker v. Boyd, 208 Ga. 829, 69 S.E.2d 760 (1952).

Attachment proper as to action for specific damages arising in tort. Graves v. Strozier, 37 Ga. 32 (1867).

Attachment proper regarding promise to pay debt with solvent notes. Monroe v. Bishop, 29 Ga. 159 (1859).

Attachment proper as to breach of promise of marriage. Morton v. Pearman, 28 Ga. 323 (1859).

Cited in McReynolds v. Colclough, 146 Ga. 696, 92 S.E. 206 (1917); Grimmett v.

Barnwell, 184 Ga. 461, 192 S.E. 191 (1937); Tennessee-Virginia Constr. Co. v. Willingham, 115 Ga. App. 90, 153 S.E.2d 627 (1967).

RESEARCH REFERENCES

ALR. — Replevin for bank account, 44 ALR 1522.

Attachment in libel and slander cases, 61 ALR 1347.

Action based on rescission of contract as one arising on contract express or implied within the meaning of attachment statute, 77 ALR 748; 95 ALR 1028.

Judgment in tort action as subject of assignment, attachment, or garnishment pending appeal, 121 ALR 420.

Attachment statute as applicable to equity suits, 154 ALR 95.

18-3-3. Issuance of attachment prior to debt becoming due; stay of execution on judgment where debt not due before final judgment.

When the debt is not due, the debtor shall be subject to attachment in the same manner and to the same extent as in cases where the debt is due, except that, where the debt does not become due before final judgment, execution upon the judgment shall be stayed until the debt is due. (Laws 1816, Cobb's 1851 Digest, p. 75; Code 1863, § 3197; Code 1868, § 3208; Code 1873, § 3275; Code 1882, § 3275; Civil Code 1895, § 4521; Civil Code 1910, § 5066; Code 1933, § 8-103.)

JUDICIAL DECISIONS

Attachment under Laws 1816, Cobb's 1851 Digest, p. 75 (see now O.C.G.A. § 18-3-3) must be by affidavit in the form required by Ga. L. 1855-56, p. 25, § 42 (see now O.C.G.A. § 18-3-19). Harrill v. Humphries, 26 Ga. 514 (1858).

Cited in Monroe v. Bishop, 29 Ga. 159 (1859); Askew v. Melvin, 144 Ga. 348, 87 S.E. 278 (1915); Hensley v. Minehan, 29 Ga. App. 251, 114 S.E. 647 (1922); Stevenson v. Allen, 94 Ga. App. 123, 93 S.E.2d 794 (1956).

RESEARCH REFERENCES

ALR. — What amounts to a "debt" within statute providing for attachment before debt is due, 65 ALR 1439; 58 ALR2d 1451.

What sort of claim, obligation, or liability

is within contemplation of statute providing for attachment, or giving right of action for indemnity, before a debt or liability is due, 58 ALR2d 1451.

18-3-4. Issuance of attachment after action has been commenced; effect of judgment on action still pending.

In all cases where the plaintiff has commenced an action for the recovery of a debt and the defendant, during the pendency of such

action, shall become subject to attachment, the plaintiff may have an attachment against the defendant; and all the proceedings in relation to the same shall be as prescribed in relation to attachments where no action is pending. A satisfaction of the judgment in the common-law action shall satisfy the judgment in attachment, and a satisfaction of the judgment in attachment shall satisfy the judgment in the common-law action. (Ga. L. 1855-56, p. 25, § 28; Code 1863, § 3201; Code 1868, § 3212; Code 1873, § 3280; Code 1882, § 3280; Civil Code 1895, § 4526; Civil Code 1910, § 5071; Code 1933, § 8-104.)

Law reviews. — For article discussing *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969) in relation to former Georgia law on prejudgment garnishment, see 21 Mercer L. Rev. 495 (1970). For article discuss-

ing Georgia's long arm statute, prejudgment attachment and habeas corpus, with respect to judicial developments in practice and procedure in the fifth circuit, see 30 Mercer L. Rev. 925 (1979).

JUDICIAL DECISIONS

Suit in attachment is separate and distinct from a common law action; and failure to number and document them separately is error on part of clerk. *Dollar v. Fred W. Amend Co.*, 184 Ga. 432, 191 S.E. 696 (1937).

Former Code 1933, § 8-104 (see now O.C.G.A. § 18-3-4) was applicable to attachments under former Code 1933, § 8-101 (see now O.C.G.A. § 18-3-1). *Threlkeld v. Whitehead*, 95 Ga. App. 378, 98 S.E.2d 76 (1957).

Pending action with bail in superior court, plaintiff may take out attachment on same demand returnable to inferior court. *Wood v. Carter*, 29 Ga. 580 (1859).

Filing of declaration claiming damages was commencement of action for purposes of former Code 1863, § 3201 (see now O.C.G.A. § 18-3-4), though the defen-

dant was not yet served. *Graves v. Strozier*, 37 Ga. 32 (1867).

Effect upon pending action of payment of costs of attachment. — When attachment is sued out against the defendant in a pending common-law action, payment by the defendant to the sheriff of the principal, interest, and costs upon the attachment in order to relieve the defendant's property from seizure does not discharge the defendant from any additional liability to which the defendant might have been subject in the original action. *Johnson & Son v. Friedman-Shelby Shoe Co.*, 15 Ga. App. 561, 83 S.E. 969 (1914).

Cited in *Heath v. Bates*, 70 Ga. 633 (1883); *Donaldson v. Tripod Paint Co.*, 43 Ga. App. 3, 158 S.E. 640 (1931); *Sheehan v. Ruben*, 83 Ga. App. 336, 63 S.E.2d 605 (1951); *Crawford v. Sumerau*, 101 Ga. App. 32, 112 S.E.2d 682 (1960).

18-3-5. Issuance against administrator or executor removing or about to remove property of deceased person; entry of final judgment against administrator or executor.

Process of attachment may issue against an administrator of an estate or the executor of the last will and testament of any deceased person, as in other cases, when the administrator or executor actually removes or is about to remove the property of the deceased person outside the limits of any county, provided that final judgment shall not be entered against such administrator or executor until after the

expiration of two years from the granting of letters of administration or letters testamentary, as the case may be. (Ga. L. 1857, p. 24, § 1; Code 1863, § 3199; Code 1868, § 3210; Code 1873, § 3277; Code 1882, § 3277; Civil Code 1895, § 4523; Civil Code 1910, § 5068; Code 1933, § 8-105.)

Cross references. — Administrators and executors generally, T. 53, C. 6.

JUDICIAL DECISIONS

Nature of removal for which attachment authorized. — Former Code 1868, § 3210 did not authorize attachment on ground that the executor or administrator was personally removing, but rather on ground that the executor or administrator is actually removing or about to remove property of the estate. *Holloway v. Chiles*, 40 Ga. 346 (1869).

Twelve-month exemption from suit allowed executors and administrators does not prevent levy of attachment against property of estate in hands of administrator or executor. *Hartley v. Hartley*, 173 Ga. 710, 161 S.E. 358 (1931).

Proviso that final judgment not be entered for two years from commencement of administration. — Pro-

viso in former Civil Code 1910, § 5068 that final judgment shall not be entered until expiration of two years from granting of letters of administration serves as a quasi-injunction to restrain administration of property upon which attachment has been levied until determination of issues which may be raised in attachment case. *Hartley v. Hartley*, 173 Ga. 710, 161 S.E. 358 (1931).

Judgment in attachment will not raise priority of debt owed creditor of intestate in proceeding to marshal assets. *Wooten v. Hartley*, 186 Ga. 639, 198 S.E. 750 (1838).

Cited in *Ross v. Edwards*, 52 Ga. 24 (1874).

RESEARCH REFERENCES

ALR. — Garnishment against executor or administrator by creditor of estate, 60 ALR3d 1301.

18-3-6. Issuance against joint contractors or partners.

In cases of joint contractors and partners, where any one of them shall render himself liable to attachment according to law, an attachment may issue against him, upon the plaintiff, his agent, or his attorney at law complying with this article. The proceeding against such joint contractor or partner shall be in all respects as in other cases of attachment, except that such attachment shall be levied only upon the separate property of such joint contractor or partner. (Ga. L. 1851-52, p. 19, § 1; Ga. L. 1855-56, p. 25, § 26; Code 1863, § 3198; Code 1868, § 3209; Code 1873, § 3276; Code 1882, § 3276; Civil Code 1895, § 4522; Civil Code 1910, § 5067; Code 1933, § 8-106.)

JUDICIAL DECISIONS

Exception to rule that joint obligors are necessary parties. — Former Civil Code 1910, § 5067 provided an exception to rule that joint obligors are all necessary parties to suit on the obligation if within the jurisdiction of the court. *Clark v. Maddox*, 41 Ga. App. 807, 154 S.E. 728 (1930).

In attachment against one member of partnership, the declaration need not be against all partners. *Connon v. Dunlap*, 64 Ga. 680 (1880).

Interest of one partner in partnership property was not subject to levy and sale under attachment; it could only be reached at law by process of gar-

nishment. *J.A. Holifield & Co. v. White*, 52 Ga. 567 (1874) (decided prior to repeal of § 14-8-74 by Ga. L. 1984, p. 1439).

Partner as sole survivor and non-resident. — Attachment available against partner's interest in partnership when the partner is the only survivor and nonresident. *Leroy M. Wiley & Co. v. Sledge*, 8 Ga. 532 (1850).

Interest of tenants in common of a ship can be attached. *Walter v. Kierstead*, 74 Ga. 18 (1884).

Cited in *Starr v. Mayer & Co.*, 60 Ga. 546 (1878); *Shaw v. Goodman*, 138 Ga. 567, 75 S.E. 661 (1912).

RESEARCH REFERENCES

ALR. — Joint bank account as subject to attachment, garnishment, or execution by creditor of one of the joint depositors, 11 ALR3d 1465.

18-3-7. Issuance against nonresident corporations.

Attachments may issue against nonresident corporations transacting business within the state under the same rules and regulations as are prescribed in relation to issuing attachments and garnishments in other cases. (Ga. L. 1855-56, p. 25, § 33; Code 1863, § 3202; Code 1868, § 3213; Code 1873, § 3281; Code 1882, § 3281; Civil Code 1895, § 4527; Civil Code 1910, § 5072; Code 1933, § 8-108.)

JUDICIAL DECISIONS

This statute was cumulative and not restrictive of other attachment statutes; and nonresident corporation having property in this state is subject to attachment whether or not the corporation transacts business here. *Pacific Selling Co. v. Albright-Prior Co.*, 3 Ga. App. 143, 59 S.E. 468 (1907).

Construction of attachment law. — Attachment was unknown at common law, and should be strictly construed, especially as to nonresident debtors. *Mitchell v. Union Bag & Paper Corp.*, 75 Ga. App. 15, 42 S.E.2d 137 (1947).

Attachment against foreign corporation, also being sued in this state. — Fact that Georgia court may have personal jurisdiction over a corporation does

not mean it is not subject also to attachment, for this statute was intended to authorize attachment against a foreign corporation, even though the corporation might be sued in Georgia. *Image Mills, Inc. v. Vora*, 146 Ga. App. 196, 245 S.E.2d 882 (1978) (see O.C.G.A. § 18-3-7).

Whether doing business in this state or not, nonresident corporation is subject to attachment. *Parramore v. Alexander*, 132 Ga. 642, 64 S.E. 660 (1909).

Affidavit alleging transaction of business in state. — Affidavit is sufficient which alleges the defendant, though not incorporated in this state, transacts business here. *Parramore v. Alexander*, 132 Ga. 642, 64 S.E. 660 (1909).

Cited in *Wilson v. Danforth*, 47 Ga. 676

(1873); *Selma, R. & D.R.R. v. Tyson*, 48 Ga. 351 (1873); *Mississippi Cent. R.R. Co. v. Plant*, 58 Ga. 167 (1877); *Schmidlapp & Co. v. La Confiance Ins. Co.*, 71 Ga. 246 (1883); *Pacific Selling Co. v. Albright-Prior*

Co., 3 Ga. App. 143, 59 S.E. 468 (1907); *Louisiana State Rice Milling Co. v. Mente & Co.*, 173 Ga. 1, 159 S.E. 497 (1931); *Mitchell v. Union Bag & Paper Corp.*, 75 Ga. App. 15, 42 S.E.2d 137 (1947).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 12 Am. Jur. Pleading and Practice Forms, Foreign Corporations, § 3.

ALR. — Constitutionality of statute prescribing conditions of right of defendant in foreign attachment to appear and defend, 17 ALR 884.

Foreign corporation as a nonresident for purposes of attachment law of the state in which it is doing business or is domesticated, 114 ALR 1378.

Sufficiency of affidavit for attachment, respecting fraud or intent to defraud, as against objection that it is a mere legal conclusion, 8 ALR2d 578.

Foreign attachment or garnishment as available in action by nonresident against nonresident or foreign corporation upon a foreign cause of action, 14 ALR2d 420.

18-3-8. Right of surety or endorser upon an instrument of writing to attach property of principal.

(a) In all cases where a person is surety or endorser upon an instrument of writing and the principal shall become subject to attachment according to Code Section 18-3-1, such surety or endorser may, upon complying with this chapter, have attachment against his principal. The proceedings shall be in all respects the same as in other cases of attachment, and the money raised by the attachment shall be paid to the person holding the instrument of writing.

(b) If the surety or endorser has paid the debt, then the money raised upon the attachment or so much thereof as will pay the amount the surety or endorser has paid shall be paid to the surety or endorser.

(c) In case the debt is not due at the time judgment is rendered against the principal, execution shall be stayed until the debt is due. (Laws 1820, Cobb's 1851 Digest, p. 75; Laws 1842, Cobb's 1851 Digest, p. 88; Ga. L. 1855-56, p. 25, § 27; Code 1863, § 3200; Code 1868, § 3211; Code 1873, § 3279; Code 1882, § 3279; Civil Code 1895, § 4525; Civil Code 1910, § 5070; Code 1933, § 8-107.)

Cross references. — Suretyship generally, T. 10, C. 7.

JUDICIAL DECISIONS

Cited in *Patne v. Oliver*, 96 Ga. App. 644, 101 S.E.2d 154 (1957).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2C Am. Jur. Pleading and Practice Forms, Attachment and Garnishment, § 452.

ALR. — What sort of claim, obligation, or liability is within contemplation of stat-

ute providing for attachment, or giving right of action for indemnity, before a debt or liability is due, 58 ALR2d 1451.

Funds in hands of his attorney as subject of attachment or garnishment by client's creditor, 35 ALR3d 1094.

18-3-9. Requirement of application for order authorizing issuance of writ of attachment prior to entry of judgment; contents of application for writ; procedure for granting or denial of issuance of writ.

(a) When the plaintiff contends one or more of the grounds set forth in Code Section 18-3-1 exist, prior to obtaining judgment against the defendant, the plaintiff may make application to a judge of any court of record, other than the probate court, in the county of the residence of the defendant, if known, and, if not known, in the county wherein the property sought to be attached is located, for an order authorizing issuance of a writ of attachment. The application shall be made in writing, under oath, and shall set forth the specific facts that show the existence of one or more of such grounds, the basis and nature of the claim, and the amount of indebtedness claimed therein by the plaintiff.

(b) Upon presentation of plaintiff's sworn application for a writ of attachment, it shall be the duty of the judge to inquire into the facts alleged, going beyond mere conclusions of fact alleged by the plaintiff and clearly setting forth the facts entitling the creditor to a writ of attachment as set forth in Code Section 18-3-1. Upon consideration of the inquiry, the judge shall have the discretion to grant or deny the issuance of a writ of attachment. Any order by a judge granting the issuance of a writ of attachment shall be subject to approval of a bond by the clerk of the court, pursuant to Code Section 18-3-10, prior to filing of the writ of attachment. (Ga. L. 1855-56, p. 25, § 2; Code 1863, § 3189; Code 1868, § 3200; Code 1873, § 3265; Code 1882, § 3265; Ga. L. 1893, p. 117, § 1; Civil Code 1895, § 4511; Civil Code 1910, § 5056; Code 1933, § 8-109; Ga. L. 1968, p. 1013, § 1; Ga. L. 1980, p. 1065, § 1.)

JUDICIAL DECISIONS

No basis for writ of attachment. — Absent allegations of property in Georgia, there was no basis for the issuance of a writ of attachment, although the defendants resided outside of Georgia. *Ralls Corp. v. Huerfano River Wind, LLC*, 27 F. Supp. 3d 1303 (N.D. Ga. 2014).

Cited in *Kahn v. Herman*, 3 Ga. 266

(1847); *Deupree v. Eisenach*, 9 Ga. 598 (1851); *Dobbs v. Justices of Inferior Court*, 17 Ga. 624 (1855); *Holston Mfg. Co. v. Lea*, 18 Ga. 647 (1855); *Henderson v. Pittman*, 20 Ga. 735, 65 Am. Dec. 649 (1856); *B.W. & J.P. Force & Co. v. Hubbard*, 26 Ga. 289 (1858); *Harrill v. Humphries*, 26 Ga. 514 (1858); *Brown & Sanford v. McCluskey*, 26

Ga. 577 (1858); *Cohen v. Manco*, 28 Ga. 27 (1859); *Stowers v. Carter*, 28 Ga. 351 (1859); *Brewer v. Ainsworth*, 32 Ga. 487 (1861); *Kennon & Klink v. Evans, Gardner & Co.*, 36 Ga. 89 (1867); *Cox v. Felder*, 36 Ga. 597 (1867); *Irvin v. Howard*, 37 Ga. 18 (1867); *Wilkowski v. Halle*, 37 Ga. 678, 95 Am. Dec. 374 (1868); *Mississippi Cent. R.R. Co. v. Plant*, 58 Ga. 167 (1877); *Guckenheimer & Son v. Day & Higgs*, 74 Ga. 1 (1884); *Krutina v. Culpepper*, 75 Ga. 602 (1885); *DeLeon v. Heller, Hirsch & Co.*, 77 Ga. 740 (1886); *Jones v. Wylie*, 82 Ga. 745, 9 S.E. 614 (1889); *Heard v. National Bank*, 114 Ga. 291, 40 S.E. 266 (1901); *Levin v. American Furn. Co.*, 133 Ga. 670, 66 S.E. 888 (1909); *Silverman & Son v. Sloat & Bro.*, 11 Ga. App. 193, 74 S.E. 938 (1912); *Hensley v. Minehan*, 29 Ga. App. 251, 114 S.E. 647 (1922); *Bennett v. Wheatley*, 154 Ga. 591, 115 S.E. 83 (1922); *Friedman v. First Nat'l Bank*, 31

Ga. App. 742, 122 S.E. 81 (1924); *West v. Gainesville Nat'l Bank*, 32 Ga. App. 703, 124 S.E. 733 (1924); *Brach & Sons v. Oglesby Grocery Co.*, 33 Ga. App. 481, 127 S.E. 157 (1925); *Dulion v. S.A. Lynch Enter. Fin. Corp.*, 53 F.2d 568 (5th Cir. 1931); *Harmon v. Wiggins*, 48 Ga. App. 469, 172 S.E. 847 (1934); *Stalvey v. Varn Motors & Fin. Co.*, 56 Ga. App. 696, 193 S.E. 627 (1937); *Stone v. Atlantic Eng'r & Contracting Co.*, 95 Ga. App. 312, 97 S.E.2d 709 (1957); *Benefield v. Radiator Specialty Co.*, 116 Ga. App. 588, 158 S.E.2d 423 (1967); *Kazakos v. Soteris*, 120 Ga. App. 258, 170 S.E.2d 50 (1969); *Jenkins v. Community Loan & Inv. Corp.*, 120 Ga. App. 543, 171 S.E.2d 654 (1969); *Reeves v. Motor Contract Co.*, 324 F. Supp. 1011 (N.D. Ga. 1971); *Doran v. Home Mart Bldg. Centers, Inc.*, 233 Ga. 705, 213 S.E.2d 825 (1975); *Johnson v. American Credit Co.*, 581 F.2d 526 (5th Cir. 1978).

OPINIONS OF THE ATTORNEY GENERAL

Magistrate courts' power to order prejudgment attachment. — Because magistrate courts are not "courts of re-

cord" those courts may not order prejudgment attachment or garnishment. 1984 Op. Att'y Gen. No. U84-28.

RESEARCH REFERENCES

ALR. — Affidavits stating grounds of attachment on information and belief, 86 ALR 588.

18-3-10. Bond requirements generally.

No writ of attachment shall issue unless accompanied by a bond with good security, conditioned to pay the defendant all costs and damages that he may sustain in consequence of the issuance of the writ of attachment in the event that the amount claimed to be due was not due, that no lawful ground for issuance of the attachment existed, or that the property sought to be attached was not subject to attachment. The bond shall be in a sum equal to twice the amount claimed due in the plaintiff's application. The bond shall be presented to the clerk of the court where the application provided for in Code Section 18-3-9 is sought to be filed for approval by such clerk prior to filing of the writ of attachment. (Laws 1833, Cobb's 1851 Digest, p. 83; Ga. L. 1855-56, p. 25, § 3; Code 1863, § 3190; Code 1868, § 3201; Code 1873, § 3266; Code 1882, § 3266; Ga. L. 1892, p. 56, § 1; Civil Code 1895, § 4512; Civil Code 1910, § 5057; Code 1933, § 8-111; Ga. L. 1980, p. 1065, § 2.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

FAILURE TO GIVE ATTACHMENT BOND

LIABILITY ON ATTACHMENT BOND

RECOVERY ON ATTACHMENT BOND

General Consideration

Requirements of former Code 1933, § 8-111 were mandatory and prerequisite to issuance of attachment. *Powell v. Stinson's Garage, Inc.*, 97 Ga. App. 613, 103 S.E.2d 580 (1958).

Principal cannot be surety to the principal's own bond. *Bonds v. Powl*, 140 Ga. App. 140, 230 S.E.2d 133 (1976).

President of corporation may be surety for the corporation. *Levin v. American Furn. Co.*, 133 Ga. 670, 66 S.E. 888 (1909).

Notary public, who was attorney for plaintiff, cannot take bond required by former Code 1868, § 3201. *Wilkowski v. Halle*, 37 Ga. 678, 95 Am. Dec. 374 (1868).

Security must also be of twice the value of the debt. *Lockett v. DeNeufville*, 55 Ga. 454 (1875).

Amount of interest due on debt may be disregarded. *Saulter v. Butler*, 10 Ga. 510 (1851).

Cited in *Kahn v. Herman*, 3 Ga. 266 (1847); *Brown, Shipley & Co. v. Clayton*, 12 Ga. 564 (1853); *Shockley v. Davis*, 17 Ga. 175 (1855); *Smith v. Joiner*, 27 Ga. 65 (1855); *Alston v. Dunning*, 35 Ga. 229 (1866); *Cox v. Felder*, 36 Ga. 597 (1867); *Rogers v. Birdsall Co.*, 72 Ga. 133 (1883); *Guckenheimer & Son v. Day & Higgs*, 74 Ga. 1 (1884); *Born v. Williams & Bro.*, 81 Ga. 796, 7 S.E. 868 (1888); *Goggins v. Jones*, 115 Ga. 596, 41 S.E. 995 (1902); *Greene v. Lombard*, 33 Ga. App. 518, 126 S.E. 890 (1925); *Harmon v. Wiggins*, 48 Ga. App. 469, 172 S.E. 847 (1934); *Higgins v. Gosden*, 53 Ga. App. 313, 185 S.E. 574 (1936); *Stalvey v. Varn Motors & Fin. Co.*, 56 Ga. App. 696, 193 S.E. 627 (1937); *Maryland Cas. Co. v. Tow*, 71 Ga. App. 178, 30 S.E.2d 433 (1944); *Irwin v. Griffin*, 202 Ga. 456, 43 S.E.2d 687 (1947); *Draper Canning Co. v. Dempsey*, 91 Ga. App. 593, 86 S.E.2d 678 (1955); *Kitson v. Hawke*,

136 Ga. App. 92, 220 S.E.2d 28 (1975); *Johnson v. American Credit Co.*, 581 F.2d 526 (5th Cir. 1978); *Solomon Refrigeration, Inc. v. Osburn*, 148 Ga. App. 772, 252 S.E.2d 686 (1979).

Failure to Give Attachment Bond

Bond requirement of this statute was jurisdictional and noncompliance rendered attachment null and void. *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937).

Requirement that plaintiff in attachment give specified bond is jurisdictional, and its absence renders proceeding fatally defective. *Tapley v. Proctor*, 150 Ga. App. 337, 258 S.E.2d 25 (1979).

Financial inability to give attachment bond renders proceeding seeking attachment fatally defective. *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937).

Mere financial inability to furnish bond required affords no lawful basis for equitable interference. *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937).

Liability on Attachment Bond

Liability of surety on statutory bond. — See *United States Fid. & Guar. Co. v. Luttrell*, 110 Ga. App. 325, 138 S.E.2d 457 (1964).

Extent of liability. — Under statutory bond required of the plaintiff in attachment, the defendant cannot recover from the principal and surety thereon for damage other than such as proximately results from seizure of the defendant's property under such attachment. *Dunn & McCarthy, Inc. v. Pinkston*, 54 Ga. App. 92, 187 S.E. 175 (1936).

Liability for wrongful attachment. — Fact that attachment is irregular or void will not screen the plaintiff in attachment or surety on attachment bond from

liability for damages resulting from wrongful attachment, levy, and sale of the defendant's property thereunder. *United States Fid. & Guar. Co. v. Luttrell*, 110 Ga. App. 325, 138 S.E.2d 457 (1964).

Recovery on Attachment Bond

Conditions necessary to recovery on attachment bond. — Only conditions necessary to recovery on bond are failure on the part of the plaintiff to recover in the case and sustaining by defendant of damages or costs in consequence of the suing out of attachment. No question of malicious use or abuse of legal process or other additional element necessary for a recovery in tort is involved. *United States Fid. & Guar. Co. v. Luttrell*, 110 Ga. App. 325, 138 S.E.2d 457 (1964).

Seizure of defendant's property is a prerequisite to action on attachment bond. *Massachusetts Bonding & Ins. Co. v. United States Conservation Co.*, 31 Ga. App. 716, 122 S.E. 728 (1924).

Recovery on statutory bond permitted if any property wrongfully seized belongs to defendant in attachment, although some of the property does not.

United States Fid. & Guar. Co. v. Luttrell, 110 Ga. App. 325, 138 S.E.2d 457 (1964).

Plaintiff's failure as condition precedent. — Failure of the plaintiff to recover in attachment is condition precedent to recovery on statutory bond. *M & M Transf. Co. v. Auto Rental & Leasing, Inc.*, 313 F. Supp. 907 (N.D. Ga. 1970).

Action on attachment bond will lie without preliminary recovery against plaintiff. *Fourth Nat'l Bank v. Mayer*, 96 Ga. 728, 24 S.E. 453 (1895).

Compensatory damages, including attorney's fees, interest, and expenses are recoverable in action on attachment bond, but not exemplary damages, which can only be recovered by common-law action. *Fourth Nat'l Bank v. Mayer*, 96 Ga. 728, 24 S.E. 453 (1895).

Recovery unavailable against surety for attorney's fees for prosecuting suit on attachment bond against the surety. *United States Fid. & Guar. Co. v. Luttrell*, 108 Ga. App. 606, 134 S.E.2d 77 (1963).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2C Am. Jur. Pleading and Practice Forms, Attachment and Garnishment, §§ 385, 452.

ALR. — Liability on attachment bond as affected by lack of levy or by invalid levy, 108 ALR 917.

Recovery of value of use of property wrongfully attached, 45 ALR2d 1221.

Right to recover attorney's fees for wrongful attachment, 65 ALR2d 1426.

What constitutes malice sufficient to justify an award of punitive damages in action for wrongful attachment or garnishment, 61 ALR3d 984.

18-3-10.1. Service of process in action by defendant against nonresident plaintiff for damages.

When a person who has been a defendant in attachment desires to bring an action against the plaintiff for damages, and the plaintiff in attachment does not reside in this state, it shall be sufficient to serve the complaint and summons on the security to the bond given by the plaintiff, and the action may proceed against both principal and security. (Ga. L. 1855-56, p. 25, § 54; Code 1863, § 3267; Code 1868, § 3278; Code 1873, § 3354; Code 1882, § 3354; Civil Code 1895, § 5013; Civil Code 1910, § 5595; Code 1933, § 3-304.)

Cross references. — Service of process generally, § 9-11-4.

JUDICIAL DECISIONS

Constitutionality. — Proceeding under this statute afforded due process of law and did not violate U.S. Const., amend. 14. *Continental Nat'l Bank v. Folsom*, 78 Ga. 449, 3 S.E. 269 (1887).

Service on security of nonresident national bank which gave bond under statute was sufficient. *Continental Nat'l Bank v. Folsom*, 78 Ga. 449, 3 S.E. 269 (1887).

RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Process, §§ 31, 32, 84.

18-3-11. Persons who may make affidavit and execute bond where debt due to partnership or several persons jointly.

When the debt, for the recovery of which the attachment is sought, is due to a partnership or is due to several persons jointly, any one of the partners or joint creditors, his agent, or his attorney at law may make the affidavit and give the bond as prescribed and sign the names of the other partners or joint creditors to said bond; and the partners or joint creditors shall be bound thereby in the same manner as though they had signed it themselves. (Ga. L. 1855-56, p. 25, § 4; Code 1863, § 3191; Code 1868, § 3202; Code 1873, § 3267; Code 1882, § 3267; Civil Code 1895, § 4513; Civil Code 1910, § 5058; Code 1933, § 8-110.)

JUDICIAL DECISIONS

Partner cannot be surety on partnership bond. *Copeland & Co. v. Monroe*, 16 Ga. App. 586, 85 S.E. 789 (1915).

Cited in *Williams Bros. Lumber Co. v. Anderson*, 210 Ga. 198, 78 S.E.2d 612 (1953).

RESEARCH REFERENCES

ALR. — Affidavits stating grounds of attachment on information and belief, 86 ALR 588.

18-3-12. Persons who may be taken as security or surety on a bond.

No person shall be taken as security or surety on any attachment bond who is an attorney for the plaintiff or a nonresident, except such nonresident who is possessed of real estate in the county where the attachment issues which is the value of the amount of such bond. (Ga.

L. 1873, p. 29, § 1; Code 1873, § 3268; Code 1882, § 3268; Civil Code 1895, § 4514; Civil Code 1910, § 5059; Code 1933, § 8-112.)

JUDICIAL DECISIONS

Plaintiff's attorney as surety. — Former Civil Code 1895, § 4514 was directory; consequently, a proceeding was not void when plaintiff's attorney signs bond as surety. *Husband Bros. v. Georgia S. &*

Florida Ry. Co., 3 Ga. App. 157, 59 S.E. 326 (1907).

Cited in *Burton v. Wynne*, 55 Ga. 615 (1876).

18-3-13. Procedure for contesting sufficiency of bond; review of sufficiency of bond; requirement of additional security or new bond; failure to give additional security or new bond.

When any attachment shall be issued and levied upon the property of the defendant, the defendant, his agent, or his attorney may file an affidavit stating that he has a good defense to the action, that the bond given in the action is not a good bond, and stating the ground of its insufficiency. When the affidavit is made and delivered to the levying officer, the officer shall return such attachment together with the affidavit forthwith to the judge issuing the attachment. The judge issuing the attachment shall without delay hear testimony as to the sufficiency of the bond and may in his discretion require additional security or a new bond to be given within such time as he may prescribe. If the plaintiff fails to provide such additional security or new bond, the judge shall dismiss the levy made under the attachment. (Ga. L. 1873, p. 29, § 2; Code 1873, § 3271; Code 1882, § 3271; Ga. L. 1892, p. 56, § 2; Civil Code 1895, § 4517; Ga. L. 1899, p. 37, § 1; Civil Code 1910, § 5062; Code 1933, § 8-113; Ga. L. 1980, p. 1065, § 3.)

JUDICIAL DECISIONS

No question of amendment can be entertained, except amendment of bond, and of that only insofar as may be necessary to make the bond conform to law as a bond in support of attachment as originally issued and levied. *Lockett v. DeNeufville*, 55 Ga. 454 (1875).

Amendment of bond. — Plaintiff in attachment may amend the plaintiff's bond, "as in other cases at common law." *Collins v. Southern Fin. Corp.*, 51 Ga. App. 400, 180 S.E. 744 (1935).

Amendment of bond which was absolutely void was not authorized by this statute. *Copeland & Co. v. Monroe*, 16 Ga. App. 586, 85 S.E. 789 (1915).

Filing of attachment bond for first time at trial term was not authorized by statute. *Copeland & Co. v. Monroe*, 16 Ga. App. 586, 85 S.E. 789 (1915).

Burden of proof is on defendant to show insufficiency of bond. *Reid v. Armour Packing Co.*, 93 Ga. 696, 21 S.E. 131 (1894); *Stephens v. Woodson*, 8 Ga. App. 639, 70 S.E. 55 (1911).

Time for raising objection. — Judgment on attachment not void for insufficiency of bond when question not raised in proceeding. *Collins v. Southern Fin. Corp.*, 51 Ga. App. 400, 180 S.E. 744 (1935).

Surety on bond as a minor whose contracts are voidable. — Contract

made by minor not void, but is voidable only; it is therefore no ground for dismissal of attachment that surety upon attachment bond executed by plaintiff in attachment was a minor. *Benjamin v. Pardue*, 44 Ga. App. 587, 162 S.E. 291 (1932).

Cited in *Gregory v. Clark*, 73 Ga. 542

(1884); *Reid v. Armour Packing Co.*, 93 Ga. 696, 21 S.E. 131 (1894); *Kesler v. Groover*, 58 Ga. App. 548, 199 S.E. 332 (1938); *Kitson v. Hawke*, 231 Ga. 157, 200 S.E.2d 703 (1973); *Hagopian v. Consolidated Equities Corp.*, 397 F. Supp. 934 (N.D. Ga. 1975).

RESEARCH REFERENCES

ALR. — Constitutionality of statute prescribing conditions of right of defendant in foreign attachment to appear and defend, 17 ALR 884.

Duty to give bond and procure return of property in order to mitigate damages from its wrongful seizure under legal process, 33 ALR 1479.

Value of attached property as limit of liability on bond to release attachment, 80 ALR 595.

Liability on attachment bond as affected by lack of levy or by invalid levy, 108 ALR 917.

18-3-14. Service of copy of writ of attachment on defendant; notification of defendant of issuance of attachment.

(a) The defendant shall be given notice of the attachment issued against his property by any one or more of the following methods:

(1) The plaintiff, at the time the attachment is filed with the clerk, shall commence procedures to effectuate the service of a copy of the writ of attachment on the defendant; and service thereafter shall be made on the defendant as soon as is reasonably practicable. Service pursuant to this paragraph shall be made pursuant to Code Section 9-11-4;

(2) The plaintiff, after issuance of the writ of attachment and not more than three business days after levy upon the property of the defendant, shall cause a written notice to be sent to the defendant at defendant's last known address by registered or certified mail or statutory overnight delivery, return receipt requested. Either the return receipt indicating receipt by the defendant or the envelope bearing the official notification from the United States Postal Service of the defendant's refusal to accept delivery or failure to claim such registered or certified mail or statutory overnight delivery shall be filed with the clerk of the court in which the attachment is pending. The defendant's refusal to accept or failure to claim such registered or certified mail or statutory overnight delivery addressed to defendant shall be deemed notice to defendant;

(3) The plaintiff, after the issuance of the writ of attachment and not more than three business days after levy upon the property of the defendant, shall cause a written notice to be delivered personally to

the defendant by the plaintiff or by plaintiff's attorney at law or other agent. A certification by the person making the delivery shall be filed with the clerk;

(4) When the defendant resides out of the state or has departed the state or cannot, after due diligence, be found within the state or conceals his place of residence from the plaintiff and the fact shall appear, by affidavit, to the satisfaction of the judge or clerk of the court, the levy and attachment shall constitute sufficient notice to the defendant, provided such levy and attachment without more shall constitute sufficient notice, unless the plaintiff has actual knowledge of the defendant's address, in which case, to provide sufficient notice, the plaintiff shall also mail a written notice of attachment to the defendant at said address or, not having actual knowledge of the defendant's address but the address at which the defendant was last known to reside, to provide sufficient notice, the plaintiff shall also mail a written notice of attachment to the defendant at said address. A mailing of the written notice provided in this paragraph shall be made after the issuance of the writ of attachment and not more than three business days after levy upon the property of the defendant, and a certificate of such mailing shall be filed with the clerk by the person mailing the notice;

(5) Where it shall appear by affidavit that a defendant in the attachment action is not a resident of this state or has departed from this state or, after due diligence, cannot be found in this state or that the defendant conceals his place of residence from the plaintiff, notice may be given by causing two publications of the written notice in the paper in which advertisements are printed by the sheriff in each county in which a writ of attachment is served. Such publications must be at least six days apart and the second publication must be made not more than 21 days after levy upon the property of the defendant. A certification by the person causing the notice to be published shall be filed with the clerk, provided such publication shall constitute sufficient notice alone, unless the plaintiff has actual knowledge of the defendant's address, in which case, to provide sufficient notice, the plaintiff shall also mail a written notice of attachment to the defendant at said address. A mailing of the written notice provided in this paragraph shall be made after the issuance of the writ of attachment and not more than three business days after levy upon the property of the defendant, and a certificate of such mailing shall be filed with the clerk by the person mailing the notice; or

(6) Where the defendant's address is known, the plaintiff, after issuance of the attachment and not more than three business days after levy upon the property of the defendant, shall send a written

notice of the attachment to the defendant at such known address by ordinary mail. A certification by the person mailing the notice shall be filed with the clerk.

(b) The receiving by the defendant of actual timely notice of the attachment and levy shall constitute notice.

(c) "Written notice," as referred to in paragraphs (2) through (6) of subsection (a) of this Code section, shall consist of a copy of the affidavit and bond for attachment or of a document which includes the names of the plaintiff and the defendant, the amount claimed in the affidavit for attachment, and the court wherein the proceeding is filed.

(d) The methods of notification specified in subsection (a) of this Code section are cumulative and may be used in any sequence or combination. Where it appears that a plaintiff has reasonably, diligently, and in good faith attempted to use one method, another method thereafter may be utilized and, for the time during which the attempt was being made, the time limit shall be tolled for the subsequent method. (Laws 1799, Cobb's 1851 Digest, p. 70; Ga. L. 1855-56, p. 25, § 5; Code 1863, § 3192; Code 1868, § 3203; Code 1873, § 3269; Code 1882, § 3269; Civil Code 1895, § 4515; Civil Code 1910, § 5060; Code 1933, § 8-114; Ga. L. 1980, p. 1065, § 4; Ga. L. 1991, p. 94, § 18; Ga. L. 2000, p. 1589, § 3.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, certain decisions under former Code 1868, § 3233, former Code 1873, § 3309, former Code 1882, § 3309, and former Code 1933, § 8-602, dealing with notice to the defendant, have been included in the annotations for this Code section.

Absent personal service, appearance, or replevy, in personam judgment is void. — When the defendants were not personally served with notice of pendency of attachment, did not appear and defend, and did not give bond and security to replevy property attached, an in personam judgment against the defendants was accordingly erroneous. *Broome v. Graham*, 99 Ga. App. 682, 109 S.E.2d 824 (1959) (decided under former Code 1933, § 8-602).

Contents of notice. — Written notice to the defendant that attachment was pending against the defendant stating the court to which attachment was returnable, and the time, and stating on what

property attachment had been levied, was sufficient compliance with former Code 1868, § 3233 to authorize proceedings as in ordinary suit, especially if the defendant appeared and pleaded to the merits. *Pool v. Perdue*, 44 Ga. 454 (1871) (decided under former Code 1868, § 3233).

Administrator of defendant who dies pending attachment. — If, pending attachment, the defendant dies, and the defendant's administrator was made party to the proceeding, and no notice was given, as provided by former Code 1873, § 3309, the administrator stood precisely as did the deceased defendant. The administrator may attack the validity of the attachment, and if the administrator's objection was good the whole proceeding fell. *Ross v. Edwards*, 52 Ga. 24 (1874) (decided under former Code 1873, § 3309).

When defendant receives sufficient notice and fails to defend. — When nonresident defendants in attachment were given sufficient notice to put the defendants upon inquiry in time to have

defended, but failed to do so, the supreme court will not control decision of presiding judge in refusing to allow the defendants to open judgment rendered in an attachment case for purpose of pleading to merits. *Steers & Co. v. Morgan & Armstrong*, 66 Ga. 552 (1881) (decided under former Code 1873, § 3309).

Plaintiff may entitle self to general judgment against defendant by giving prescribed notice. *Sutton v. Gunn*, 86 Ga. 652, 12 S.E. 979 (1891) (decided under former Code 1882, § 3309).

Effect on third persons of judgment by court without jurisdiction. — General judgment of court without jurisdiction of particular class of attachments will not be valid against third persons although the judgment might be good against a defendant. *First Nat'l Bank v. Ragan*, 92 Ga. 333, 18 S.E. 295 (1893) (decided under former Code 1882, § 3309).

Absence of signature on notice of attachment. — Although notices of attachment were not signed by the plaintiff, plaintiff's attorney, or anyone as agent for the plaintiff, when the notices conveyed information required by statute and defendants were in no manner prejudiced by absence of a signature, the notice was sufficient to entitle the plaintiff to judgment on the declaration filed as at common law. *Stalvey v. Varn Motors & Fin. Co.*, 56 Ga. App. 696, 193 S.E. 627 (1937).

Cited in *Cox v. Felder*, 36 Ga. 597 (1867); *Tharpe v. Foster*, 52 Ga. 79 (1874); *Bennett v. Wheatley*, 154 Ga. 591, 115 S.E. 83 (1922); *Gaston v. Jackson Nat'l Bank*, 45 Ga. App. 106, 163 S.E. 265 (1932); *Higgins v. Gosden*, 53 Ga. App. 313, 185 S.E. 574 (1936); *Stalvey v. Varn Motors & Fin. Co.*, 56 Ga. App. 696, 193 S.E. 627 (1937); *Sassoon v. State*, 138 Ga. App. 172, 225 S.E.2d 732 (1976); *Johnson v. American Credit Co.*, 581 F.2d 526 (5th Cir. 1978).

18-3-15. Right of defendant to postseizure hearing.

When a writ of attachment is issued against the property of the defendant, the defendant may at any time traverse the plaintiff's affidavit upon which the attachment was obtained, stating that the affidavit is untrue or legally insufficient. Upon filing of the traverse, the court shall issue a show cause order to the plaintiff requiring him to appear at a specified time, which shall not be more than ten days from the filing of the traverse, to prove the grounds for the issuance of the attachment. If the plaintiff shall fail to carry the burden of proof, the order authorizing the attachment shall be revoked. (Code 1933, § 8-114.1, enacted by Ga. L. 1980, p. 1065, § 5.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1868, § 3236, former Code 1873, § 3312, former Code 1882, § 3312, former Civil Code 1895, § 4560, and former Civil Code 1910, § 5107 are included in the annotations for this Code section.

Traverse need not be sworn to. *Ouzts v. Seabrook*, 47 Ga. 359 (1872) (decided under former Code 1868, § 3236).

Demurrer (now motion to dismiss) may be filed for lack of affidavit and attachment dismissed. *DeLeon v. Heller, Hirsch & Co.*, 77 Ga. 740 (1886) (decided under former provisions).

Denial of truth of ground for attachment may be treated as traverse. *Cooley v. Abbey*, 111 Ga. 439, 36 S.E. 786 (1900) (decided under former Code 1893, § 4560).

Third-party claimant to property levied upon. — Claimant of property

levied on by execution issued on judgment founded on attachment cannot, on trial of claim, traverse grounds on which attachment issued. *Foster v. Higginbotham*, 49 Ga. 263 (1873) (decided under former Code 1882, § 3312).

Burden of proof. — On trial of traverse, burden of proof is on plaintiff in attachment. *Oliver v. Wilson*, 29 Ga. 642 (1859) (decided prior to codification of this principle).

Admissibility of evidence to sustain traverse after replevy of attached property. — When ground of attachment is duly traversed, defendant is entitled to introduce evidence to sustain the defendant's traverse, and presiding justice errs in holding that it is too late to do this after the defendant has replevied property attached. *Brumby v. Rickoff*, 94 Ga. 429, 21 S.E. 232 (1894) (decided under former Code 1873, § 3312).

Plaintiff is competent witness as to traverse by administrator regarding contract entered with intestate. — When the plaintiff makes an affidavit for purpose of obtaining attachment against an administrator, and the administrator files traverse to affidavit, the plaintiff is a competent witness upon trial of issue formed, even though the contract, which is the foundation of the plaintiff's claim, was made with intestate. Effect of verdict for the defendant, upon such issue, is a dismissal of attachment. *Ouzts v. Seabrook*, 47 Ga. 359 (1872) (decided under former Code 1868, § 3236).

Waiver. — Objections to form of affida-

vit are waived by appearance of the defendant, and pleading to the merits. *Pool v. Perdue*, 44 Ga. 454 (1871) (decided under former Code 1868, § 3236).

Defendant in attachment does not waive traverse to the plaintiff's affidavit by afterwards pleading to the merits of the action. The two defenses are perfectly consistent, the former going to the writ and the latter to the declaration. *Parker v. Brady*, 56 Ga. 372 (1876) (decided under former Code 1868, § 3236).

Effect of finding issue in defendant's favor. — When issue on traverse is found in favor of the defendant, all defendant gains is that levy falls, and if judgment is obtained on merits the judgment does not date from time of levy, but the judgment would take lien on property attached as well as on other property from date of judgment only. *Blakely Milling & Trading Co. v. Thompson*, 34 Ga. App. 129, 128 S.E. 688 (1924) (decided under former Civil Code 1910, § 5107).

Intervenor's right to traverse affidavit of attachment. — Construing O.C.G.A. §§ 18-3-15 and 18-3-50 in pari materia, in light of the due process requirements, the intervenor has the same right to traverse the plaintiff's affidavit of attachment as the defendant, and once the affidavit of attachment is traversed, the procedure to follow is the same as that accorded the defendant. *Trax, Inc. v. Pentagon Aero-Marine Corp.*, 162 Ga. App. 276, 290 S.E.2d 196 (1982).

Cited in *Williams v. Williams*, 170 Ga. App. 563, 317 S.E.2d 625 (1984).

RESEARCH REFERENCES

ALR. — Filing bond to secure release or return of seized property as appearance, 57 ALR2d 1109.

18-3-16. Issuance and levy of attachment on Sunday.

Attachments may issue and be levied on Sunday when the plaintiff, his agent, or his attorney at law shall state, in his sworn application for a writ of attachment, that he has reason to believe the debt will not be satisfied unless process of attachment shall issue on Sunday and shall also comply with the other provisions of this chapter. (Laws 1834, Cobb's 1851 Digest, p. 482; Ga. L. 1855-56, p. 25, § 23; Code 1863,

§ 3196; Code 1868, § 3207; Code 1873, § 3274; Code 1882, § 3274; Civil Code 1895, § 4520; Civil Code 1910, § 5065; Code 1933, § 8-115.)

JUDICIAL DECISIONS

Omission in pleadings of oath required is amendable when necessary facts existed at time of attachment under

this statute was issued. *Sloan v. Smith*, 29 Ga. App. 591, 116 S.E. 200 (1923).

RESEARCH REFERENCES

ALR. — Power of municipal corporation to legislate as to Sunday observance, 37 ALR 575.

18-3-17. Courts to which attachments returnable; applicability of general rules of civil practice and procedure; filing of declaration in attachment; notice of declaration.

(a) Attachments shall be returnable to the court of record in which filed pursuant to subsection (a) of Code Section 18-3-9 and shall be governed by the rules of procedure and practice governing ordinary civil actions, as respects appearance day, trial term, and judgment pursuant to default, and by any and all other rules relating to procedure and practice.

(b) The plaintiff shall file his declaration in attachment within 15 days after the levy of attachment and the declaration shall thereafter be governed by the rules governing ordinary civil actions as provided for in subsection (a) of this Code section. Notice of the declaration shall be given pursuant to Code Section 18-3-14. (Laws 1799, Cobb's 1851 Digest, pp. 70, 638; Ga. L. 1855-56, p. 25, § 6; Ga. L. 1857, p. 117, § 1; Code 1863, § 3194; Code 1868, § 3205; Code 1873, § 3272; Code 1882, § 3272; Civil Code 1895, § 4518; Civil Code 1910, § 5063; Code 1933, § 8-117; Ga. L. 1962, p. 520, § 1; Ga. L. 1980, p. 1065, § 6.)

Cross references. — Provisions governing pleadings, defenses, and procedures subsequent to filing of declaration

in attachment, § 18-3-18. Civil Practice Act, T. 9, C. 11.

JUDICIAL DECISIONS

Cited in *Wanet v. Corbet*, 13 Ga. 441 (1853); *Duke v. Horton*, 32 Ga. 637 (1861); *Chapman v. Woodruff*, 34 Ga. 91 (1864); *Irvin v. Howard*, 37 Ga. 18 (1867); *Nashville, Chattanooga & St. Louis Ry. Co. v. Cleghorn & Co.*, 94 Ga. 413, 21 S.E. 227 (1894); *Woodward Lumber Co. v. Vizard*, 144 F. 982 (N.D. Ga. 1906); *National Bank*

v. Pritchard, 4 Ga. App. 46, 61 S.E. 841 (1908); *Ferger Grain Co. v. Eatonton Milling & Grocery Co.*, 17 Ga. App. 170, 86 S.E. 401 (1915); *Tygart v. Domestic Elec. Co.*, 151 Ga. 624, 107 S.E. 866 (1921); *Watters & Co. v. O'Neill*, 151 Ga. 680, 108 S.E. 35 (1921); *Carroll & Downs v. Groover*, 27 Ga. App. 747, 110 S.E. 30

(1921); *Bailey v. Kennett*, 32 Ga. App. 255, 122 S.E. 804 (1924); *Farmers Hdwe. Co. v. Bearden*, 32 Ga. App. 445, 123 S.E. 730 (1924); *Gaston v. Jackson Nat'l Bank*, 45 Ga. App. 106, 163 S.E. 265 (1932); *Harmon v. Wiggins*, 48 Ga. App. 469, 172 S.E. 847 (1934); *Stalvey v. Varn Motors & Fin. Co.*, 56 Ga. App. 696, 193 S.E. 627 (1937); *Grand Trunk W.R.R. v. Barge*, 75 Ga. App. 646, 44 S.E.2d 281 (1947); *Harris v. McDaniel*, 92 Ga. App. 299, 88 S.E.2d 442 (1955); *Parker v. Mercer*, 111 Ga. App. 108, 140 S.E.2d 915 (1965); *Peterson v. General Shoe Corp.*, 115 Ga. App. 12, 153 S.E.2d 637 (1967); *Benefield v. Radiator*

Specialty Co., 116 Ga. App. 588, 158 S.E.2d 423 (1967); *Tennessee-Virginia Constr. Co. v. Willingham*, 117 Ga. App. 290, 160 S.E.2d 444 (1968); *Smith v. Hooks*, 117 Ga. App. 837, 162 S.E.2d 296 (1968); *Merchants & Mfrs. Transf. Co. v. Auto Rental & Leasing, Inc.*, 121 Ga. App. 729, 175 S.E.2d 156 (1970); *Smith v. Robinson*, 122 Ga. App. 693, 178 S.E.2d 697 (1970); *M & M Transf. Co. v. Auto Rental & Leasing, Inc.*, 313 F. Supp. 907 (N.D. Ga. 1970); *Hagopian v. Consolidated Equities Corp.*, 397 F. Supp. 934 (N.D. Ga. 1975); *Johnson v. American Credit Co.*, 581 F.2d 526 (5th Cir. 1978).

RESEARCH REFERENCES

ALR. — Attachment or garnishment as affected by trick or device by which the property of or indebtedness to nonresident

was subjected to the jurisdiction, 37 ALR 1255.

18-3-18. Provisions governing pleadings, defenses, and procedures subsequent to filing of declaration in attachment.

All pleadings, defenses, and procedures subsequent to the filing of the declaration in attachment shall be governed by Chapter 10 of Title 9. (Laws 1838, Cobb's 1851 Digest, p. 86; Ga. L. 1855-56, p. 25, § 20; Code 1863, § 3221; Code 1868, § 3232; Code 1873, § 3308; Code 1882, § 3308; Civil Code 1895, § 4556; Civil Code 1910, § 5102; Code 1933, § 8-601; Ga. L. 1962, p. 520, § 2; Ga. L. 1980, p. 1065, § 12.)

Law reviews. — For article surveying judicial developments in Georgia's trial

practice and procedure laws, see 31 Mercer L. Rev. 249 (1979).

RESEARCH REFERENCES

ALR. — Attack by defendant upon attachment or garnishment as an appear-

ance subjecting him personally to jurisdiction, 129 ALR 1240.

18-3-19. Forms for attachment.

In all cases of attachment, the form of the affidavit, bond, attachment, and order authorizing the issuance thereof may be as follows:

(1) Affidavit for attachment.

AFFIDAVIT

STATE OF GEORGIA
COUNTY OF _____

Personally appeared _____ who on oath says that he is attorney at law for _____ and that _____ is indebted to said plaintiff in the sum of \$ _____ and that said defendant _____.

Affiant

Sworn to and subscribed
before me this _____
day of _____, _____.

Judge

(2) Bond.

BOND

STATE OF GEORGIA
COUNTY OF _____

We, _____, principal, and _____, security, jointly and severally acknowledge ourselves bound unto the foregoing defendant in the sum of \$ _____, subject to the following conditions:

The said principal is seeking attachment against the said defendant which is now about to be sued out in the _____ Court of _____ County.

Now, if the said plaintiff shall pay all damages that the defendant may sustain, and also all costs that may be incurred by him in consequence of suing out such attachment, in the event that the said plaintiff shall fail to recover in said case, then this bond shall be void.

(SEAL)
(SEAL)

Witnessed and approved
this _____ day of
_____, _____.

Deputy Clerk,
_____ Court of _____ County

(3) Attachment.

ATTACHMENT

STATE OF GEORGIA
COUNTY OF _____

To the marshal of said court or his lawful deputies, to all and singular the sheriffs or their lawful deputies, and to all lawful constables of said state:

You are commanded to seize so much of the property of the foregoing defendant as will make the sum of \$ _____ and all costs, and to serve such summons of garnishment as may be placed in your hands, and that you make return of this attachment with your actions entered thereon to the _____ term, _____, of the _____ Court of _____ County, to which court this attachment is hereby made returnable.

This _____ day of _____, _____.
_____(SEAL)
_____ Court of _____ County

(4) Order.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____)	
Plaintiff)	
v.	)	Civil action
	)	File no. _____
_____)	
Defendant)	
)	

ORDER

Upon application of the plaintiff for a writ of attachment, and having considered the affidavit with bond attached, and inquiring into the grounds and circumstances herein, it is the determination of this court that the plaintiff is (or is not) entitled to a writ of attachment, and it is

ORDERED that a writ of attachment issue upon the property of the defendant (or that a writ of attachment be denied).

This _____ day of _____, _____.

Judge,
_____ Court of _____ County

(Ga. L. 1855-56, p. 25, § 42; Code 1863, § 3205; Code 1868, § 3216; Code 1873, § 3283; Code 1882, § 3283; Civil Code 1895, § 4529; Civil Code 1910, § 5074; Code 1933, § 8-119; Ga. L. 1980, p. 1065, § 7; Ga. L. 1999, p. 81, § 18.)

JUDICIAL DECISIONS

Affidavit may be sufficient in form though it does not show that debt is due. Askew v. Melvin, 144 Ga. 348, 87 S.E. 278 (1915).

Variance in defendant's name in required documents. — Variance between affidavit and bond on one hand and attachment on the other, in the name of party against whom proceedings are brought is fatal to the attachment. Leffler & Son v. Union Compress Co., 126 Ga. 662, 55 S.E. 927 (1906).

Bill of particulars not annexed to papers. — Attachment not necessarily void because no bill of particulars is annexed to original attachment papers. Pharr v. Estey Piano & Organ Co., 7 Ga. App. 262, 66 S.E. 618 (1909).

Absent levy or seizure of property

under attachment there can be no recovery on bond. Hinton-Bellah, Inc. v. Thebit, 62 Ga. App. 672, 9 S.E.2d 779 (1940).

Effect of release on recovery of attachment expenses. — Fact that plaintiff's property had been released did not preclude the plaintiff from recovering expense sustained in consequence of the attachment. Hinton-Bellah, Inc. v. Thebit, 62 Ga. App. 672, 9 S.E.2d 779 (1940).

Damages recoverable on attachment expenses. — Hinton-Bellah, Inc. v. Thebit, 62 Ga. App. 672, 9 S.E.2d 779 (1940).

Cited in Cohen v. Manco, 28 Ga. 27 (1859); Graves v. Rivers, 123 Ga. 224, 51 S.E. 318 (1905); Thebit v. Hinton-Bellah, Inc., 57 Ga. App. 205, 194 S.E. 894 (1938).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2B Am. Jur. Pleading and Practice Forms, Attachment and Garnish-

ment, § 91. 2C Am. Jur. Pleading and Practice Forms, Attachment and Garnishment, § 340.

18-3-20. Substantial compliance in matters of form sufficient.

A substantial compliance in all matters of form shall be held sufficient in all applications for attachment and in all attachments issued as provided by this chapter. (Ga. L. 1855-56, p. 25, § 43; Code 1863, § 3204; Code 1868, § 3215; Code 1873, § 3282; Code 1882, § 3282; Civil Code 1895, § 4528; Civil Code 1910, § 5073; Code 1933, § 8-118.)

JUDICIAL DECISIONS

Levy failing to state that property was levied on as property of the defendant was amendable and such defect was not ground for arresting judgment. Flegal v. Loveless, 93 Ga. App. 41, 90 S.E.2d 606 (1955).

Absence of signature on notice of attachment. — Although notices of at-

tachment were not signed by the plaintiff, the plaintiff's attorney, or anyone as agent for the plaintiff, where the notices conveyed information required by statute and defendants were in no manner prejudiced by absence of a signature, the notice was sufficient to entitle the plaintiff to judgment on the declaration filed as at com-

mon law. *Stalvey v. Varn Motors & Fin. Co.*, 56 Ga. App. 696, 193 S.E. 627 (1937).

Cited in *B.W. & J.P. Force & Co. v. Hubbard*, 26 Ga. 289 (1858); *Kennon & Klink v. Evans, Gardner & Co.*, 36 Ga. 89

(1867); *Irvin v. Howard*, 37 Ga. 18 (1867); *Black v. Scanlon*, 48 Ga. 12 (1873); *Neal v. Gordon*, 60 Ga. 112 (1878); *Pharr v. Estey Piano & Organ Co.*, 7 Ga. App. 262, 66 S.E. 618 (1909).

ARTICLE 2

LEVY AND REPLEVY OF PROPERTY GENERALLY

Law reviews. — For note discussing procedures for levy upon an attachment, see 12 Ga. L. Rev. 814 (1978).

For comment on *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556

(1972), holding the seizure of property in replevin without notice and hearing or waiver as violative of due process, see 22 J. of Pub. L. 169 (1973).

RESEARCH REFERENCES

ALR. — Right to damages as distinguished from interest for loss of use of property taken in replevin, 6 ALR 478.

What is "stock in trade" within exemption law, 9 ALR 1259.

Seat in chamber of commerce, board of trade, or stock exchange as subject of attachment, garnishment, or execution, 14 ALR 284.

Amount of alternative money judgment in replevin as affected by sale of property under foreclosure of lien of third person, while in hands of unsuccessful party, 22 ALR 215.

Replevin for an undivided share in or undivided quantity of a larger mass, 26 ALR 1015.

Bankruptcy of debtor within four months after attachment or execution as discharging surety on bond given to release property seized thereunder, 36 ALR 449; 107 ALR 1138.

Wrongful attachment or garnishment of debt as conversion, 40 ALR 594.

Amount of judgment recovered by defendant in replevin on account of counter-

claim as within coverage of bond given by plaintiff, 87 ALR 295.

Redemption money in hands of officer as subject to attachment, garnishment, or execution, 94 ALR 1049.

Attack upon attachment after judgment, because of defects or irregularities, 129 ALR 779.

Failure or refusal to surrender possession or disclose whereabouts of property in replevin as contempt, 130 ALR 632.

Validity of attachment of chattels within store or building other than private dwelling, made without removing the goods or without making an entry, 22 ALR2d 1276.

Allowance, in replevin action, of loss of profits from deprivation of use of detained property, 48 ALR2d 1053.

Liability of creditor for excessive attachment or garnishment, 56 ALR3d 493.

Recovery of damages for mental anguish, distress, suffering, or the like, in action for wrongful attachment, garnishment, sequestration, or execution, 83 ALR3d 598.

18-3-30. Duty of officer to whom attachment directed generally; duty of officer to whom attachment directed regarding property removed from county.

It shall be the duty of any one of the officers to whom an attachment is directed to levy the attachment upon real or personal property of the defendant which is necessary to satisfy the claim of the plaintiff and which may be found in the county of which he is an officer. It shall be the

duty of any one of the officers to whom an attachment is directed, where the defendant has removed his property beyond the limits of the county in which the attachment is issued and returnable, to follow the property into any county of the state, levy the attachment upon such property of the defendant which is necessary to satisfy the claim of the plaintiff, and return the property to the county in which the attachment is returnable. (Laws 1799, Cobb's 1851 Digest, p. 70; Laws 1841, Cobb's 1851 Digest, p. 87; Ga. L. 1855-56, p. 25, § 10; Code 1863, § 3206; Code 1868, § 3217; Code 1873, § 3284; Code 1882, § 3284; Civil Code 1895, § 4530; Civil Code 1910, § 5075; Code 1933, § 8-201.)

Law reviews. — For article discussing *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969) in relation to former Georgia law on prejudgment garnishment, see 21 Mercer L. Rev. 495 (1970).

For comment on *Reeves v. Motor Contract Co.*, 324 F. Supp. 1011 (N.D. Ga. 1971), see 23 Mercer L. Rev. 369 (1972).

JUDICIAL DECISIONS

Presumption in favor of officer. — Absent evidence to the contrary, it is presumed that an officer did the officer's duty and did not exceed the officer's authority under this statute. *Connolly v. Atlantic Contracting Co.*, 120 Ga. 213, 47 S.E. 575 (1904).

Failure to state where levy was made. — When return of an officer on levy of attachment fails to show in what county the levy was made, but the levy is in other respects legal and regular, failure to set out where levy was made is not ground for dismissal. *Connolly v. Atlantic Contracting Co.*, 120 Ga. 213, 47 S.E. 575 (1904).

Levy by sheriff of attachment which should properly be levied by a constable is invalid. *Pearce & Renfroe v. Renfroe Bros.*, 68 Ga. 194 (1881).

Cited in *Massengale v. McGinty*, 73 Ga. 120 (1884); *McFarlin v. Board of Drainage Comm'rs*, 153 Ga. 766, 113 S.E. 447 (1922); *Lane v. Bradfield*, 37 Ga. App. 395, 140 S.E. 417 (1927); *Peterson v. General Shoe Corp.*, 115 Ga. App. 12, 153 S.E.2d 637 (1967); *Trax, Inc. v. Pentagon Aero-Marine Corp.*, 162 Ga. App. 276, 290 S.E.2d 196 (1982).

OPINIONS OF THE ATTORNEY GENERAL

Escrow accounts of real estate brokers are not subject to attachment when broker is defendant inasmuch as money in such accounts is not property of the broker

nor does it constitute a debt free from contingencies. 1972 Op. Att'y Gen. No. 72-1.

RESEARCH REFERENCES

ALR. — Levy upon or garnishment of contents of safety deposit box, 39 ALR 1215.

Replevin for bank account, 44 ALR 1522.

Contingent remainder as subject to levy and sale by creditor, 60 ALR 803.

Interest of vendee under conditional sales contract as subject to attachment, garnishment, or execution, 61 ALR 781.

Liability of sheriff or other officer executing process of execution or attachment for failure to seize sufficient property, 93 ALR 316.

Maintainability of replevin or similar possessory action where defendant, at time action is brought, is no longer in possession of property, 97 ALR 896.

Bank deposit as subject of garnishment for debt of depositor as affected by previous acts by bank in relation to deposit, 107 ALR 697.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one of the joint depositors, 11 ALR3d 1465.

Potential liability of insurer under liability policy as subject of attachment, 33 ALR3d 992.

Liquor license as subject to execution or attachment, 40 ALR4th 927.

18-3-31. Levy by officer of attachments in order received; entry of time and date of levy on attachment; entry of levy on docket by clerk.

In all cases it shall be the duty of the officer levying attachments to levy them in the order in which they come into his hands, and it shall be his duty to enter upon the same the year, month, day, and hour on which he made the levy. Where the levy is upon land, the attachment must be entered on the execution or attachment docket by the clerk of the superior court in order to be good against third persons acting in good faith and without actual notice. (Ga. L. 1855-56, p. 25, § 19; Code 1863, § 3208; Code 1868, § 3219; Code 1873, § 3286; Code 1882, § 3286; Ga. L. 1892, p. 58, § 1; Civil Code 1895, § 4532; Civil Code 1910, § 5077; Code 1933, § 8-203.)

History of Code section. — The language of this Code section is derived in part from the decision in *Deveney, Hood &*

Co. v. Burton, 110 Ga. 56, 35 S.E. 268 (1900).

JUDICIAL DECISIONS

Omission of description of property on attachment docket. — Though entry on attachment docket respecting attachment upon land does not contain description of the property, it may not be taken advantage of by a claimant to the property who acquired the property under fraudulent circumstances. *Deveney, Hood & Co. v. Burton*, 110 Ga. 56, 35 S.E. 268 (1900).

Nature of lien of judgment creditor; limitation of judgment's scope. — Lien

of a judgment creditor is not a lien acquired by contract; but is given by law. The judgment creditor is not, therefore, in the position of a bona fide purchaser, and the judgment creditor's lien extends only to property levied upon which actually belongs to the defendant in attachment. *Parker v. Boyd*, 208 Ga. 829, 69 S.E.2d 760 (1952).

18-3-32. Levy on property in a different county.

When the plaintiff in attachment wishes to levy his attachment upon property in a different county from that in which the same is returnable, it shall be the duty of the judge issuing the attachment, upon the

request of the plaintiff, his agent, or his attorney at law, to make out a copy or copies of the original attachment, bond, and affidavit and certify the same officially to be true copies. Upon delivery of the copies of the attachment, bond, and affidavit, as directed, to any officer of the county in which the property of the defendant is located, it shall be the duty of the officer forthwith to levy the attachment upon the property of the defendant located in that county and to return the attachment, with his actings and doings entered thereon, to the court to which the original attachment is returnable. (Laws 1799, Cobb's 1851 Digest, p. 73; Ga. L. 1855-56, p. 25, § 10; Code 1863, § 3193; Code 1868, § 3204; Code 1873, § 3270; Code 1882, § 3270; Civil Code 1895, § 4516; Civil Code 1910, § 5061; Code 1933, § 8-210; Ga. L. 1980, p. 1065, § 8.)

JUDICIAL DECISIONS

Cited in *Gaston v. Jackson Nat'l Bank*, 45 Ga. App. 106, 163 S.E. 265 (1932); *Stalvey v. Varn Motors & Fin. Co.*, 56 Ga. App. 696, 193 S.E. 627 (1937).

RESEARCH REFERENCES

ALR. — Attachment proceedings as affected by officer's failure to comply with statutory requirements as to return or inventory, 93 ALR 748.

Maintainability of replevin or similar possessory action where defendant, at time action is brought, is no longer in possession of property, 97 ALR2d 896.

18-3-33. Replevy of property by defendant generally upon payment of bond; amount of bond; return of property by officer taking bond; right of plaintiff to entry of judgment upon bond.

(a) When an attachment has been levied upon the property of a defendant, it shall be the duty of the officer levying the attachment to deliver the property levied upon to the defendant upon his giving bond, with good security, payable to the plaintiff in attachment, obligating himself to pay the plaintiff the amount of the judgment and costs that he may recover in the case.

(b) Where the value of the property levied upon, as appraised by the levying officer, is equal to or exceeds the claim of the plaintiff, the bond shall be fixed in an amount equal to the amount claimed to be due. Where the value of the property levied upon, as appraised by the levying officer, is less than the claim of the plaintiff, the bond shall be fixed in an amount equal to twice the value of the property levied upon.

(c) The officer taking the bond shall return the bond with the attachment to the court to which the attachment is returnable, and the plaintiff shall be entitled to entry of judgment against the defendant and his sureties upon the bond for the amount of the judgment and costs entered against the defendant in the case. (Laws 1799, Cobb's

1851 Digest, p. 71; Laws 1816, Cobb's 1851 Digest, p. 74; Ga. L. 1855-56, p. 25, § 11; Code 1863, § 3232; Code 1868, § 3243; Ga. L. 1872, p. 8, § 1; Code 1873, § 3319; Code 1882, § 3319; Civil Code 1895, § 4567; Civil Code 1910, § 5113; Code 1933, § 8-701.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
EFFECT OF REPLEVY BOND
LIABILITY OF SURETY

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under former Code 1933, § 8-901 are included in the annotations for this Code section.

Purpose of section. — Principal of this statute was the same as in garnishment proceedings. *Light v. Hunt*, 17 Ga. App. 491, 87 S.E. 763 (1916).

Bond required only after levy. — Bond provided for in this statute was required only after levy of attachment, and not after judgment on attachment against the property. *Lafferty Lumber Co. v. Thomas*, 37 Ga. App. 226, 139 S.E. 587 (1927) (see O.C.G.A. § 18-3-33).

Section not applicable when parties agree otherwise. — Since no replevy bond was given by the defendant, an agreement between parties that the constable should sell the property on a given date and deliver proceeds of the sale to the sheriff, to be held by the sheriff until final disposition of the case, controls rights of parties, and the provision, allowing the defendant in attachment to replevy the property, did not apply. *Hill v. Hixon*, 151 Ga. 333, 106 S.E. 551 (1921).

Bond with condition to produce property on day of sale was not within statute. *Moody v. Morgan*, 25 Ga. 381 (1858).

When defendant gives bond, a general judgment was authorized. *Mitchell v. Perry*, 145 Ga. 233, 88 S.E. 930 (1916).

One bond given when three attachments are levied will cover judgment in each case. *Irvin v. Howard*, 37 Ga. 18 (1867).

Failure to state name of firm. — After giving replevy bond, firm cannot request dismissal for failure to state name of firm. *DeLeon v. Heller, Hirsch & Co.*, 77 Ga. 740 (1886).

Liability of officer for noncompliance with duties. — *Ford & Booth v. Perkerson*, 59 Ga. 359 (1877).

Cited in *Rogers v. Moore, Jenkins & Co.*, 40 Ga. 386 (1869); *Walker v. Walker*, 42 Ga. 141 (1871); *Wilson v. Danforth*, 47 Ga. 676 (1873); *Nagle v. Lumpkin*, 48 Ga. 521 (1873); *Moore, Jenkins & Co. v. Allen*, 55 Ga. 67 (1875); *Chittenden v. Darden*, 5 F. Cas. 642 (N.D. Ga. 1875); *Reeves v. Chattahoochee Brick Co.*, 85 Ga. 477, 11 S.E. 837 (1890); *Henry v. Lennox-Haldeman Co.*, 116 Ga. 9, 42 S.E. 383 (1902); *Rutland v. Hill*, 19 Ga. App. 528, 91 S.E. 922 (1917); *Blakely Milling & Trading Co. v. Thompson*, 34 Ga. App. 129, 128 S.E. 688 (1925); *Courson v. Manufacturers' Fin. Acceptance Corp.*, 41 Ga. App. 551, 153 S.E. 624 (1930); *Henley v. Colonial Stages S., Inc.*, 56 Ga. App. 722, 193 S.E. 905 (1937); *Johnson v. American Credit Co.*, 581 F.2d 526 (5th Cir. 1978).

Effect of Replevy Bond

Effect of replevy bond. — When property attached has been replevied, attachment is dissolved, bond is substituted for property, and the case stands as if the case had been founded on ordinary principles. *Thompson v. Wright*, 22 Ga. 607 (1857); *Camp v. Cahn*, 53 Ga. 558 (1875); *Walter v. Kierstead*, 74 Ga. 18 (1884); *Woodbridge v. Drought*, 118 Ga. 671, 45 S.E. 266 (1903); *Watters v. Southern Fixture & Cabinet Co.*, 13 Ga. App. 468, 79 S.E. 360 (1913).

Action is in personam. — Replevy bond converts suit from action in rem to action in personam authorizing a common-law judgment. *Middlebrooks v. Carson*, 23 Ga. App. 665, 99 S.E. 151 (1919).

Replevy bond, in converting action in rem to one in personam, is equivalent to appearance. *Ubico Milling Co. v. Poythress*, 29 Ga. App. 134, 113 S.E. 815 (1922).

When defendant in attachment personally appears, replevies property attached, and defends action on its merits, the case proceeds in all respects as an ordinary action in personam and, accordingly, when there was no evidence to support single ground of attachment alleged, and traverse to attachment was well taken, this was not ground for a new trial or for setting aside judgment entered against defendant on the merits. *Patne v. Oliver*, 96 Ga. App. 644, 101 S.E.2d 154 (1957) (decided under former Code 1933, § 8-901).

Replevy bond binds defendant not only to appear, but to pay judgment, if rendered against the defendant. *Cole v. Reilly*, 28 Ga. 431 (1859).

Liability of Surety

When grounds of attachment fail, replevy bond fails in the bond's binding effect upon sureties. *Oliver v. Beasley*, 109 Ga. App. 558, 136 S.E.2d 530 (1964).

When grounds of attachment fail, replevy bond, insofar as it is sought to bind sureties thereon, fails also; in such event there is no liability of sureties on the bond, but their remedy is by affidavit of illegality or, perhaps, by some collateral motion. *Patne v. Oliver*, 96 Ga. App. 644, 101 S.E.2d 154 (1957).

Validity of replevy bond is dependent upon validity of attachment; and if attachment has been dismissed, no liability attaches against surety on the replevy bond, notwithstanding the plaintiff in attachment may, after obtaining jurisdiction in personam over the defendant, have proceeded with the suit and obtained a common-law judgment thereon against the defendant. *Burnette v. Johnson*, 38 Ga. App. 396, 144 S.E. 36 (1928).

Dismissal as to principal on ground of bankruptcy or death. — Since liability of sureties depends upon that of principal, if principal is discharged on ground of bankruptcy or death, case should be dismissed as a whole. *Langston v. Watts*, 142 Ga. 439, 83 S.E. 92 (1914).

If, upon levy of attachment for purchase-money, defendant replevies property by giving bond and security as provided in former Civil Code 1910, § 5113, and if within four months after levy of such attachment, the defendant is adjudicated a bankrupt, the lien of attachment is void, and the principal debtor and surety on replevy bond are both discharged. *Longshore v. Collier*, 37 Ga. App. 450, 140 S.E. 636 (1927).

Rights of plaintiff against sureties on replevy bond are generally the same as against the defendant. *McDonald v. W.W. Kimball Co.*, 144 Ga. 105, 86 S.E. 234 (1915).

When no objection was made to sufficiency of bond sureties not liable for more than amount named in bond. *Jones v. Fayette Fertilizer Co.*, 141 Ga. 32, 80 S.E. 306 (1913).

Bond taken for double the amount levied on sets limit. — When bond is taken for double the amount of property levied on, and judgment in attachment case is for an amount greater than the bond, judgment should be entered on the bond to the extent of the bond, no more and no less. *Wilson & Co. v. Sims*, 144 Ga. 685, 87 S.E. 890 (1916).

Surety on replevy bond not necessary party to defendant's appeal of judgment. — Surety on replevy bond executed by defendant in attachment, where the obligation, which is joint and several, is to pay whatever judgment plaintiff in attachment may obtain against the defendant in attachment, including court costs, is not a necessary and essential party to an appeal by the defendant in attachment from the judgment rendered. *Bunn v. Gamble*, 54 Ga. App. 417, 188 S.E. 257 (1936).

Sureties on replevy bond posted by the defendant upon attachment of the defendant's property are not necessary or essential parties to appeal following judgment against the defendant and the

Liability of Surety (Cont'd)

defendant's sureties. *Patne v. Oliver*, 96 Ga. App. 644, 101 S.E.2d 154 (1957).

Liability of sureties on appeal. — Sureties are liable as security upon appeals, notwithstanding loss or destruction of property. *Irvin v. Howard*, 37 Ga. 18 (1867).

Sureties cannot urge after judgment against the sureties that attachment would not lie against property attached. *Craig v. Herring & Turner ex rel. McCandless*, 80 Ga. 709, 6 S.E. 283 (1888).

When sheriff, unknown to plaintiff, fraudulently induced sureties to sign, legality of the bond was not affected; re-

dress of sureties is against sheriff. *Craig v. Herring & Turner ex rel. McCandless*, 80 Ga. 709, 6 S.E. 283 (1888).

Sureties making claim contrary to replevy bond. — When replevy bond executed by sureties recited that the property levied on was levied on as property of the defendant, the sureties are estopped to deny a valid levy on ground that levy failed to state that property was levied on as property of the defendant. *Flegal v. Loveless*, 93 Ga. App. 41, 90 S.E.2d 606 (1955).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2C Am. Jur. Pleading and Practice Forms, Attachment and Garnishment, §§ 340, 494. 21B Am. Jur. Pleading and Practice Forms, Replevin, § 2.

ALR. — Voluntary dismissal of replevin action by plaintiff as affecting defendant's right to judgment for the return or value of the property, 2 ALR 200.

Recovery for depreciation of property between the date it was replevied and final judgment, 24 ALR 1189.

Replevin for an undivided share in or undivided quantity of a larger mass, 26 ALR 1015.

Duty to give bond and procure return of property in order to mitigate damages from its wrongful seizure under legal process, 33 ALR 1479.

Liability on bond in replevin as affected by superior title or lien of third person, or seizure thereunder, 36 ALR 1102.

Premium for redelivery bond as item of damages for wrongful attachment, 42 ALR 1057.

Sufficiency of offer or tender to satisfy requirement of judgment or condition of bond in replevin for delivery or redelivery of chattels, 57 ALR 806.

Answering to merits or giving bond for release of attachment as waiver of objections to attachment, 72 ALR 120.

Liability of surety on replevin bond as affected by amendment of pleadings in replevin, 90 ALR 541.

Right of one joint owner of personal property to maintain against third person replevin, detinue, trover, or other action to recover possession or damages, 110 ALR 353.

Recovery of damages in replevin for usable value of property detained, by successful party having only security interest as conditional vendor, chattel mortgagee, or the like, 33 ALR2d 774.

Filing bond to secure release or return of seized property as appearance, 57 ALR2d 1109.

Posting of redelivery bond by defendant in attachment as waiver of damages for wrongful attachment, 57 ALR2d 1376.

Replevin or claim-and-delivery: Modern view as to validity of statute or contractual provision authorizing summary repossession of consumer goods sold under retail installment sales contract, 45 ALR3d 1233.

18-3-34. Replevy of property of foreign corporation upon payment of bond; return of bond by levying officer; right of plaintiff to entry of judgment on bond.

When an attachment is levied on the property of a foreign corporation, any agent of the corporation may recover the property levied upon by giving a bond, with good security, conditioned to pay the amount of judgment and costs that the plaintiff in attachment may recover in the case. The officer taking the bond shall return the bond with the attachment to the court to which the attachment is made returnable; and the plaintiff shall be entitled to entry of judgment against the corporation and its sureties upon the bond for the amount of the judgment and costs entered against the corporation in the case. (Ga. L. 1855-56, p. 25, § 33; Code 1863, § 3233; Code 1868, § 3244; Code 1873, § 3320; Code 1882, § 3320; Civil Code 1895, § 4568; Civil Code 1910, § 5114; Code 1933, § 8-702.)

JUDICIAL DECISIONS

Cited in Turner's Chapel A.M.E. 49 S.E. 272 (1904); Parramore v. Alexander, 132 Ga. 642, 64 S.E. 660 (1909).
Church v. Lord Lumber Co., 121 Ga. 376,

RESEARCH REFERENCES

ALR. — Recovery for depreciation of property between the date it was replevied and final judgment, 24 ALR 1189.

Duty to give bond and procure return of property in order to mitigate damages from its wrongful seizure under legal process, 33 ALR 1479.

Premium for redelivery bond as item of damages for wrongful attachment, 42 ALR 1057.

Sufficiency of offer or tender to satisfy requirement of judgment or condition of bond in replevying for delivery or redelivery of chattels, 57 ALR 806.

ARTICLE 3

THIRD-PARTY CLAIMS

Law reviews. — For note discussing procedures by which one not an original party to an attachment may interpose a

claim to the attached property, see 12 Ga. L. Rev. 814 (1978).

RESEARCH REFERENCES

ALR. — Right upon ground of duress to recover back money paid upon an excessive or unfounded claim to avoid an attachment, 18 ALR 1233.

Liability on bond in replevin as affected by superior title or lien of third person, or seizure thereunder, 36 ALR 1102.

Obligation of surety on attachment bond as affected by attachment defen-

dant's adjudication in bankruptcy, 68 ALR 1331.

General denial by answer in action for conversion or replevin as permitting proof of special title, lien, or right of possession, 104 ALR 1154.

Failure or refusal to surrender possession or disclose whereabouts of property in replevin as contempt, 130 ALR 632.

Allowance, in replevin action, of loss of profits from deprivation of use of detained property, 48 ALR2d 1053.

18-3-50. Procedure generally.

(a) When property is levied on by virtue of an attachment and the same is claimed by any person not a party to the attachment, it shall be the duty of the person claiming the same, his agent, or his attorney at law to make an oath before some person authorized by law to administer an oath that the property levied on is the property of the claimant and is not subject to the attachment according to the best of his knowledge and belief.

(b) The claimant shall give bond, with good security, payable to the plaintiff in attachment in a sum not larger than double the amount of the attachment levied and, where the property attached is of less value than the attachment, in the judgment of the levying officer, then in double the value of the property conditioned to pay the plaintiff all damages which the jury, on the trial of the right of property, may assess against him in case it should be made to appear that the claim was made for the purpose of delay; and, in case the claim is interposed by the agent or attorney at law of the claimant, the agent or attorney at law shall have power to sign the name of the claimant to the bond, and the claimant shall be bound in the same manner as though he had signed it himself. It shall be the duty of the levying officer taking the affidavit and bond to return the same to the court to which the attachment is returnable, unless the property levied on should be real estate, in which case it shall be his duty to return the same to the superior court of the county where the land lies, provided that, if the claimant is unable to give such bond and security, he may interpose his claim as provided in Code Section 9-15-2. (Laws 1814, Cobb's 1851 Digest, p. 72; Ga. L. 1855-56, p. 25, § 34; Code 1863, § 3235; Code 1868, § 3246; Code 1873, § 3322; Code 1882, § 3322; Ga. L. 1887, p. 40, § 1; Civil Code 1895, § 4569; Civil Code 1910, § 5115; Code 1933, § 8-801.)

Cross references. — Intervention generally, § 9-11-24.

JUDICIAL DECISIONS

Intervention in action. — Claimant who alleges being the true owner is permitted to intervene in an attachment action. *Trax, Inc. v. Pentagon Aero-Marine Corp.*, 162 Ga. App. 276, 290 S.E.2d 196 (1982).

Construing O.C.G.A. §§ 18-3-15 and 18-3-31 in pari materia, in light of the due

process requirements, the intervenor has the same right to traverse the plaintiff's affidavit of attachment as the defendant, and once the affidavit of attachment is traversed, the procedure to follow is the same as that accorded the defendant. *Trax, Inc. v. Pentagon Aero-Marine Corp.*, 162 Ga. App. 276, 290 S.E.2d 196 (1982).

Only issue in third-party claim requires determination of who has title.

— When property is levied on by virtue of attachment and is claimed by one not party to the attachment, the only issue on trial requires determination of who has title to the property. *Bank of Manchester v. Universal Credit Co.*, 45 Ga. App. 233, 164 S.E. 95 (1932).

Prevailing party refusing to take property back and seeking value instead.

— When tortious levy is made upon property of one not party to the process, and one files statutory claim to the property one cannot, upon recovering judgment finding the property not subject, refuse to take the property back from the

officer, and instead seek to hold person causing the levy liable for the property's full market value. *Maxwell v. Speth*, 9 Ga. App. 745, 72 S.E. 292 (1911).

To whom bond payable. — When a claim for property attached is not interposed until after judgment on attachment, claim bond should be made payable to the sheriff as in other claim cases. *Benton v. Benson*, 32 Ga. 354 (1861).

Cited in *James Selman & Co. v. Shackelford*, 17 Ga. 615 (1855); *Manufacturers' Fin. Acceptance Corp. v. Bradley*, 50 Ga. App. 138, 177 S.E. 272 (1934); *Rahal v. Titus*, 107 Ga. App. 844, 131 S.E.2d 659 (1963).

18-3-51. Delivery of property to claimant upon payment of bond; return of affidavit and bond by levying officer.

The claimant, his agent, or his attorney at law may give bond, with good security, payable to the levying officer, in a sum equal to double the value of the property claimed, the value to be judged by the levying officer, conditioned to deliver the property at the time and place of sale, provided the same should be found subject to the attachment; and, upon the delivery of the bond to the levying officer, it shall be his duty to deliver such property to the claimant, his agent, or his attorney at law; and it shall be the duty of the levying officer to return the bond, together with the affidavit and claim bond, to the court to which the attachment is returnable; and, when the claim is interposed by the agent or attorney at law of the claimant, the agent or attorney at law shall have power to sign the name of the claimant to the bond, who shall be bound thereby in the same manner as though he had signed it himself. (Laws 1836, Cobb's 1851 Digest, p. 84; Ga. L. 1855-56, p. 25, § 36; Code 1863, § 3237; Code 1868, § 3248; Code 1873, § 3324; Code 1882, § 3324; Civil Code 1895, § 4571; Civil Code 1910, § 5117; Code 1933, § 8-803.)

JUDICIAL DECISIONS

Refusal to deliver property was a forfeiture of the bond. *Stinson v. Hall*, 54 Ga. 676 (1875).

Breach of bond. — There is a breach of bond when the property has been consumed or otherwise disposed of so as to render it impossible for obligors in bond to deliver the property to levying officer on demand. *Manufacturers' Fin. Acceptance Corp. v. Bradley*, 50 Ga. App. 138, 177 S.E. 272 (1934).

Claimant's inability to deliver property, resulting from claimant's sale of the property, dispenses with advertisement and is a breach of claimant's bond. *Lassiter v. Byrd & Coker*, 55 Ga. 606 (1876).

When claimant breached claimant's bond by converting property and dismissing claimant's claim, claimant thereby waives the right, on trial of suit for breach of bond, to assert that property was not subject to attachment. *Earnest v. Barrett*,

55 Ga. App. 482, 190 S.E. 635 (1937).

Cited in *Thompson v. O'Connor*, 115 Ga. 120, 41 S.E. 242 (1902).

RESEARCH REFERENCES

ALR. — Recovery for depreciation of property between the date it was replevin and final judgment, 24 ALR 1189.

Sufficiency of offer or tender to satisfy requirement of judgment or condition of bond in replevin for delivery or redelivery of chattels, 57 ALR 806.

Right of one joint owner of personal property to maintain against third person

replevin, detinue, trover, or other action to recover possession or damages, 110 ALR 353.

Replevin or claim-and-delivery: Modern view as to validity of statute or contractual provision authorizing summary repossession of consumer goods sold under retail installment sales contract, 45 ALR3d 1233.

18-3-52. Trial of claim.

The third-party claim shall be tried in the same manner and subject to the same rules and regulations as are prescribed by law for the trial of other claims in the court to which it is returned. (Ga. L. 1855-56, p. 25, § 35; Code 1863, § 3236; Code 1868, § 3247; Code 1873, § 3323; Code 1882, § 3323; Civil Code 1895, § 4570; Civil Code 1910, § 5116; Code 1933, § 8-802.)

JUDICIAL DECISIONS

Issue in third-party claim. — When levy was made under attachment before judgment, and a claim interposed thereto, the issue was whether property levied on was that of the defendant in attachment or that of the claimant. *Cecil & Thrasher v. Gazan*, 71 Ga. 631 (1883).

Admissibility of attachment proceedings. — Attachment proceedings are admissible in a claim proceeding, though judgment therein is defective. *Cecil & Thrasher v. Gazan*, 71 Ga. 631 (1883).

Trial of intervenor's traverse claim in the same manner as defendant's traverse. — See *Trax, Inc. v. Pentagon Aero-Marine Corp.*, 162 Ga. App. 276, 290 S.E.2d 196 (1982).

Cited in *Curtis v. Wortsman*, 26 F. 36 (S.D. Ga. 1885); *Foremost Dairies, Inc. v. Kelley*, 51 Ga. App. 722, 181 S.E. 204 (1935); *Rahal v. Titus*, 107 Ga. App. 844, 131 S.E.2d 659 (1963).

18-3-53. Proceedings upon failure of claimant to deliver property pursuant to conditions of bond.

Upon the failure of the claimant to deliver the property according to the conditions of the bond, the levying officer may immediately sue the claimant and security upon the bond and recover the full value of the property claimed and also all damages, costs, and charges that the plaintiff may have sustained in consequence of the failure of the claimant to deliver the property. (Laws 1836, Cobb's 1851 Digest, p. 84; Ga. L. 1855-56, p. 25, § 37; Code 1863, § 3238; Code 1868, § 3249;

Code 1873, § 3325; Code 1882, § 3325; Civil Code 1895, § 4572; Civil Code 1910, § 5118; Code 1933, § 8-804.)

JUDICIAL DECISIONS

Inability to produce property is equivalent to failure to produce property. Manufacturers' Fin. Acceptance Corp. v. Bradley, 50 Ga. App. 138, 177 S.E. 272 (1934).

Occurrence of breach. — There is a breach of bond when property has been consumed or otherwise disposed of so as to render it impossible for obligors in bond to deliver the property to levying officer on demand. Manufacturers' Fin. Acceptance Corp. v. Bradley, 50 Ga. App. 138, 177 S.E. 272 (1934).

Defendant raising defenses decided against defendant in prior claim case.

— One who files claim to levy of attach-

ment and replevies property by giving a forthcoming bond cannot, after judgment has been rendered in the claim case finding the property subject, set up, in defense to an action upon the forthcoming bond, any contention decided against that person by the judgment in the claim case. Thompson v. O'Connor, 115 Ga. 120, 41 S.E. 242 (1902).

Cited in Wade v. Wortsman, 29 F. 754 (S.D. Ga. 1887).

RESEARCH REFERENCES

ALR. — Recovery for depreciation of property between the date it was replevied and final judgment, 24 ALR 1189.

Right of one joint owner of personal property to maintain against third person replevin, detinue, trover, or other action to

recover possession or damages, 110 ALR 353.

Recovery of attorney's fees as damages by successful litigant in replevin or detinue action, 60 ALR2d 945.

18-3-54. Liability of claimant and surety on bond for hire or use of property where plaintiff's debt unsatisfied.

(a) In cases where the claimant shall deliver the property and upon selling the same a sufficient amount shall not be raised to pay the debt and costs of the plaintiff, the plaintiff may institute an action against the claimant and his securities upon his bond and recover the full value of the hire or use of the property while the same has been in the possession of the claimant and also full damages for any deterioration of the value of the property, by use or otherwise, while the same has been in the possession of the claimant, provided such recovery shall not exceed the amount of the debt that may remain due from the defendant in attachment to the plaintiff.

(b) The remedy provided in this Code section is and shall be extended to all other claims in the cases herein provided for. (Ga. L. 1855-56, p. 25, § 38; Code 1863, § 3239; Code 1868, § 3250; Ga. L. 1873, p. 42, § 1; Code 1873, § 3326; Code 1882, § 3326; Civil Code 1895, § 4573; Civil Code 1910, § 5119; Code 1933, § 8-805.)

JUDICIAL DECISIONS

Cited in Frost v. Gibson, 59 Ga. 600 (1877); Walker v. Chambers & Co., 85 Ga. 136, 11 S.E. 582 (1890).

RESEARCH REFERENCES

ALR. — Recovery for depreciation of property between the date it was replevin and final judgment, 24 ALR 1189.

Liability of garnishee to garnishing creditor for depreciation in value of property pending contest, 32 ALR 572.

Sufficiency of offer or tender to satisfy requirement of judgment or condition of bond in replevin for delivery or redelivery of chattels, 57 ALR 806.

Liability of surety on replevin bond as affected by amendment of pleadings in replevin, 90 ALR 541.

Replevin bond or redelivery bond in replevin as covering damages for detention between judgment against principal and delivery or redelivery of property, 90 ALR 972.

Right of one joint owner of personal property to maintain against third person replevin, detinue, trover, or other action to recover possession or damages, 110 ALR 353.

18-3-55. Interposition of claim before or after judgment.

In cases of attachment, the claim may be interposed either before or after judgment. (Orig. Code 1863, § 3240; Code 1868, § 3251; Code 1873, § 3327; Code 1882, § 3327; Civil Code 1895, § 4574; Civil Code 1910, § 5120; Code 1933, § 8-806.)

JUDICIAL DECISIONS

Issue in claim interposed before judgment is whether property levied on is claimant's or defendant's. W.B. Parham & Co. v. Potts-Thompson Liquor Co., 127 Ga. 303, 56 S.E. 460 (1907).

Claim interposed pending attachment dismissed for irregularity. — If a claim, interposed pending attachment, be dismissed for irregularity, such dismissal is no bar to another claim, after judgment

on the attachment. Benton v. Benson, 32 Ga. 354 (1861).

Third person, not party to attachment, may claim property at any time before the property's sale. Simmons v. Bennett, 20 Ga. 48 (1856).

Cited in Rogers v. Bates, 19 Ga. 545 (1856); Cecil & Thrasher v. Gazan, 71 Ga. 631 (1883).

ARTICLE 4

JUDGMENT, EXECUTION, AND LEVY

18-3-70. Property bound by judgment in attachment.

When the defendant has given bond and security, or when he has appeared and made defense by himself or attorney at law without raising a valid defense of lack of jurisdiction over the person, the judgment rendered against him in such case shall bind all his property

and shall have the same force and effect as when there has been personal service, and execution shall issue accordingly, but it shall be first levied upon the property attached. In all other cases, the judgment on the attachment shall only bind the property attached and the judgment shall be entered only against such property. (Code 1933, § 8-901, enacted by Ga. L. 1982, p. 1578, § 1; Code 1981, § 18-3-70, enacted by Ga. L. 1982, p. 1578, § 2.)

JUDICIAL DECISIONS

Cited in *Keishian v. Buckley*, 752 F.2d 1513 (11th Cir. 1984).

18-3-71. Setting aside judgment.

A judgment in attachment may be set aside in a court of law upon an issue suggesting fraud or want of consideration, tendered by a judgment creditor of the defendant in attachment. (Code 1933, § 8-902, enacted by Ga. L. 1982, p. 1578, § 1; Code 1981, § 18-3-71, enacted by Ga. L. 1982, p. 1578, § 2.)

18-3-72. Execution and levy on judgment.

After the judgment has been obtained in any case of attachment, execution shall issue as in cases at common law, which execution shall be levied in the same manner as executions issuing at common law; and the proceedings in all respects shall be the same, except that when the judgment only binds the property levied on by the attachment, as aforesaid, the execution shall be issued against such property only and that property only shall be levied on and sold. (Code 1933, § 8-903, enacted by Ga. L. 1982, p. 1578, § 1; Code 1981, § 18-3-72, enacted by Ga. L. 1982, p. 1578, § 2.)

18-3-73. Application of proceeds of sale.

All money raised by the sale of defendant's property or otherwise, by virtue of this chapter, shall be paid over to the creditors of the defendant, according to the priority of the lien of their judgments, except that as between attaching creditors the attachment first levied shall be first satisfied to the entire exclusion of any attachment of younger levy. (Code 1933, § 8-904, enacted by Ga. L. 1982, p. 1578, § 1; Code 1981, § 18-3-73, enacted by Ga. L. 1982, p. 1578, § 2.)

18-3-74. When lien arises; priorities.

The lien of an attachment is created by the levy and not the judgment in the attachment; and in case of a conflict between attachments, the

first levied shall be first satisfied; but in a contest between attachments and ordinary judgments or suits, it is the judgment and not the levy which fixes the lien. However, the lien of an attachment shall have priority over the lien of an ordinary judgment that has been obtained upon a suit filed after the levy of the attachment. (Code 1933, § 8-905, enacted by Ga. L. 1982, p. 1578, § 1; Code 1981, § 18-3-74, enacted by Ga. L. 1982, p. 1578, § 2.)

18-3-75. Entry on attachment docket; effect of failure to make such entry.

As against the interests of third parties acting in good faith and without notice who may have acquired a transfer or lien binding any real estate, no attachment levied upon real estate shall be a lien on the same from the levy thereof unless said attachment is entered upon the attachment docket of the county in which the real estate is situated within five days from said levy. When the attachment is entered upon the docket after the five days, the lien shall date from such entry; and it shall be the duty of the sheriff to have said entry made within the five days. Nothing in this Code section shall be construed to affect the validity or force of any attachment as between the parties thereto. (Code 1933, § 8-906, enacted by Ga. L. 1982, p. 1578, § 1; Code 1981, § 18-3-75, enacted by Ga. L. 1982, p. 1578, § 2.)

CHAPTER 4

GARNISHMENT PROCEEDINGS

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18-4-8.	Definitions; entity as garnishee; execution and filing by certain officers or employees of an entity.	18-4-45.	Traverse of affidavit of plaintiff by defendant; show cause order; revocation of order upon failure of plaintiff to prove grounds.
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18-4-22.	Exemption of pension or retirement funds or benefits.	Postjudgment Garnishment Proceedings Generally	
18-4-22.1.	Garnishment of funds or benefits of pension, retirement, or employee benefit plans and programs which are subject to the Employee Retirement Income Security Act of 1974 [Repealed].	18-4-60.	Right to writ of garnishment after judgment.
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- 18-4-62. Contents and service of summons of garnishment; requirements as to filing of answer to summons.
- 18-4-63. Issue of additional summons of garnishment; dismissal of garnishment proceedings upon nonissuance of summons.
- 18-4-64. Service of copy of summons of garnishment upon defendant; notice of filing and issuance of summons of garnishment; time for distribution.
- 18-4-65. Issues defendant may raise by traverse of plaintiff's affidavit.
- 18-4-66. Forms for postjudgment garnishment.

Article 5

Answer by Garnishee and Subsequent Proceedings

- 18-4-80. Effect of release of summons of garnishment on garnishee.
- 18-4-81. Effect of defendant's traverse on garnishee; filing of bond by defendant; entry of judgment on bond.
- 18-4-82. Contents of garnishee answer.
- 18-4-83. Service of answer of garnishee on plaintiff or attorney.
- 18-4-84. Delivery to court of property admitted to be subject to garnishment; property in safety deposit box.
- 18-4-85. Traverse of answer of garnishee by plaintiff — Time period; discharge for failure to traverse.
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- 18-4-88. Order of proceedings after answer of garnishee generally.
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- 18-4-90. Entry of default judgment upon failure of garnishee to file garnishee answer to summons; opening of default.

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- 18-4-91. Relief of garnishee from default judgment.
- 18-4-92. Effect of garnishee's failure to respond properly to summons of garnishment.
- 18-4-92.1. Relief of garnishee from liability; definitions.
- 18-4-93. Right of defendant to become a party to garnishment proceedings; procedure.
- 18-4-94. Procedure where defendant prevails generally; establishment of interests in money or other property in court by parties filing claims thereto; distribution of money or other property.
- 18-4-95. Right of claimants of property subject to garnishment to become parties; procedure.
- 18-4-96. Procedure where money or other property in court subject to conflicting cases.
- 18-4-97. Right of garnishee to actual reasonable expenses in making true garnishee answer of garnishment; procedure for collection; reimbursement.

Article 6

Continuing Garnishment Proceedings

- 18-4-110. Right of plaintiff who has obtained money judgment to process of continuing garnishment; methods, practices, and procedures for continuing garnishment generally.
- 18-4-111. Property, money, or effects subject to continuing garnishment.
- 18-4-112. Filing and contents of affidavit for continuing garnishment; issuance of summons; notice and service of summons.
- 18-4-113. Contents of summons of continuing garnishment; filing and contents of garnishee answers.
- 18-4-114. Traverse of garnishee answer by plaintiff.
- 18-4-115. Entry of default judgment against garnishee; relief from default judgment.

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- 18-4-116. Effect of and proceedings upon filing of traverse by defendant.
- 18-4-117. Effect of termination of employment relationship between garnishee and defendant.
- 18-4-118. Forms for continuing garnishment.

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- 18-4-130. Continuing garnishment for family support; issuance of writ of garnishment.
- 18-4-131. Definitions.
- 18-4-132. Contents of affidavit for a continuing garnishment for sup-

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- port; attachment of certified copy of judgment; amendment of affidavit.
- 18-4-133. Service of summons; requirements as to filing of first garnishee answer accompanied by money; application of money.
- 18-4-134. Filing further garnishee answers and tendering money; application of money; filing of final garnishee answer by garnishee upon termination of defendant's employment.
- 18-4-135. Period of attachment of writ of garnishment; garnishee's reliance upon information in affidavit of garnishment.

Cross references. — Executions and judicial sales, T. 9, C. 13. Use of garnishment to collect taxes, § 48-2-55. Garnishments, Uniform Rules for the Superior Courts of Georgia, Rule 15.1.

Law reviews. — For article as to federal restrictions on garnishment, see 21 Mercer L. Rev. 495 (1970). For article, "Garnishment Restrictions Under Federal Law," see 6 Ga. St. B.J. 399 (1970). For article critically analyzing the various elements constitutionally required for prejudgment seizure of a debtor's property, focusing on § 9-503 of the U.C.C., see 28 Mercer L. Rev. 665 (1977). For article

discussing 1976 to 1977 developments in Georgia garnishment law, see 29 Mercer L. Rev. 41 (1977). For article discussing the 1977 revisions of the garnishment statute, see 29 Mercer L. Rev. 265 (1977).

For note discussing the constitutionality of former Georgia garnishment laws, see 28 Mercer L. Rev. 341 (1976). For note discussing notice and judicial supervision in postjudgment garnishment in Georgia, see 26 Emory L.J. 597 (1977). For note discussing constitutional developments affecting garnishment procedures, see 12 Ga. L. Rev. 814 (1978).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1855-6, pp. 36, 37, former Civil Code 1895, § 4709, and former Civil Code 1910, §§ 5265, 5268, and 5269 are included in the annotations for this chapter.

Due process compliance. — Garnishment in attachment must comply with defendant's due process rights under a valid garnishment statute. *Coursin v. Harper*, 144 Ga. App. 4, 240 S.E.2d 565 (1977).

Proceedings on garnishment in attachment which do not comply with statutory

provisions violate the defendant's due process rights under the United States and Georgia Constitutions. *Coursin v. Harper*, 144 Ga. App. 4, 240 S.E.2d 565 (1977).

Constitutional requirements for garnishment proceedings. — See *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975).

Garnishment must be strictly pursued. — Garnishment proceeding is a distinct suit against a separate party, and for an entirely new cause of action, and such proceeding, being purely statutory and in derogation of common law, must be

strictly pursued. *Anderson v. Ledbetter-Johnson Contractors*, 62 Ga. App. 732, 9 S.E.2d 860 (1940).

No constitutional right to jury trial. — Georgia garnishment law is a special statutory proceeding enacted subsequent to the first Georgia Constitution and is in derogation of the common law. Thus, a garnishment action is not a civil action of such a nature in which a trial by jury is guaranteed. *Mull v. Mull*, 167 Ga. App. 687, 307 S.E.2d 675 (1983).

Garnishment constitutes a distinct suit against separate party for an entirely new cause of action. *Ahrens & Ott Mfg. Co. v. Patton Sash, Door & Bldg. Co.*, 94 Ga. 247, 21 S.E. 523 (1894) (decided under former Ga. L. 1855-56, p. 36); *Woods v. Massachusetts Mills*, 17 Ga. App. 422, 87 S.E. 688 (1916); *Lamb v. Whitman*, 17 Ga. App. 687, 87 S.E. 1095 (1916); *Jones v. Maril*, 19 Ga. App. 216, 91 S.E. 445 (1917) (decided under former Civil Code 1910, § 5265).

Issuance of successive summons of garnishment is permissible. *Born v. Williams & Bro.*, 81 Ga. 796, 7 S.E. 868 (1888); *Pratt v. Young*, 90 Ga. 39, 15 S.E. 630 (1892), (decided under former Ga. L. 1855-56, p. 37).

Original summons is served, rather than a copy thereof, and it is unnecessary that a copy be put on file. *Tifton Compress Co. v. Robinson*, 31 Ga. App. 350, 120 S.E. 701 (1923) (decided under former Civil Code 1910, § 5269).

Only evidence record showing to whom summons directed and to what court returnable is officer's entry. *Tifton Compress Co. v. Robinson*, 31 Ga. App. 350, 120 S.E. 701 (1923) (decided under former Civil Code 1910, § 5269).

Waiver. — Appearance and pleading waives all objections to process and return

of officer. *Flournoy & Epping v. Rutledge*, 73 Ga. 735 (1884) (decided under former Ga. L. 1855-56, p. 37).

Defective service waived by appearance of garnishee. *Dooly v. Miles*, 101 Ga. 797, 29 S.E. 118 (1897) (decided under former Civil Code 1895, § 4709).

Summons returnable to justice court, when main suit pending in the superior court, is void. *Durden v. Belt*, 61 Ga. 545 (1878) (decided under former Ga. L. 1855-56, p. 37).

Reliance on officer's promise to notify garnishee when to answer. — Promise by officer that the officer would notify garnishee when to answer, coupled with sheer ignorance on part of latter, was not an excuse. *Jones v. Bibb Brick Co.*, 120 Ga. 321, 48 S.E. 25 (1904) (decided under former Civil Code 1895, § 4709).

Attorney at law of corporation cannot verify answer. *Plant & Son v. Mutual Life Ins. Co.*, 92 Ga. 636, 19 S.E. 719 (1893) (decided under Ga. L. 1855-56, p. 37).

Failure to make timely answer. — Garnishee cannot attack judgment for causes anterior to rendition when garnishee failed to make timely answer. *Henderson v. Mutual Fertilizer Co.*, 150 Ga. 465, 104 S.E. 229 (1920) (decided under former Civil Code 1910, § 5269).

Damages when plaintiff fails in original suit. — When the plaintiff fails to recover in original suit, the defendant may recover as damages the premium on, and expenses paid in procuring dissolution bond, and reasonable attorneys fees. *Collins v. Myers*, 30 Ga. App. 151, 117 S.E. 265 (1923) (decided under former Civil Code 1910, § 5268).

Cited in *Williamson v. Williamson*, 155 Ga. App. 271, 270 S.E.2d 692 (1980).

RESEARCH REFERENCES

ALR. — Necessity and sufficiency, in order to toll statute of limitations as to debt, of statement of amount of debt in

acknowledgment or new promise to pay, 21 ALR4th 1121.

ARTICLE 1

GENERAL PROVISIONS

Law reviews. — For note, “Post-judgment Garnishment in Georgia: Acting Largely in the Dark,” see 12 Ga. L. Rev. 60

(1977). For note discussing postjudgment garnishment as a creditor’s remedy, see 12 Ga. L. Rev. 814 (1978).

JUDICIAL DECISIONS

Constitutionality. — Postjudgment garnishment procedure meets requirements of judicial supervision and notice, and is not unconstitutional for those reasons. *Easterwood v. LeBlanc*, 240 Ga. 61, 239 S.E.2d 383 (1977); *Farmer v. Farmer*, 147 Ga. App. 387, 249 S.E.2d 106 (1978).

Georgia’s garnishment statutes prior to

July 1, 1975, were unconstitutional in prejudgment and postjudgment garnishment cases. *Madsen v. Memorial Sales of Ga., Inc.*, 140 Ga. App. 178, 230 S.E.2d 115 (1976).

Cited in *Lege v. United States*, 236 Ga. 138, 223 S.E.2d 78 (1976).

RESEARCH REFERENCES

ALR. — Attachment or garnishment of goods covered by negotiable warehouse receipt, 40 ALR 969.

Garnishment of carrier in respect of goods shipped, 46 ALR 933.

Attachment or garnishment as interference with foreign or interstate commerce, 85 ALR 1395.

Local property of insolvent foreign corporation for which a liquidator or receiver has been appointed in another state as subject to sequestration or seizure under execution or attachment, 98 ALR 351.

Effect as between garnishor and principal defendant in garnishment of judgment against garnishee, 103 ALR 839.

Effect of judgment in garnishment proceedings as between garnishee and principal defendant, 166 ALR 272.

Recovery of damages for mental anguish, distress, suffering, or the like, in action for wrongful attachment, garnishment, sequestration, or execution, 83 ALR3d 598.

18-4-1. Definitions; practice and procedure generally.

(a) As used in this chapter, the terms “garnishee answer,” “garnishee’s answer,” or “answer of garnishee” means the response filed by a garnishee responding to a summons of garnishment detailing the property, money, or other effects of the defendant that are in the possession of the garnishee or declaring that the garnishee holds no such property, money, or other effects of the defendant.

(b) The procedure in garnishment cases shall be uniform in all courts throughout this state; and, except as otherwise provided in this chapter, Chapter 11 of Title 9 shall apply in garnishment proceedings. (Code 1933, § 46-305, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 1982, p. 3, § 18; Ga. L. 2012, p. 2, § 1/HB 683.)

JUDICIAL DECISIONS

Cited in Legend Carpets v. Stinson, 147 Ga. App. 58, 248 S.E.2d 48 (1978); Associated Dry Goods Corp. v. Kunz & Hauptman, P.C., 247 Ga. 475, 277 S.E.2d 22 (1981); Cale v. Eastern Air Lines, 159 Ga. App. 630, 284 S.E.2d 647 (1981); North Ga. Medical Ctr. v. Food Lion, Inc., 238 Ga. App. 78, 517 S.E.2d 799 (1999); TBF Fin., LLC v. Houston, 298 Ga. App. 657, 680 S.E.2d 662 (2009).

RESEARCH REFERENCES

ALR. — Bank deposit as subject of garnishment for debt of depositor as affected by previous acts by bank in relation to deposit, 107 ALR 697.

18-4-2. Discovery.

Discovery in a garnishment proceeding shall be made in the manner provided for in Chapter 11 of Title 9. (Code 1933, § 46-601, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 1982, p. 3, § 18.)

18-4-3. Amendment of affidavits, bonds, garnishee answer, or pleadings.

Unless otherwise provided in this chapter, any affidavit, bond, garnishee answer, or pleading required or permitted by this chapter shall be amendable at any time before judgment thereon. (Code 1933, § 46-602, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 2012, p. 2, § 2/HB 683.)

JUDICIAL DECISIONS

Amendment after evidence but prior to judgment. — It is not error to allow a party to amend the party’s garnishment affidavit only a few days before judgment, and after all the evidence has been presented. Coleman v. Burnett, 169 Ga. App. 297, 312 S.E.2d 627 (1983).
Absence of a judge’s or clerk’s signature on an affidavit for garnishment did not constitute a nonamendable defect justifying the grant of a motion to set aside a judgment. Horizon Credit Corp. v. Lanier Bank & Trust Co., 220 Ga. App. 362, 469 S.E.2d 452 (1996).
Cited in Concert Promotions, Inc. v. Haas & Dodd, Inc., 169 Ga. App. 711, 314 S.E.2d 720 (1984); Ivey v. Ivey, 170 Ga. App. 226, 316 S.E.2d 840 (1984).

RESEARCH REFERENCES

ALR. — Discharge of attachment or garnishment, or bond for its dissolution, by subsequent amendment of pleadings or writ, 74 ALR 912.

18-4-4. Judge to perform functions of clerk where court has no clerk.

Where this chapter makes the performance of any function the duty of the clerk, the function shall be performed by the judge if the court in

which the proceedings are filed has no clerk. (Code 1933, § 46-604, enacted by Ga. L. 1976, p. 1608, § 1.)

18-4-5. Challenge to sufficiency of bond; requiring of additional security; discharge of original surety.

(a) Any party of record to a proceeding under this chapter who may be affected materially thereby may challenge the sufficiency of any bond required or permitted by this chapter. Such challenge shall be made by motion to require additional security; and, if upon hearing the same the court shall determine that the security upon the bond is inadequate for the purposes for which the bond is filed, an order shall be entered requiring the person filing the bond to furnish additional security within seven days of the date of the order.

(b) The original surety shall not be discharged from his liability on the bond until another surety is approved. (Code 1933, § 46-603, enacted by Ga. L. 1976, p. 1608, § 1.)

JUDICIAL DECISIONS

Cited in *Herring v. Herring*, 143 Ga. App. 286, 238 S.E.2d 240 (1977).

18-4-6. Issuance of release of garnishment.

It shall be the duty of the clerk of the court in which garnishment proceedings are pending to issue a release of garnishment if:

- (1) The plaintiff or his attorney so requests in writing;
- (2) The amount claimed due together with the costs of the garnishment proceeding are paid into court;
- (3) A dissolution bond is filed by the defendant and approved by the clerk as provided for in this chapter;
- (4) A judge shall enter an order, after a hearing required by this chapter, directing that the garnishment be released; or
- (5) The garnishment is dismissed. (Code 1933, § 46-307, enacted by Ga. L. 1976, p. 1608, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 4718, are included in the annotations for this section.

Disposition of effects in garnishee's hands. — Upon dissolution of garnishment, effects in garnishee's hands should be paid to defendant. Garnishee cannot relieve oneself by paying money into

court. *Turner's Chapel A.M.E. Church v. Lord Lumber Co.*, 121 Ga. 376, 49 S.E. 272 (1904) (decided under former Civil Code 1895, § 4718).

Filing of common-law bond is no obstacle to entering of judgment against garnishee. *Warlick v. Neal Loan*

& Banking Co., 120 Ga. 1070, 48 S.E. 402 (1904).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 400 et seq.

Am. Jur. Pleading and Practice

Forms. — 2C Am. Jur. Pleading and Practice Forms, Attachment and Garnishment, § 452.

18-4-7. Discharge of employee subject to garnishment.

No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness, even though more than one summons of garnishment may be served upon such employer with respect to the indebtedness. (Code 1933, § 46-303, enacted by Ga. L. 1976, p. 1608, § 1.)

Law reviews. — For survey article on labor and employment law for the period

from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 303 (2003).

RESEARCH REFERENCES

ALR. — Who is "employee" within debt exemption statute, 58 ALR 777.

Wrongful discharge: employer's liability under state law for discharge of employee based on garnishment order against wages, 41 ALR5th 31.

Protection of debtor from acts of discrimination by private entity under

§ 525(b) of Bankruptcy Code of 1978 (11 USCS § 525(b)), 105 ALR Fed. 555.

Preemption of state-law wrongful discharge claim, not arising from whistleblowing, by § 301(a) of Labor-Management Act of 1947 (29 U.S.C.A. § 185(a)), 184 ALR Fed. 241.

18-4-8. Definitions; entity as garnishee; execution and filing by certain officers or employees of an entity.

(a) As used in this Code section, the term:

(1) "Entity" means a public corporation or a corporation, limited liability company, partnership, limited partnership, professional corporation, firm, or other business entity other than a natural person.

(2) "Public corporation" means the State of Georgia or any department, agency, branch of government, or State of Georgia political subdivision, as such term is defined in Code Section 50-15-1, or any public board, bureau, commission, or authority created by the General Assembly.

(b) When a garnishment proceeding is filed in a court under any provision of this chapter involving an entity as garnishee, the execution and filing of a garnishee answer may be done by an entity's authorized officer or employee and shall not constitute the practice of law. If a traverse or claim is filed to such entity's garnishee answer in a court of record, an attorney shall be required to represent such entity in further garnishment proceedings.

(c) An entity's payment into court of any property, money, or other effects of the defendant, or property or money which is admitted to be subject to garnishment, may be done by an entity's authorized officer or employee and shall not constitute the practice of law. (Code 1981, § 18-4-8, enacted by Ga. L. 2012, p. 2, § 3/HB 683.)

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 1 et seq.

ARTICLE 2

PROPERTY AND PERSONS SUBJECT TO GARNISHMENT

Cross references. — Susceptibility of court-appointed receivers to garnishment, § 9-8-12.

Law reviews. — For note discussing property and persons subject to garnishment, see 12 Ga. L. Rev. 814 (1978).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1855-6, p. 36, former Civil Code 1895, § 4705, and former Civil Code 1910, § 5265, are included in the annotations for this article.

Defendant's unliquidated claim for damages against garnishee. — Claim, debt, or demand owing by garnishee to the defendant, to be subject to process of garnishment cannot be an unliquidated claim for damages against the garnishee. *Curtis v. Bailey*, 51 Ga. App. 119, 179 S.E. 633 (1935) (decided under former Civil Code 1910, § 5265).

Debt due jointly to defendant and nonparty, by weight of authority, cannot be garnished. *Bryant v. McCrary*, 40 Ga. App. 685, 151 S.E. 236 (1929) (decided under former Civil Code 1910, § 5265).

Effect on lien of garnishment of subsequent bankruptcy proceeding. — See *Henley v. Colonial Stages S., Inc.*,

56 Ga. App. 722, 193 S.E. 905 (1937) (decided under former Civil Code 1910, § 5265).

Garnishment proceedings are purely statutory and cannot be extended to property not subject to process. *Weston v. Beverly & McCollum*, 10 Ga. App. 261, 73 S.E. 404 (1912) (decided under former Civil Code 1910, § 5265).

Tort for conversion must be reduced to final judgment before garnishment will lie. *Southern Ry. v. Hodgson Bros. Co.*, 148 Ga. 851, 98 S.E. 541 (1919) (decided under former Civil Code 1910, § 5265).

Garnishment lies in suit on dormant judgment. *Bridges v. North*, 22 Ga. 52 (1857) (decided under Ga. L. 1855-6, p. 36); *Atlanta & W.P.R.R. v. Farmers' Exch.*, 6 Ga. App. 405, 65 S.E. 165 (1909) (decided under former Civil Code 1895, § 4705).

RESEARCH REFERENCES

C.J.S. — 38 C.J.S., Garnishment, § 60 et seq.

ALR. — Liability of garnishee to garnishing creditor for depreciation in value of property pending contest, 32 ALR 572.

Attachment or garnishment of goods covered by negotiable warehouse receipt, 40 ALR 969.

Judgment as subject to garnishment in another court of the state in which it was rendered, 43 ALR 190.

Garnishee's duty as to protection of rights of principal defendant or third person, 45 ALR 646.

Garnishment of carrier in respect of goods shipped, 46 ALR 933.

Garnishment of fire insurer, 53 ALR 724.

Foreign attachment or garnishment upon which jurisdiction is dependent resting upon property coming into hands of garnishee, or obligations having their inception, after service of the writ, 53 ALR 1022.

Garnishment of salaries, wages, or commissions not expressly exempted by statute, 56 ALR 601.

Accounts in one's hands for collection as subject of garnishment, 60 ALR 884.

Expiration of period of life of judgment as affecting pending garnishment proceeding by judgment creditor against one indebted to judgment debtor, 75 ALR 1359.

Interest of mortgagor or pledgor in property in possession of mortgagee or pledgee as subject of garnishment, 83 ALR 1383.

Attachment or garnishment as interference with foreign or interstate commerce, 85 ALR 1395.

Effect as between garnishor and principal defendant in garnishment of judgment against garnishee, 103 ALR 839.

Home Owners' Loan Corporation or other similar agency as subject to garnishment, 108 ALR 705.

Garnishment as remedy in case of violation of bulk sales law, 155 ALR 1061.

Garnishee's pleading, answering interrogatories, or the like, as affecting his right to assert court's lack of jurisdiction, 41 ALR2d 1093.

Recovery of damages for mental anguish, distress, suffering, or the like, in action for wrongful attachment, garnishment, sequestration, or execution, 83 ALR3d 598.

18-4-20. Property subject to garnishment generally; claim amount and defendant's social security number on summons; information to be contained on summons of garnishment upon financial institution.

(a) As used in this Code section, the term:

(1) "Disposable earnings" means that part of the earnings of an individual remaining after the deduction from those earnings of the amounts required by law to be withheld.

(2) "Earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

(b) All debts owed by the garnishee to the defendant at the time of service of the summons of garnishment upon the garnishee and all debts accruing from the garnishee to the defendant from the date of service to the date of the garnishee's answer shall be subject to process of garnishment; and no payment made by the garnishee to the defen-

dant or to his order, or by any arrangement between the defendant and the garnishee, after the date of the service of the summons of garnishment upon the garnishee, shall defeat the lien of such garnishment.

(c) All property, money, or effects of the defendant in the possession or control of the garnishee at the time of service of the summons of garnishment upon the garnishee or coming into the possession or control of the garnishee at any time from the date of service of the summons of garnishment upon the garnishee to the date of the garnishee's answer shall be subject to process of garnishment except, in the case of collateral securities in the hands of a creditor, such securities shall not be subject to garnishment so long as there is an amount owed on the debt for which the securities were given as collateral.

(d)(1) Notwithstanding subsection (a) of this Code section, the maximum part of the aggregate disposable earnings of an individual for any work week which is subject to garnishment may not exceed the lesser of:

(A) Twenty-five percent of his disposable earnings for that week; or

(B) The amount by which his disposable earnings for that week exceed 30 times the federal minimum hourly wage prescribed by Section 6(a)(1) of the Fair Labor Standards Act of 1938, U.S.C. Title 29, Section 206(a)(1), in effect at the time the earnings are payable.

(2) In case of earnings for a period other than a week, a multiple of the federal minimum hourly wage equivalent in effect to that set forth in subparagraph (B) of paragraph (1) of this subsection shall be used.

(e) The limitation on garnishment set forth in subsection (d) of this Code section shall apply although the garnishee may receive a summons of garnishment in more than one garnishment case naming the same defendant unless the garnishee has received a summons of garnishment based on a judgment for alimony or the support of a dependent, in which case the limitation on garnishment set forth in subsection (f) of this Code section shall apply although the garnishee may receive a summons of garnishment in more than one garnishment case naming the same defendant. No garnishee shall withhold from the disposable earnings of the defendant any sum greater than the amount prescribed by subsection (d) or subsection (f) of this Code section, as applicable, regardless of the number of summonses served upon the garnishee.

(f) The exemption provided by subsection (d) of this Code section shall not apply if the judgment upon which the garnishment is based is a judgment for alimony or for the support of any dependent of the

defendant, provided the summons of garnishment shall contain a notice to the garnishee that the garnishment is based on the judgment for alimony or the support of a dependent. In any case in which the garnishment is based on the judgment, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment shall be 50 percent of the individual's disposable earnings for that week.

(g) Except as provided in Article 7 of this chapter for a summons of continuing garnishment for support, the summons of garnishment, including a summons of continuing garnishment pursuant to Article 6 of this chapter, shall on its face state the total amount claimed to be due at the time of the summons and the amount subject to garnishment shall not exceed the amount so shown on the summons of garnishment.

(h) The summons of garnishment, including a summons of continuing garnishment, shall on its face set forth the social security number of the defendant to the extent it is reasonably available to the plaintiff; provided, however, that if such summons is filed with a court, the court filing shall be redacted in accordance with Code Section 9-11-7.1 or 15-10-54, as applicable. The defendant's full social security number shall be made known to the garnishee and defendant in accordance with Code Section 9-11-7.1 or 15-10-54, as applicable, to the extent such information is reasonably available to the plaintiff.

(i)(1) A summons of garnishment upon a financial institution, or an attachment thereto, shall state with particularity all of the following information, to the extent reasonably available to the plaintiff:

(A) The name of the defendant, and, to the extent such would reasonably enable the garnishee to properly respond to the summons, all known configurations, nicknames, aliases, former or maiden names, trade names, or variations thereof;

(B) The service address and the current addresses of the defendant and, to the extent such would reasonably enable the garnishee to properly respond to the summons of garnishment and such is reasonably available to the plaintiff, the past addresses of the defendant;

(C) The social security number or federal tax identification number of the defendant; provided, however, that if such summons is filed with a court, the court filing shall be redacted in accordance with Code Section 9-11-7.1 or 15-10-54, as applicable. The defendant's full social security number or federal tax identification number shall be made known to the garnishee and defendant in accordance with Code Section 9-11-7.1 or 15-10-54, as applicable, to the extent such information is reasonably available to the plaintiff; and

(D) Account, identification, or tracking numbers reasonably available to the plaintiff used by the garnishee in the identification or administration of the defendant’s funds or property; provided, however, that if such summons is filed with a court, the court filing shall be redacted in accordance with Code Section 9-11-7.1 or 15-10-54, as applicable. The defendant’s account, identification, or tracking numbers shall be made known to the garnishee and defendant in accordance with Code Section 9-11-7.1 or 15-10-54, as applicable, to the extent such information is reasonably available to the plaintiff.

(2) A misspelling of any information required by this subsection, other than the surname of a natural person defendant, shall not invalidate a summons of garnishment, so long as such information is not misleading in a search of the garnishee’s records. (Code 1933, § 46-301, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 1977, p. 159, § 3; Ga. L. 1980, p. 1769, §§ 2-4; Ga. L. 1984, p. 370, § 1; Ga. L. 1985, p. 149, § 18; Ga. L. 1985, p. 785, § 1; Ga. L. 1985, p. 1632, § 1; Ga. L. 1997, p. 941, § 1; Ga. L. 2012, p. 2, § 4/HB 683; Ga. L. 2014, p. 482, § 7/SB 386.)

The 2014 amendment, effective July 1, 2014, in subsection (h), substituted “shall on its face set forth the social security number of the defendant to the extent it is reasonably available to the plaintiff; provided, however, that if such summons is filed with a court, the court filing shall be redacted in accordance with Code Section 9-11-7.1 or 15-10-54, as applicable.” for “may on its face set forth, if known, the social security number of the defendant” and added the second sentence; and re-wrote subsection (i). See editor’s notes for applicability.

Editor’s notes. — Ga. L. 2014, p. 482, § 10/SB 386, not codified by the General Assembly, provides, in part, that this Act shall become effective on July 1, 2014, and

shall apply to any filings made on or after July 1, 2014.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 114 (1997).

For note reviewing Georgia’s new garnishment procedures, see 17 Ga. St. B.J. 140 (1981).

For comment on *Reeves v. Motor Contract Co.*, 324 F. Supp. 1011 (N.D. Ga. 1971), see 23 Mercer L. Rev. 369 (1972). For comment discussing due process problems with Georgia’s prejudgment procedures prior to the adoption of the 1976 Acts on garnishment, in light of *Hall v. Stone*, 229 Ga. 96, 189 S.E.2d 403 (1972), see 9 Ga. St. B.J. 336 (1973).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- CONSTITUTIONALITY
- WHAT IS SUBJECT TO GARNISHMENT
- SETOFF BY GARNISHEE

General Consideration

In light of the similarity of the statutory provisions, decisions under former Ga. L. 1855-56, p. 36; former Ga. L. 1872, p. 43; former Ga. L. 1880-81, p. 109; former Civil Code 1895, §§ 4712 and 4732; former Civil Code 1910, §§ 5265, 5272, 5273, 5296, and 5298; and former Code 1933, §§ 46-201, 46-203, and 46-208 as they read prior to revision of Chapter 46-2 by Ga. L. 1976, p. 1608, § 1, are included in the annotations for this Code section.

Garnishment is a purely statutory proceeding, and will not be extended so as to reach money or property of the defendant not made subject thereto by statute. *Hartsfield Co. v. Zakas Bakery*, 50 Ga. App. 284, 177 S.E. 825 (1934) (decided under former Civil Code 1910, § 5272).

Purpose of garnishment lien. — Purpose of garnishment proceeding is to assure that property in hands of third party is held subject to order of the court until conflicting claims are adjudicated. It frequently has been held that a judgment creates no lien on choses in action belonging to the defendant. *Carmichael Tile Co. v. Yaarab Temple Bldg. Co.*, 177 Ga. 318, 170 S.E. 294 (1933) (decided under former Civil Code 1910, § 5273).

Garnishment lien is intended to reach something actually due the defendant and which the defendant could force the garnishee to pay. *A.C. White Transf. & Storage Co. v. Grady Mem. Hosp.*, 151 Ga. App. 751, 261 S.E.2d 476 (1979).

Presence of a debt is necessary to validity of garnishment process. In *re Eidson*, 6 Bankr. 613 (Bankr. N.D. Ga. 1980).

Underlying debt is essential for validity of garnishment. In *re Eidson*, 6 Bankr. 613 (Bankr. N.D. Ga. 1980).

When no debt is owed by garnishee to the defendant, there is no basis for garnishment. *Goodyear Tire & Rubber Co. v. New Amsterdam Cas. Co.*, 101 Ga. App. 577, 114 S.E.2d 546 (1960) (decided under former Code 1933, § 46-201, as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Garnishments issued under void judgments are also void. In *re Eidson*, 6 Bankr. 613 (Bankr. N.D. Ga. 1980).

Garnishment operates both on person of garnishee and on debt itself. — Garnishment proceeding notifies the debtor not to pay the debt, operates to arrest the debt's payment, fixes a lien upon it, and ultimately subjects it to the plaintiff's claim. Thus, it operates both on the person of the garnishee and on the debt itself. In *re Eidson*, 6 Bankr. 613 (Bankr. N.D. Ga. 1980).

Garnishment action properly allowed. — Trial court did not err by allowing a garnishment action to proceed because the garnishor was not pursuing a reverse-piercing claim, or any other equitable action, against the garnishee, rather, the action arose from a garnishment action expressly authorized by law. *Carrier411 Servs. v. Insight Tech., Inc.*, 322 Ga. App. 167, 744 S.E.2d 356 (2013).

Garnishment law not intended to violate existing contracts or restrain right to contract. — Garnishee is bound by existing liens on property in the garnishee's hands, and while garnishment law is to prevent evasions and subterfuges, it does not intend to violate existing contracts or restrain right to contract, but is only intended to reach something actually due the defendant and which the defendant could recover personally. *J. Austin Dillon Co. v. Edwards Shoe Stores, Inc.*, 53 Ga. App. 437, 186 S.E. 470 (1936) (decided under former Code 1933, § 46-208).

Salespersons earnings not subject to garnishment. — One who sells bread, cakes, and pastries for a baking company, receiving as remuneration therefore 10 percent of the cash purchase-price of all such products sold by that person, the company furnishing daily an automobile truck to haul and deliver the bread and pies, with the necessary gasoline to operate the truck, and also the necessary products for such salesperson to sell, it being the arrangement and agreement that at the end of each day the salesperson shall account to the company for the products sold that day, delivering to the company 90 percent of the cash sales, and all unsold bread, and retaining for the salesperson 10 percent thereof, does not earn any salary, wages, or other compensation for selling such bakery products as can be

reached by or subjected to the process of garnishment served upon the baking company in proceedings against the salesperson. *Hartsfield Co. v. Zakas Bakery*, 50 Ga. App. 284, 177 S.E. 825 (1934) (decided under former Civil Code 1910, § 5273).

Judgment creditor is bound by existing counter-claims, setoffs, pledges, encumbrances, or liens, though they may be unrecorded. *Owens v. Atlanta Trust & Banking Co.*, 122 Ga. 521, 50 S.E. 379 (1905) (decided under former Civil Code 1895, § 4712).

Garnishment lien attaches upon service of summons. — Lien attaches to the garnished funds when the summons of garnishment is served. *Ameron Protective Coatings Div. v. Georgia Steel, Inc.*, 25 Bankr. 781 (Bankr. M.D. Ga. 1982).

Garnishing creditor has, as to any property, money, or effects of garnishee's debtor that may be caught in hands of garnishee, an inchoate lien, which arises on service of summons of garnishment. *Shabaz v. Henn*, 48 Ga. App. 441, 173 S.E. 249 (1934) (decided under former Civil Code 1910, § 5273).

Service of garnishment operates as an inchoate lien until judgment is rendered against garnishee. Such inchoate lien becomes a complete lien upon, and in virtue of, rendition of judgment against garnishee, after which time the legal rights of the creditor are fixed, dating from service of garnishment. *Carmichael Tile Co. v. Yaarab Temple Bldg. Co.*, 177 Ga. 318, 170 S.E. 294 (1933) (decided under former Civil Code 1910, § 5273).

Service of summons operates as a lien upon all garnishee's indebtedness to the defendant, and on all accruing indebtedness, which lien shall not be defeated by any payments to defendant or other arrangements between a defendant and a garnishee. *J. Austin Dillon Co. v. Edwards Shoe Stores, Inc.*, 53 Ga. App. 437, 186 S.E. 470 (1936) (decided under former Code 1933, § 46-201, as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

As to nature of lien created upon service of summons of garnishment, see *Ownby v. Wager*, 64 Ga. App. 433, 13 S.E.2d 686 (1941) (decided under former Code 1933, § 46-203, as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Garnishee to whom defendant is indebted has lien superior to plaintiff in garnishment. — If debtor is indebted to garnishee, the latter has a lien on funds coming into the garnishee's hands, or future indebtedness to the debtor, superior to that of the plaintiff in garnishment; the garnishee is entitled to pay oneself before the garnishee is required to collect for the benefit of others, and this applies to any past indebtedness due the garnishee by the defendant. *W.C. Caye & Co. v. Milledgeville Banking Co.*, 91 Ga. App. 664, 86 S.E.2d 717 (1955) (decided under former Code 1933, § 46-203 prior to revision by Ga. L. 1976, p. 1608, § 1).

When garnishing creditor obtains valid judgment, lien shall date from service of garnishment. — Service of a summons of garnishment in all cases operates as a lien on the garnishee's indebtedness at the date of service, and upon all future indebtedness accruing up to date of answer, which lien is inchoate or incomplete; such inchoate lien becomes completed when the creditor obtains a valid judgment against the debtor and such lien shall date from service of garnishment. *Anderson v. Ashford & Co.*, 174 Ga. 660, 163 S.E. 741 (1932) (decided under former Civil Code 1910, § 5273).

Garnishment by judgment creditor against defendant's insurer. — After the parents of a shooting victim obtained a judgment against the owner of the property on which their son was shot, and the owner filed bankruptcy, the Court of Appeals erred in reversing the trial court and holding that a judgment debtor had no garnishment action against the owner's insurer. *Ross v. St. Paul Reinsurance Co., Ltd.*, 279 Ga. 92, 610 S.E.2d 57 (2005).

Service of summons more than four months before bankruptcy proceeding is effective. — Service of summons of garnishment more than four months before proceeding in bankruptcy is filed creates a lien upon any property, money, or effects of the debtor which may be caught in the hands of the garnishee. *Light v. Hunt*, 17 Ga. App. 491, 87 S.E. 763 (1916) (decided under former Civil Code 1910, § 5272).

Garnishment may be classified as a proceeding quasi in rem. — Statutory

General Consideration (Cont'd)

proceeding in garnishment strictly speaking is not a proceeding in rem. It partakes both of the nature of a proceeding in personam and a proceeding in rem and may be classified as a proceeding quasi in rem. In *re Eidson*, 6 Bankr. 613 (Bankr. N.D. Ga. 1980).

State law controls both procedures and extent to which wages may be garnished under 42 U.S.C. § 659(a). *Williamson v. Williamson*, 247 Ga. 260, 275 S.E.2d 42, cert. denied, 454 U.S. 1097, 102 S. Ct. 669, 70 L. Ed. 2d 638 (1981).

Effect of exclusive jurisdiction of bankruptcy court over debt. — When debt upon which garnishment action is based came into exclusive jurisdiction of United States Bankruptcy Court prior to entry of judgment by state court, jurisdiction of state court over cause of action is preempted. In *re Eidson*, 6 Bankr. 613 (Bankr. N.D. Ga. 1980).

Position of garnishing plaintiff with respect to garnishee is no better than that of the defendant with respect to the garnishee. If the defendant personally could not obtain judgment against the garnishee, garnishing the plaintiff cannot do so. *Gant, Inc. v. Citizens & S. Nat'l Bank*, 151 Ga. App. 212, 259 S.E.2d 485 (1979); *Scarboro v. Ralston Purina Co.*, 160 Ga. App. 576, 287 S.E.2d 623 (1981).

Ascertainment of whether garnishee is indebted to or holds assets of defendant. — In garnishment action, question as to whether such garnishee is or is not indebted to the defendant, or whether such garnishee has assets of such defendant in its hands, should be ascertained by comparing their respective claims or accounts, and after service of summons, garnishee may not increase indebtedness to itself for purpose of this comparison. *A.C. White Transf. & Storage Co. v. Grady Mem. Hosp.*, 151 Ga. App. 751, 261 S.E.2d 476 (1979).

Proceeds of war risk insurance paid to beneficiary under federal statute not subject to garnishment. *Hunt v. Slagle*, 45 Ga. App. 470, 165 S.E. 287 (1932).

Certificates of title held by bank as security interest. — Judgment creditor cannot reach debtor's rights in vehicles,

certificates of title to which are held by bank as security interests for debtor's loans, by attempting to garnish certificates of title in bank's hand. *Cobb Bank & Trust Co. v. Springfield*, 145 Ga. App. 753, 245 S.E.2d 42 (1978).

Effect of execution for amount of garnished property. — When judgment is rendered against the garnishee for property in the garnishee's control at the time of service of the summons of garnishment, and the execution is issued for an amount equal to the value of that same property, no distinction will be drawn between the judgment and the execution; indeed, the garnishee must turn over an amount equal to the value of the garnishable property. *Toporek v. Water Processing Co.*, 169 Ga. App. 141, 312 S.E.2d 132 (1983).

Finding required as to amount withheld. — Trial court erred when the court did not determine whether more had been withheld from the party's earnings than is subject to garnishment under subsection (d) of O.C.G.A. § 18-4-20 as the issue was distinctly raised in the evidence and in the party's contentions that these garnishments were keeping the party in slavery and destroying the party's ability to pay current obligations. *Cale v. Cale*, 161 Ga. App. 398, 288 S.E.2d 677 (1982).

Limitation on creation of debts to defeat garnishment. — Statutory limitation of O.C.G.A. § 18-4-20(b) as to payments to the defendant is based upon the theory that a garnishee may not create a debt on the part of a defendant after the service of the summons of garnishment and then use that debt in order to defeat the lien created by the service of that summons. *Ameron Protective Coatings Div. v. Georgia Steel, Inc.*, 25 Bankr. 781 (Bankr. M.D. Ga. 1982).

Garnishee may not defeat a lien of garnishment by making payments to the defendant. *Ameron Protective Coatings Div. v. Georgia Steel, Inc.*, 25 Bankr. 781 (Bankr. M.D. Ga. 1982).

Independent liability of the garnishees arises when the garnishees are no longer in possession due to some arrangement, between the defendant and the garnishees after the date of the service of the summons of continuing garnish-

ment upon the garnishees, designed to defeat the lien of such garnishment. *Stone v. George F. Richardson, Inc.*, 169 Ga. App. 232, 312 S.E.2d 339 (1983), overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

Collusion between judgment debtor and debtor's professional corporations. — Arrangement between judgment debtor and debtor's professional corporations whereby judgment debtor technically ceased to draw salaries from the corporations supported finding of fraud and collusion, and did not defeat lien of garnishment against such corporations. *Stone v. George F. Richardson, Inc.*, 163 Ga. App. 86, 293 S.E.2d 746 (1982).

Title does not vest in plaintiff in garnishment proceeding. — Title to property that is the subject of a garnishment does not vest in the plaintiffs in the garnishment proceeding, but rather remains property belonging to the defendant. *Conner v. Mount Carmel Country Estates*, 21 Bankr. 616 (Bankr. N.D. Ga. 1982).

Stay does not allow return of property. — Georgia's garnishment statutes, including O.C.G.A. § 18-4-20(b), (c), provide that a garnishment plaintiff is protected by the effect of the service of a summons of garnishment through the time of the garnishee's answer; thus, a stay of the garnishee's answer does not allow the garnishee to return to the defendant any of the defendant's property. *Chase Manhattan Bank v. LaFray*, 258 Ga. App. 183, 573 S.E.2d 435 (2002).

Transfer of garnishment funds to creditor constitutes transfer of property of debtor within the ambit of 11 U.S.C. §§ 101(40) and 547 of the Bankruptcy Code. *Conner v. Mount Carmel Country Estates*, 21 Bankr. 616 (Bankr. N.D. Ga. 1982).

Garnishment as preference for bankruptcy purposes. — Georgia law does not vest title in plaintiff but, instead, allows garnishment of property "belonging to defendant." This is true despite fact that nonanswering garnishee is subject to direct liability to plaintiff. Accordingly, to extent that a transfer occurred during 90 day preference period preceding filing of debtor's petition, a preferential transfer

has been made. *Evans v. CIT Fin. Servs., Inc.*, 16 Bankr. 731 (Bankr. N.D. Ga. 1982).

Garnishee cannot waive judgment-debtor's claim to exemption. — While the garnishee can waive its defenses to the proceeding, a garnishee cannot waive the judgment-debtor's claim to an exemption from the garnishment process of the amounts in the hands of the garnishee. *Cale v. Eastern Air Lines*, 159 Ga. App. 630, 284 S.E.2d 647 (1981).

Garnishee failing to disclose exemption may incur liability. — Garnishee who fails to disclose exemption when the fact is within the garnishee's knowledge, and when the defendant is not present to claim it personally, may render oneself liable to the defendant after payment into court; for the garnishee ought to disclose the garnishment; and the garnishee cannot deprive the defendant of that right against the garnishee by failing to do so. *Cale v. Eastern Air Lines*, 159 Ga. App. 630, 284 S.E.2d 647 (1981).

Garnishee paying over money which constitutes part of personalty exemption of the debtor does so at garnishee's own risk. Garnishee will be liable to the debtor (garnishee's creditor) for the full amount of the money garnishee has paid. A person who has been brought into court as a garnishee may answer that the property of the debtor, in the garnishee's hands, or the garnishee's indebtedness to such debtor, is exempt by law from seizure on attachment or execution, and the garnishee is bound to bring the fact to the notice of the court; otherwise the judgment against such garnishee, and the satisfaction thereof, will not bar an action against the garnishee by the attaching debtor. *Cale v. Eastern Air Lines*, 159 Ga. App. 630, 284 S.E.2d 647 (1981).

Garnishee may waive garnishee's personal jurisdiction defense under O.C.G.A. § 18-4-20 and submit itself to the jurisdiction of a court which would not otherwise have jurisdiction over the garnishee. *Cale v. Eastern Air Lines*, 159 Ga. App. 630, 284 S.E.2d 647 (1981).

Garnishment of ERISA welfare plan. — Federal Employee Retirement Income Security Act, 29 U.S.C. § 1001 et

General Consideration (Cont'd)

seq., does not forbid garnishment of an ERISA welfare benefit plan, even when the purpose is to collect judgments against plan participants. *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 108 S. Ct. 2182, 100 L. Ed. 2d 836 (1988).

Cited in *Mercantile Nat'l Bank v. Founders Life Assurance Co.*, 236 Ga. 71, 222 S.E.2d 368 (1976); *King v. Tyler*, 148 Ga. App. 272, 250 S.E.2d 784 (1978); *Fidelity Nat'l Bank v. KM Gen. Agency, Inc.*, 244 Ga. 753, 262 S.E.2d 67 (1979); *Burgess v. Jones*, 158 Ga. App. 826, 282 S.E.2d 399 (1981).

Constitutionality

Due process requirements. — Garnishment of wages to satisfy alimony orders or judgments meets demands of due process. *Black v. Black*, 245 Ga. 281, 264 S.E.2d 216 (1980).

Allowing garnishment of wages earned wholly outside this state is not an unconstitutional extension of the laws of this state to a debt created outside the geographical limits of this state thus depriving the garnishee of due process. *United Merchants & Mfrs., Inc. v. Citizens & S. Nat'l Bank*, 166 Ga. App. 468, 304 S.E.2d 552 (1983).

What Is Subject to Garnishment

Garnishee's dominion and control over property. — It was the legislature's intent to allow a garnishor to obtain a garnishment lien only on the property over which the garnishee exercised dominion or control. *Parham v. Lanier Collection Agency & Serv., Inc.*, 178 Ga. App. 84, 341 S.E.2d 889 (1986).

Test of whether funds in hands of third person are subject to garnishment is whether or not the principal debtor could personally recover such funds by suit directly against the garnishee. *Anderson v. Burnham*, 12 Bankr. 286 (Bankr. N.D. Ga. 1981).

Check is an asset which is garnishable. *Water Processing Co. v. Southern Golf Bldrs., Inc.*, 248 Ga. 597, 285 S.E.2d 21 (1981).

Garnishment may reach out-of-state wages. — Wages of persons who reside out of this state and which have been earned wholly within or without this state are subject to garnishment in this state particularly when the case is not one brought by writ of attachment. *Phillips v. Phillips*, 159 Ga. App. 676, 285 S.E.2d 52 (1981).

Garnishment may reach property or money belonging to client in hands of an attorney. *Water Processing Co. v. Southern Golf Bldrs., Inc.*, 248 Ga. 597, 285 S.E.2d 21 (1981).

Garnishment cannot reach assets in possession of garnishee which defendant personally could not recover. *Anderson v. Burnham*, 12 Bankr. 286 (Bankr. N.D. Ga. 1981).

Garnishment cannot reach assets in possession of garnishee which defendant personally could not recover from garnishee. *J. Austin Dillon Co. v. Edwards Shoe Stores, Inc.*, 53 Ga. App. 437, 186 S.E. 470 (1936) (decided under former Code 1933, § 46-201, as it read prior to revision by Ga. L. 1976, p. 1608, § 1); *Southern Amusement Co. v. Neal*, 15 Ga. App. 130, 82 S.E. 765 (1914) (decided under former Civil Code 1910, § 5272); *Gainesville Feed & Poultry Co. v. Waters*, 87 Ga. App. 354, 73 S.E.2d 771 (1952) (decided under former Code 1933, § 46-203 prior to revision by Ga. L. 1976, p. 1608, § 1).

Creditor cannot reach by garnishment assets which the debtor personally could not recover from the garnishee; for what one cannot recover personally cannot, by garnishment, be recovered against the debtor. *Hiatt v. Edwards*, 52 Ga. App. 152, 182 S.E. 634 (1935) (decided under former Code 1933, § 46-201 prior to revision by Ga. L. 1976, p. 1608, § 1).

If the defendant personally cannot obtain judgment against the garnishee, the garnishing plaintiff cannot do so. *Hiatt v. Edwards*, 52 Ga. App. 152, 182 S.E. 634 (1935) (decided under former Code 1933, § 46-201 prior to revision by Ga. L. 1976, p. 1608, § 1).

Husband's obligation to make a lump-sum cash payment to his ex-wife could not be characterized as alimony for garnishment purposes, when

the terms of the divorce decree described an exchange of assets between the parties, and it was clear that alimony was not involved. *Boyd v. Boyd*, 191 Ga. App. 718, 382 S.E.2d 730 (1989).

Income of tenant cropper. — When landlord furnishes to landlord's cropper everything to make the crop, except labor (which is furnished by the cropper, the cropper's family, and others employed by the cropper), net amount due cropper after full settlement with landlord is in nature of wages paid to day laborers. *McElmurray v. Turner*, 86 Ga. 215, 12 S.E. 359 (1890) (decided under former Ga. L. 1872, p. 43); *Thompson v. Passmore*, 9 Ga. App. 771, 72 S.E. 185 (1911) (decided under former Civil Code 1910, § 5298).

Contract debtor or one holding property of defendant in tort action. — Plaintiff in a pending tort action for damages for personal injuries alleged to have been caused by negligence of the defendant may take out garnishment proceeding against contract debtor of the defendant in tort action, or against one who has property, money, or effects in the debtor's possession belonging to the defendant in tort action. *Curtis v. Bailey*, 51 Ga. App. 119, 179 S.E. 633 (1935) (decided under former Code 1933, § 46-201, as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Garnishment is not permitted as to tort liability prior to final judgment. *Gamble v. Cent. R.R. & Banking Co.*, 80 Ga. 595, 7 S.E. 315, 12 Am. St. R. 276 (1888) (decided under former Ga. L. 1880-81, p. 109); *Southern Ry. v. Hodgson Bros. Co.*, 148 Ga. 851, 98 S.E. 541 (1919) (decided under former Civil Code 1910, § 5272).

Garnishment can be based on claim for mesne profits in ejectment action. *Walker v. Zorn*, 56 Ga. 35 (1876) (decided under former Ga. L. 1855-56, p. 36).

Money held by bank on note collected for payee may be garnished. *Freeman v. Exchange Bank*, 87 Ga. 45, 13 S.E. 160 (1891) (decided under former Ga. L. 1880-81, p. 109).

Money held by third person for creditors before acceptance of arrangement by latter may be garnished. *Cox v. Reeves*, 78 Ga. 543, 3 S.E. 620

(1887) (decided under Ga. L. 1880-81, p. 109); *Bluethenthal & Bickart v. Silverman*, 113 Ga. 102, 38 S.E. 344 (1901) (decided under former Civil Code 1895, § 4712).

Garnishment permitted as to debt on note paid by garnishee. *Connally v. Rice*, 77 Ga. 312 (1886) (decided under former Ga. L. 1880-81, p. 109).

Proceeds of compromised tort claim may be subject to garnishment. *Lee & Anderson v. Louisville & Nashville R.R.*, 2 Ga. App. 337, 58 S.E. 520 (1907) (decided under former Civil Code 1895, § 4712).

Garnishment does not lie against debtor's land. *Groves v. Bibb Sewer Pipe Co.*, 149 Ga. 542, 101 S.E. 190 (1919); *Groves v. Bibb Sewer Pipe Co.*, 24 Ga. App. 558, 101 S.E. 587 (1919) (decided under former Civil Code 1910, § 5265).

Word "property" in former Civil Code 1910, § 5272 did not include land. *Groves v. Bibb Sewer Pipe Co.*, 149 Ga. 542, 101 S.E. 190 (1919); *Groves v. Bibb Sewer Pipe Co.*, 24 Ga. App. 558, 101 S.E. 587 (1919) (decided under former Civil Code 1910, § 5272).

Proceeds from land sold by executor are subject to garnishment. — If executors, empowered by will to sell lands of decedent, sell the land for purpose of division, proceeds are personalty, unimpressed with character of real estate, and therefore are subject to garnishment. *Brown Guano Co. v. Bridges*, 34 Ga. App. 652, 130 S.E. 695 (1925) (decided under former Civil Code 1910, § 5272).

Bank accounts. — Bank was not entitled to assume that an account was a legitimate corporate account when the bank did not follow the bank's own internal procedure with respect to opening the account and, thus, the bank was not excused from complying with a summons of garnishment naming a signatory on the account, nor did the fact that the bank was unable to locate the account relieve the bank from the bank's responsibilities under the garnishment statutes. *Mobile Paint Mfg. Co. v. Johnston*, 219 Ga. App. 299, 464 S.E.2d 903 (1995).

Deposited checks not subject to garnishment. *Bostwick-Goddell Co. v. Wolff*, 19 Ga. App. 61, 90 S.E. 975 (1901)

What Is Subject to**Garnishment (Cont'd)**

(decided under former Civil Code 1895, § 4712).

Notes set apart as homestead not subject to garnishment. *Watkins v. Cason*, 46 Ga. 444 (1913) (decided under former Civil Code 1910, § 5272).

Contingent claim for attorneys fees not subject to garnishment. *Modlin v. Smith*, 13 Ga. App. 259, 79 S.E. 82 (1907) (decided under former Civil Code 1895, § 4712).

Money paid into court under order to await distribution not subject to garnishment. *Chance v. Simpkins*, 22 Ga. App. 148, 95 S.E. 739 (1918) (decided under former Civil Code 1910, § 5272).

Garnishment based on judgment against corporation cannot subject money belonging to individual. *Todd v. Stewart*, 17 Ga. App. 113, 86 S.E. 284 (1915) (decided under former Civil Code 1910, § 5272).

Escrow accounts of real estate broker. — Moneys belonging to others held in escrow by real estate brokers are not subject to garnishment for broker's personal debts. *Citizens & S. Nat'l Bank v. AVCO Fin. Servs., Inc.*, 129 Ga. App. 605, 200 S.E.2d 309 (1973) (decided under former Code 1933, § 46-201, as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Garnishment did not reach surplus of proceeds of security in hands of secured creditor, arising from sale made after garnishment had been answered. *Cutter & Co. v. Central Bank & Trust Corp.*, 24 Ga. App. 564, 101 S.E. 704 (1919) (decided under former Civil Code 1910, § 5296).

Setoff by Garnishee

Garnishment lien subject to offset of garnishee; latter subject to good faith. — Garnishment lien becomes perfected upon rendition of valid judgment in favor of garnishing creditor against the defendant, subject, however, to any claim or right of offset in garnishee at the time of service of summons of garnishment or subsequently thereto, up to the time for answer, provided the right in the garnishee was not a result of bad faith on the

garnishee's part. *Gant, Inc. v. Citizens & S. Nat'l Bank*, 151 Ga. App. 212, 259 S.E.2d 485 (1979).

Garnishee's setoff may not be result of bad faith on the garnishee's part. — Setoff of a valid claim is a remedy specifically given by law to the garnishees, and a garnishment lien is subject to any claim or right of setoff in the garnishee at time of service of summons of garnishment, or subsequently thereto, up to time for answer, provided such right in garnishee was not a result of bad faith on the garnishee's part. *Florida First Nat'l Bank v. First Nat'l Bank*, 154 Ga. App. 211, 267 S.E.2d 849 (1980).

Availability of setoff. — Right to setoff is an available remedy specifically given by law, whether the defendant debtor is an employee of the garnishee or bears some other relation to the garnishee. *Florida First Nat'l Bank v. First Nat'l Bank*, 154 Ga. App. 211, 267 S.E.2d 849 (1980).

Bank's right to setoff general deposit account of customer. — Generally, a bank has right of setoff against amount of general deposit account belonging to customer of a matured debt due by customer to the bank. *Washington Loan & Banking Co. v. First Fulton Bank & Trust*, 155 Ga. App. 141, 270 S.E.2d 242 (1980).

Superiority of lien of garnishee to whom defendant is indebted. — If the debtor is indebted to the garnishee, the latter has a lien on funds coming into the garnishee's hands, or future indebtedness to the debtor, superior to that of another creditor in garnishment; garnishee is entitled to pay oneself before the garnishee is required to collect for the benefit of others. *Florida First Nat'l Bank v. First Nat'l Bank*, 154 Ga. App. 211, 267 S.E.2d 849 (1980).

Requirement of filing answer. — If the defendant owes debt of a greater amount to the garnishee than the garnishee owes to the defendant, the garnishee would not be required to pay any sums into the court, but this would not relieve the garnishee of responsibility of filing an answer. *Washington Loan & Banking Co. v. First Fulton Bank & Trust*, 155 Ga. App. 141, 270 S.E.2d 242 (1980).

Garnishee may setoff claim for money illegally taken between time of service and answer. — Garnishee may setoff against defendant a claim for money illegally taken from the garnishee between time of service of garnishment and time for filing garnishment answer. *Jacobs Pharmacy Co. v. Southern Bell Tel. Co.*, 56 Ga. App. 661, 193 S.E. 487 (1937) (decided under former Code 1933, § 46-203 prior to revision by Ga. L. 1976, p. 1608, § 1).

Employer-garnishee cannot setoff employee's indebtedness to employer entirely against nonexempt wages. — Garnishee, in answering a summons of garnishment in a suit against an em-

ployee who works for daily, weekly, or monthly wages, where the employee is indebted to the garnishee, is not entitled to offset debt of employee against only that portion of wages due which is not exempt but which is subject to process of garnishment; but garnishee, if garnishee offsets debt of defendant against what garnishee owes defendant, must offset it without reference to whether any portion of garnishee's indebtedness to defendant is exempt from or subject to garnishment. *Davison-Paxon Co. v. Mutual Empire Clothing Co.*, 52 Ga. App. 686, 184 S.E. 409 (1936) (decided under former Code 1933, § 46-208 as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

OPINIONS OF THE ATTORNEY GENERAL

Right of setoff exists in garnishee-employer respecting indebtedness of defendant-employee to garnishee employer as against claim of plaintiff in garnishment; thus, the gar-

nishee is entitled to pay oneself from earnings accruing to the employee before paying the plaintiff in garnishment. 1976 Op. Att'y Gen. No. U76-26.

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 69 et seq.

ALR. — Money due only on further performance of contract by debtor as subject to garnishment, 2 ALR 506.

Rights of holder of check as affected by garnishment of drawer's bank account, 5 ALR 587.

Garnishment of bank in suit against the payee or other holder of a check upon the bank, 5 ALR 589.

Levy upon or garnishment of contents of safety deposit box, 19 ALR 863; 39 ALR 1215.

Judgment as subject to garnishment in another court of the state in which it was rendered, 43 ALR 190.

Money or other property taken from prisoner as subject of attachment, garnishment, or seizure under execution, 48 ALR 583.

Priority of assignment of chose in action over subsequent garnishment as affected by lack of notice to debtor of assignment, 52 ALR 109.

Foreign attachment or garnishment upon which jurisdiction is dependent rest-

ing upon property coming into hands of garnishee, or obligations having their inception, after service of the writ, 53 ALR 1022.

Garnishment of salaries, wages, or commissions not expressly exempted by statute, 56 ALR 601.

Debt owing to two or more as subject of garnishment in action against less than all, 57 ALR 844.

Who is "employee" within debt exemption statute, 58 ALR 777.

Right of creditor upon dissolution of his own attachment to garnish custodian of attached property, 59 ALR 526.

Garnishment against executor or administrator by creditor of heir, legatee, distributee, or creditor of estate, 59 ALR 768.

County as subject to garnishment process, 60 ALR 823.

Interest of vendee under conditional sales contract as subject to attachment, garnishment, or execution, 61 ALR 781.

Issuance of successive writs of garnishment or other process to reach property or

earnings exempt in whole or in part, 65 ALR 1283.

Indebtedness to partnership as subject of attachment or garnishment by creditor of individual partner, 71 ALR 77.

Construction, application, and effect of statute exempting from garnishment debt evidenced by negotiable instrument, 71 ALR 581.

Interest of mortgagor or pledgor in property in possession of mortgagee or pledgee as subject of garnishment, 83 ALR 1383.

Liability for conversion of property as the subject of garnishment by creditor of the owner, 91 ALR 1337.

Unliquidated claims of damage in tort as subject of garnishment, 93 ALR 1088.

Withdrawal value of stock in building and loan association as basis of attachment or execution by member or as subject of garnishment by member's creditor, 94 ALR 1017.

Redemption money in hands of officer as subject to attachment, garnishment, or execution, 94 ALR 1049.

Indebtedness as subject to garnishment or trustee process after debtor has given his check therefor, 94 ALR 1391.

Right to garnish amount payable under a contract contemplating a cash transaction, 95 ALR 1497.

Garnishment by landlord's creditor of tenant's obligation in respect of rent, 100 ALR 307.

Garnishment of bank deposit as affected by bank's right, or waiver of right, to set off depositor's indebtedness to it against deposit or apply deposit to such indebtedness, 106 ALR 62; 110 ALR 1268.

Garnishment as suit within rule that state may not be sued without its consent, 114 ALR 261.

Resident or foreign corporation doing business within state as subject to garnishment because of indebtedness to non-resident who in turn is indebted to non-resident principal defendant, 116 ALR 387.

Debtor's exemption (other than home-

stead) as applicable in favor of nonresidents or of residents absent or about to remove from the state, 119 ALR 554.

What amounts to a contingency within statute or rule permitting garnishment or similar process before an obligation is due or payable, if payment or delivery is not dependent upon a contingency, 134 ALR 853.

Right of creditors to reach by garnishment or other process, commissions of debtor, as executor, administrator, or trustee, 143 ALR 190.

Form of judgment against garnishee respecting obligation payable in installments, 7 ALR2d 680.

Judgment debtor's personal injury claims against third person or latter's liability insurer as subject to creditor's bill, 51 ALR2d 595.

Value of room and board furnished to servant as included in total salary or earnings for purpose of statute exempting wages, 51 ALR2d 947.

Sharecropper's share in crop wholly or partly unharvested as subject to garnishment, 82 ALR2d 858.

Garnishment of salary, wages, or commissions where defendant debtor is indebted to garnishee-employer, 93 ALR2d 995.

Funds deposited in court as subject of garnishment, 1 ALR3d 936.

Attachment and garnishment of funds in branch bank or main office of bank having branches, 12 ALR3d 1088.

Funds in hands of his attorney as subject of attachment or garnishment by client's creditor, 35 ALR3d 1094.

Liability of creditor for excessive attachment or garnishment, 56 ALR3d 493.

Garnishment against executor or administrator by creditor of estate, 60 ALR3d 1301.

Special bank deposits as subject of attachment or garnishment to satisfy depositor's general obligations, 8 ALR4th 998.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one joint depositor, 86 ALR5th 527.

18-4-21. Garnishment of salaries of officials and employees of state and its subdivisions; exemption; summons.

(a) Money due officials or employees of a municipal corporation or county of this state or of the state government, or any department or institution thereof, as salary for services performed for or on behalf of the municipal corporation or county of this state, or the state, or any department or institution thereof, shall be subject to garnishment, except in no event may the officials' or employees' salary for services performed for or on behalf of any municipal corporation or county of this state, or the state, or any department or institution thereof, be garnisheed where the judgment serving as a basis for the issuance of the summons of garnishment arises out of the liability incurred in the scope of the officials' or employees' governmental employment while responding to an emergency. In such cases, the summons shall be directed to such political entity and served upon the person authorized by law to draw the warrant on the treasury of the government or to issue a check for such salary due, or upon the chief administrative officer of the political subdivision, department, agency, or instrumentality; and such entity shall be required to respond to the summons in accordance with the mandate thereof and as provided by this chapter.

(b) For purposes of this Code section only, the state and its political subdivisions, departments, agencies, and instrumentalities shall be deemed private persons; and jurisdiction for the purpose of issuing a summons of garnishment shall be restricted to a court located in the county in which the warrant is drawn on the treasury of the government or in which the check is issued for the salary due the official or employee of the state or its political subdivisions, departments, agencies, or instrumentalities. (Code 1933, § 46-306, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 1977, p. 634, § 1; Ga. L. 1980, p. 1769, § 6; Ga. L. 2012, p. 2, § 5/HB 683.)

Law reviews. — For survey article on local government law, see 34 Mercer L. Rev. 225 (1982).

For note reviewing Georgia's new garnishment procedures, see 17 Ga. St. B.J. 140 (1981).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 18-4-21 is not unconstitutionally vague, nor does the statute violate equal protection of the laws for two reasons: (1) this is a limited waiver of state sovereign immunity from suit; and (2) the section is intended to encourage selfless response to emergencies on the part of governmental employees. Harp v. Winkles, 255 Ga. 42, 335 S.E.2d 292 (1985).

“Employed while responding to an emergency.” — City police officer responding to an “officer down” call and under the direct supervision of the officer's immediate supervisor is “employed while responding to an emergency,” pursuant to O.C.G.A. § 18-4-21 (a), such that the officer's wages are exempt from garnishment by a judgment creditor. Harp v. Winkles, 255 Ga. 42, 335 S.E.2d 292

(1985).

Garnishment of funds other than those designated by section. — O.C.G.A. § 18-4-21 provides for limited waiver of sovereign immunity by permitting salaries of officials and employees of the state and the state's subdivisions to be made subject to garnishment. That section, however, is silent as to other funds in

hands of the subdivision of the state. Therefore, such funds are still not subject to garnishment in Georgia. *Grant v. Barge*, 160 Ga. App. 488, 287 S.E.2d 393 (1981).

Cited in *City of Atlanta v. Gilmore*, 252 Ga. 406, 314 S.E.2d 204 (1984); *City of Atlanta v. Gilmore*, 171 Ga. App. 306, 320 S.E.2d 639 (1984).

OPINIONS OF THE ATTORNEY GENERAL

Subjecting National Guard to garnishment. — National Guard is not subject to state garnishment unless garnish-

ment is for child support or alimony. 1980 Op. Att'y Gen. No. U80-35.

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 62 et seq.

Am. Jur. Pleading and Practice Forms. — 12 Am. Jur. Pleading and Practice Forms, Foreign Corporations, § 3.

ALR. — Constitutionality of statute au-

thorizing garnishment of salary or wages of public officials or employees, 22 ALR 760; 123 ALR 903.

Garnishment as suit within rule that state may not be sued without its consent, 114 ALR 261.

18-4-22. Exemption of pension or retirement funds or benefits.

(a) Funds or benefits from a pension or retirement program as defined in 29 U.S.C. Section 1002(2)(A) or funds or benefits from an individual retirement account as defined in Section 408 or 408A of the United States Internal Revenue Code of 1986, as amended, shall be exempt from the process of garnishment until paid or otherwise transferred to a member of such program or beneficiary thereof. Such funds or benefits, when paid or otherwise transferred to the member or beneficiary, shall be exempt from the process of garnishment only to the extent provided in Code Section 18-4-20 for other disposable earnings, unless a greater exemption is otherwise provided by law.

(b) The exemption provided by this Code section shall not apply when the garnishment is based upon a judgment for alimony or for child support, in which event such funds or benefits shall then be subject to the process of garnishment to the extent provided in subsection (f) of Code Section 18-4-20.

(c) Nothing in this Code section shall prohibit the attachment or alienation of welfare benefits as defined in 29 U.S.C. Section 1002(1) in the control of an administrator or trustee. (Code 1933, § 46-302, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 1980, p. 1769, § 5; Ga. L. 1983, p. 683, § 1; Ga. L. 1990, p. 360, § 1; Ga. L. 2006, p. 119, § 1/HB 149.)

Law reviews. — For article, “Retirement Benefits: Protection from Creditors’ Claims,” see 24 Ga. St. B.J. 118 (1988).

For note reviewing Georgia’s new gar-

nishment procedures, see 17 Ga. St. B.J. 140 (1981). For note on 1990 amendment of this Code section, see 7 Ga. St. U.L. Rev. 265 (1990).

JUDICIAL DECISIONS

Pension funds exempt, not individual pension payments. — Law exempted from garnishment all pension funds for policemen and municipal employees, irrespective of their source or intended beneficiaries, but it is the funds, rather than the individual pension payments, that are exempt from garnishment. *Cooper v. City of Atlanta Policemen’s Pension Fund*, 147 Ga. App. 633, 249 S.E.2d 684 (1978).

When funds or benefits exempt. — O.C.G.A. § 18-4-22 means that funds or benefits from a pension or retirement program are exempt from the process of garnishment until such funds or benefits are in the hands of the member or beneficiary of the program. *Davis v. Davis*, 161 Ga. App. 722, 288 S.E.2d 748 (1982).

Chapter 7 bankruptcy. — Debtor’s Individual Retirement Account (IRA) would be excluded from the bankruptcy estate under 11 U.S.C. § 541(c)(2) on the basis of the restriction on transfer by garnishment contained in subsection (a) of O.C.G.A. § 18-4-22, notwithstanding that the transfer restriction was contained only in the Georgia statute and was not contained within the IRA document itself and notwithstanding that the debtor had access to the IRA funds for personal use upon payment of a 10% penalty tax. *Meehan v. Wallace*, 102 F.3d 1209 (11th Cir. 1997).

Federal preemption. — Twenty-five percent of the defendant ERISA beneficiary’s benefit payment was subject to garnishment by the defendant judgment creditor under a continuing garnishment pursuant to O.C.G.A. § 18-4-22(a) because the ERISA Plan was a Top Hat Plan, which was not subject to the ERISA anti-alienation provision, 29 U.S.C. § 1056. *AFLAC Inc. v. Diaz-Verson*, No.

(CDL), 2012 U.S. Dist. LEXIS 73140 (M.D. Ga. May 25, 2012).

Benefits not actually received not subject to garnishment. — Retirement benefits paid into registry of trial court by garnishee were not subject to garnishment because the defendant had never received actual possession of the benefits. *Birchfield v. Birchfield*, 165 Ga. App. 101, 299 S.E.2d 409 (1983).

Individual retirement accounts. — Federal law preempts O.C.G.A. § 18-4-22 and mandates a finding that individual retirement accounts possessed by the garnishees are exempt from garnishment by commercial creditors in a nonbankruptcy situation. *Citizens Bank v. Shingler*, 173 Ga. App. 511, 326 S.E.2d 861 (1985) (decided prior to 1990 amendment specifically exempting individual retirement account funds or benefits).

Chapter 7 debtor’s Roth individual retirement account (IRA) was not excluded from the property of the estate because O.C.G.A. § 18-4-22(a) applied only to an IRA within the meaning of 26 U.S.C. § 408 and Georgia law provided no similar protection for a Roth IRA established under 26 U.S.C. § 408A. *Goodman v. Bramlette (In re Bramlette)*, 333 B.R. 911 (Bankr. N.D. Ga. 2005).

Annuity. — O.C.G.A. § 44-13-100 specifically addresses what types of annuities and similar contracts are exempt in bankruptcy cases. Therefore, the debtor’s attempt to exempt the annuity under O.C.G.A. §§ 18-4-22 and 47-2-332 would have failed even if the annuity met the requirements of those statutes (which appeared not to be the case in any event). *In re Sheffield*, 507 B.R. 400 (Bankr. S.D. Ga. 2014).

Cited in *Goddard v. Boozer*, 160 Ga. App. 303, 287 S.E.2d 308 (1981).

RESEARCH REFERENCES

ALR. — Who is “employee” within debt exemption statute, 58 ALR 777.

Debtor’s exemption (other than homestead) as applicable in favor of nonresidents or of residents absent or about to remove from the state, 119 ALR 554.

Employee retirement pension benefits as exempt from garnishment, attachment, levy, execution, or similar proceedings, 93 ALR3d 711.

Enforcement of claim for alimony or support, or for attorneys’ fees and costs incurred in connection therewith, against exemptions, 52 ALR 5th 221.

Individual retirement accounts as exempt property in bankruptcy, 133 ALR Fed. 1.

18-4-22.1. Garnishment of funds or benefits of pension, retirement, or employee benefit plans and programs which are subject to the Employee Retirement Income Security Act of 1974.

Repealed by Ga. L. 1990, p. 360, § 2, effective July 1, 1990.

Editor’s notes. — The former Code § 46-309, enacted by Ga. L. 1981, p. 804, section was based on Code 1933, § 1.

18-4-23. Service of summons of garnishment controlled by Civil Practice Act.

The method of service of a summons of garnishment shall be as provided in Code Section 9-11-4. (Code 1933, § 46-304, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 1984, p. 1319, § 2; Ga. L. 2012, p. 2, § 6/HB 683.)

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1884-85, p. 95, former Civil Code 1895, § 4710, former Civil Code 1910, § 5270, and former Code 1933, § 46-106, as it read prior to revision by Ga. L. 1976, p. 1608, § 1, have been included in the annotations for this Code section.

Construction. — Because garnishment is a special statutory proceeding in derogation of common law, O.C.G.A. § 18-4-23 must be strictly construed. *ARC Sec., Inc. v. Massey Bus. College*, 221 Ga. App. 489, 471 S.E.2d 569 (1996).

Former Civil Code 1895, § 4710 was not restricted to service on domestic corporations. *Cathcart v. Cincinnati,*

Hamilton & Dayton Ry. Co., 108 Ga. 253, 33 S.E. 875 (1899) (decided under former Civil Code 1895, § 4710).

Corporation not transacting business in this state is not subject to garnishment, though the corporation’s agent resides herein. *Schmidlapp & Co. v. La Confiance Ins. Co.*, 71 Ga. 246 (1883).

Service upon agent in cases of foreign debt or garnishee. — Garnishment can lawfully be served upon a foreign corporation by making personal service upon an authorized agent of the company in this state even though the principal debtor and the garnishee may both be nonresidents, or that the debt garnished was contracted and is payable elsewhere (i.e., in another state). *United*

Merchants & Mfrs., Inc. v. Citizens & S. Nat'l Bank, 166 Ga. App. 468, 304 S.E.2d 552 (1983).

Process served on corporation pending its application for charter will not confer jurisdiction. Bartram, Hendrix & Co. v. Collins Mfg. Co., 69 Ga. 751 (1882).

Construction of "agent." — Word "agent" in former Civil Code 1910, § 5270 should not be construed in a narrow, technical sense, but should be given a broad, common-sense construction. Central of Ga. Ry. v. Ellis, 17 Ga. App. 536, 87 S.E. 815 (1916) (decided under former Civil Code 1910, § 5270).

Service on agent in charge. — When agent was served, return is amendable to show that agent was in charge. Southern Express Co. v. National Bank, 4 Ga. App. 399, 61 S.E. 857 (1908) (decided under former Civil Code 1895, § 4710).

Service upon agent who is defendant in main suit. — Service of garnishment upon corporation doing business in this state may be perfected by service upon its agent in charge of its business in this state, even though agent is defendant in main suit. Jewel Tea Co. v. Patillo, 50 Ga. App. 620, 178 S.E. 925 (1935) (decided under former Code 1933, § 46-106).

Delegation of employee as agent. — If principal officer in charge of business of corporation is authorized to designate another employee because the corporation prefers that the corporation's principal officer not receive service, then that employee can be designated as agent in charge of office of corporation for purpose of receiving such service. Cleveland Lumber Co. v. Delta Equities, Inc., 232 Ga. 883, 209 S.E.2d 212 (1974).

Entry of service must show service on corporation or the corporation's alter ego. North Ga. Banking Co. v. Fancher, 23 Ga. App. 683, 99 S.E. 229 (1919) (decided under former Civil Code 1910, § 5270).

President of chartered bank is the bank's alter ego. Third Nat'l Bank v. McCullough Bros., 108 Ga. 249, 33 S.E. 848 (1899); Twilley & Hodges v. Middle

Ga. Bank, 28 Ga. App. 416, 111 S.E. 694 (1922).

When person other than president is served, return must show it was agent in charge. Twilley & Hodges v. Middle Ga. Bank, 28 Ga. App. 416, 111 S.E. 694 (1922) (decided under former Civil Code 1910, § 5270).

Service on others. — Entry showing service on cashier must show that cashier was in charge. North Ga. Banking Co. v. Fancher, 23 Ga. App. 683, 99 S.E. 229 (1919) (decided under former Civil Code 1910, § 5270).

Return merely designating person served as "supt." is insufficient. Hargis v. East Tenn., V. & Ga. Ry., 90 Ga. 42, 15 S.E. 631 (1892); Southern Ry. v. Hagan, 103 Ga. 564, 29 S.E. 760 (1897) (decided under former Civil Code 1895, § 4710).

Service on chief clerk when agent is absent, and that clerk is in charge suffices. Central of Ga. Ry. v. Ellis, 17 Ga. App. 536, 87 S.E. 815 (1916) (decided under former Civil Code 1910, § 5270).

Personal service upon ticket agent in charge of ticket office of railroad company, and selling tickets and handling passenger business for the railroad and other like companies is sufficient. Seaboard Air-Line Ry. v. Browder, 144 Ga. 322, 87 S.E. 6 (1915) (decided under former Civil Code 1910, § 5270).

Burden of proof. — When corporation denies that agent served was in charge of office, prima facie presumption in favor of return arises, and burden of proof is on company. Twilley & Hodges v. Middle Ga. Bank, 28 Ga. App. 416, 111 S.E. 694 (1922) (decided under former Civil Code 1910, § 5270).

Evidence sufficient to challenge service. — Testimony from the president and controller of a corporation that they were the only persons authorized to receive service and that the person served was not a corporate officer, performed only clerical functions, and was paid on an hourly basis, along with similar testimony from the receptionist who was served, was sufficient evidence that service was improper. ARC Sec., Inc. v. Massey Bus. College, 221 Ga. App. 489, 471 S.E.2d 569 (1996).

ARTICLE 3

PREJUDGMENT GARNISHMENT PROCEEDINGS GENERALLY

Law reviews. — For article discussing *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969) in relation to former Georgia law on prejudgment garnishment, see 21 Mercer L. Rev. 495 (1970). For article discussing prejudgment garnishment and procedural due process prior to the 1976 revision, see 9 Ga. L. Rev. 589 (1975). For article discussing Georgia's prejudgment garnishment law, prior to enactment of

the 1976 Acts, in light of *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 233 Ga. 793, 214 S.E.2d 667 (1975), see 11 Ga. St. B.J. 242 (1975).

For note discussing grounds and procedures for obtaining prejudgment garnishment, see 12 Ga. L. Rev. 814 (1978).

For comment on *Reeves v. Motor Contract Co.*, 324 F. Supp. 1011 (N.D. Ga. 1971), see 23 Mercer L. Rev. 369 (1972).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1955-56, p. 37, former Civil Code 1895 § 4709, and former Civil Code 1910, §§ 5265 and 5269, are included in the annotations for this article. Decisions under prior law dealing with garnishment procedure generally appear in the annotations at the beginning of this chapter.

Garnishments may be issued upon pending suits and summons of garnishments may be served upon any "person" who is supposed to be indebted to, or who has in one's possession property or effects belonging to, defendant. A partnership is but an association of persons, and has always been amenable to suit at common law. *Ocilla Grocery Co. v. Wilcox, Ives & Co.*, 37 Ga. App. 718, 141 S.E. 822 (1928) (decided under former Civil Code 1910, § 5269).

When action is pending. — When there remains the possibility of the judgment being reversed and the defendant prevailing, action is still pending. *Carrollton Bank v. Glass*, 35 Ga. App. 89, 132 S.E. 238 (1926) (decided under former Civil Code 1910, § 5265).

After case has terminated in judgment against defendant therein, addi-

tional summons may not issue. *Ahrens & Ott Mfg. Co. v. Patton Sash, Door & Bldg. Co.*, 94 Ga. 247, 21 S.E. 523 (1894) (decided under former Ga. L. 1855-56, p. 37); *Paton & Co. v. Chamberliss & Co.*, 114 Ga. 626, 40 S.E. 760 (1902) (decided under former Civil Code 1895, § 4709).

Malicious abuse of process. — When the trial court concluded the statutory grounds for garnishment were established, there was no showing that the plaintiff-bank had proceeded in the absence of any justiciable issue so as to warrant the filing of a counterclaim by the defendant for malicious abuse and use of process. *Young v. Bank of Quitman*, 180 Ga. App. 491, 349 S.E.2d 510 (1986).

Technical defects in issuance of garnishments. — Since affidavits filed in support of legal proceedings are amendable as provided by O.C.G.A. § 9-10-130, assuming there were technical defects in the issuance of the garnishments, these defects were cured at the hearing on traverses where the orders of the trial court (although finding them technically correct) dismissed them as moot because of the satisfaction of the indebtedness. *Young v. Bank of Quitman*, 180 Ga. App. 491, 349 S.E.2d 510 (1986).

RESEARCH REFERENCES

ALR. — Liability of garnishee to garnishing creditor for depreciation in value of property pending contest, 32 ALR 572.

Attachment or garnishment as affected by trick or device by which the property of or indebtedness to nonresident was subjected to the jurisdiction, 37 ALR 1255.

Garnishment of carrier in respect of goods shipped, 46 ALR 933.

Priority of assignment of chose in action over subsequent garnishment as affected by lack of notice to debtor of assignment, 52 ALR 109.

Right of one to summon or charge himself as garnishee, 61 ALR 1458.

Issuance of successive writs of garnishment or other process to reach property or earnings exempt in whole or in part, 65 ALR 1283.

Residence of partnership for purposes of statutes authorizing attachment or garnishment on ground of nonresidence, 9 ALR2d 471.

18-4-40. Grounds for issuance of writ of garnishment prior to judgment.

In cases where an action is pending against the defendant, garnishment may issue prior to judgment only in the following cases:

- (1) When the defendant resides outside the limits of the state;
- (2) When the defendant is actually removing, or about to remove, outside the limits of the county;
- (3) When the defendant is causing his property to be removed beyond the limits of the state;
- (4) When the defendant has transferred, has threatened to transfer, or is about to transfer property to defraud or delay his creditors; or
- (5) When the defendant is insolvent. (Code 1933, § 46-201, enacted by Ga. L. 1976, p. 1608, § 1.)

Law reviews. — For survey article on construction law, see 59 Mercer L. Rev. 55 (2007).

For comment discussing due process problems with Georgia's prejudgment pro-

cedures prior to the adoption of the 1976 Acts on garnishment, in light of Hall v. Stone, 229 Ga. 96, 189 S.E.2d 403 (1972), see 9 Ga. St. B.J. 336 (1973).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, certain decisions under former Code 1933, § 46-101, as it read prior to revision by Ga. L. 1976, p. 1608, § 1, are included in the annotations for this Code section.

Garnishment proceedings are purely statutory and cannot be extended to cases not enumerated in stat-

utes, and courts have no power to enlarge the remedy or hold under it property not made subject to process. Undercoffer v. Brosnan, 113 Ga. App. 475, 148 S.E.2d 470 (1966) (decided under former Code 1933, § 46-101).

Process of garnishment issued upon ground not authorized by statute is without authority of law, and judg-

ment based upon it is binding upon no one. *Undercofler v. Brosnan*, 113 Ga. App. 475, 148 S.E.2d 470 (1966) (decided under former Code 1933, § 46-101).

Prejudgment garnishment for children's expenses. — O.C.G.A. § 19-6-15(h)(3)(B)(i) does not authorize garnishment for uninsured health care expenses that have not been reduced to a money judgment without compliance with the requirements of the more restrictive prejudgment garnishment procedure set out in O.C.G.A. § 18-4-40. *Stoker v. Severin*, 292 Ga. App. 870, 665 S.E.2d 913 (2008).

Use of post-judgment garnishment procedures when money judgment obtained. — When the defendant defaulted and a money judgment was obtained against it, there was a "judgment" on the merits, even though there was no expressly adjudicated "final judgment," and the use of post-judgment garnishment procedures, rather than prejudgment gar-

nishment procedures, to enforce the judgment provided the defendant with the process to which it was due under the federal constitution. *Georgia Farm Bldgs., Inc. v. Willard*, 597 F. Supp. 629 (N.D. Ga. 1984).

Former spouse not entitled to prejudgment garnishment. — Because the amount a former spouse claimed the other spouse owed for health care and extracurricular activity expenses incurred by their children had not been reduced to a money judgment, and because the former spouse failed to show entitlement to the process of prejudgment garnishment under O.C.G.A. § 18-4-40, the other spouse's traverse to the garnishment petition was properly granted. *Stoker v. Severin*, 292 Ga. App. 870, 665 S.E.2d 913 (2008).

Cited in *Merrill Lynch, Pierce, Fenner & Smith v. Trotti*, 173 Ga. App. 601, 327 S.E.2d 565 (1985); *McArthur Elec., Inc. v. Cobb County Sch. Dist.*, 281 Ga. 773, 642 S.E.2d 830 (2007).

RESEARCH REFERENCES

C.J.S. — 38 C.J.S., Garnishment, § 173.

ALR. — Refusal to render judgment or garnishment in proceedings in rem, because of danger to garnishee of double liability in event of refusal of court of another jurisdiction to recognize or give effect to judgment, if rendered, 69 ALR 609.

Garnishment as suit within rule that state may not be sued without its consent, 114 ALR 261.

Resident or foreign corporation doing

business within state as subject to garnishment because of indebtedness to non-resident who in turn is indebted to non-resident principal defendant, 116 ALR 387.

What amounts to a contingency within statute or rule permitting garnishment or similar process before an obligation is due or payable, if payment or delivery is not dependent upon a contingency, 134 ALR 853.

Garnishment as remedy in case of violation of bulk sales law, 155 ALR 1061.

18-4-41. Application to judge for writ; contents.

When the plaintiff contends one or more of the grounds set forth in Code Section 18-4-40 exist, the plaintiff may, prior to obtaining judgment against the defendant, make application to a judge of any court of record, other than the probate court, in the county of residence of the garnishee having jurisdiction over the garnishee, for an order authorizing the issuance of summons of garnishment. Such application shall be made in writing, under oath, and shall set forth the specific facts that show the existence of one or more such grounds as well as the name of the court where the action is pending, the case number of such action,

and the amount claimed therein by the plaintiff. (Code 1933, § 46-202, enacted by Ga. L. 1976, p. 1608, § 1.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1991, “exist” was substituted for “exists” near the beginning of the first sentence of this Code section.

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 4708, are included in the annotations for this Code section.

Amount stated in affidavit may be less than ad damnum clause in original suit. The latter may be reduced by amendment. *Seaboard Air-Line Ry. v. Hutchinson*, 4 Ga. App. 526, 62 S.E. 97 (1908) (decided under former Civil Code 1895, § 4708).

OPINIONS OF THE ATTORNEY GENERAL

Magistrate courts. — Because magistrate courts are not “courts of record” they may not order prejudgment attachment or garnishment. 1984 Op. Att’y Gen. No. U84-28.

RESEARCH REFERENCES

ALR. — Waiver or admission by garnishee as affecting principal defendant, 64 ALR 430.

18-4-42. Entry of order by judge authorizing garnishment prior to judgment; issuance of summons of garnishment pursuant to order by clerk of court generally.

After considering plaintiff’s application, if the judge to whom same is made finds that the facts alleged show the existence of one or more of the grounds set forth in Code Section 18-4-40, he may enter an order authorizing garnishment prior to judgment. The entry of such order shall authorize the clerk of the court in which the garnishment proceedings are pending to issue summons of garnishment from time to time without a further showing until the case is terminated or until further order of the court. (Code 1933, § 46-203, enacted by Ga. L. 1976, p. 1608, § 1.)

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5273, and former Code 1933, § 46-203, as it read prior to revision by Ga. L. 1976, p. 1608, § 1 are included in the annotations for this Code section.

Service of summons creates lien. — Garnishing creditor has, as to any property, money, or effects of the debtor that may be caught in the hands of the garnishee, an inchoate lien, which arises on service of summons of garnishment. *Shabaz v. Henn*, 48 Ga. App. 441, 173 S.E.

249 (1934) (decided under former Civil Code 1910, § 5273).

Service of garnishment operates as an inchoate lien until judgment is rendered against the garnishee. Such inchoate lien becomes a complete lien upon, and in virtue of, rendition of judgment against garnishee, after which time the legal rights of creditor are fixed, dating from service of garnishment. *Carmichael Tile Co. v. Yaarab Temple Bldg. Co.*, 177 Ga.

318, 170 S.E. 294 (1933) (decided under former Civil Code 1910, § 5273).

Nature of lien created upon service of summons of garnishment. — See *Ownby v. Wager*, 64 Ga. App. 433, 13 S.E.2d 686 (1941) (decided under former Code 1933, § 46-203, as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Cited in *Anderson v. Burnham*, 12 Bankr. 286 (Bankr. N.D. Ga. 1981).

18-4-43. Bond required prior to issuance of summons of garnishment; amount; presentation of bond to clerk of court for approval.

No summons of garnishment prior to judgment shall issue unless accompanied by a bond with good security, conditioned to pay the defendant all costs and damages that he may sustain in consequence of the issuance of the summons of garnishment in the event that the amount claimed to be due was not due, or that no lawful ground for the issuance of such garnishment prior to judgment existed, or that the property sought to be garnisheed was not subject to garnishment. Such bond shall be in a sum equal to twice the amount claimed due in the plaintiff's application. The bond shall be presented to the clerk of the court where the application provided for in this article is sought to be filed, for approval by the clerk prior to making application to the judge of the court for the writ of garnishment. (Code 1933, § 46-204, enacted by Ga. L. 1976, p. 1608, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, certain decisions under former Civil Code 1895, § 4708, former Civil Code 1910, § 5268, and former Code 1933, § 46-102 as it read prior to revision by Ga. L. 1976, p. 1608, § 1 are included in the annotations for this Code section.

Purpose of bond. — Bond is intended for protection of the defendant, not to insure the garnishee against costs in answering. *Brunswick Bank & Trust Co. v. Delegal*, 122 Ga. 189, 50 S.E. 44 (1905) (decided under former Civil Code 1895, § 4708).

Bond executed by applicant for garnishment is amendable. *Carrollton Bank v. Glass*, 35 Ga. App. 89, 132 S.E. 238 (1926) (decided under former Civil Code 1910, § 5268).

Attorney's fees for defense of garnishment. — Reasonable attorney's fees incurred by the defendant in a garnishment proceeding in defense to the garnishment constitute damages sustained by the defendant in consequence of suing out a garnishment and are recoverable as such in suit on bond. *Cohen v. Nichols*, 54 Ga. App. 394, 188 S.E. 48 (1936) (decided under former Code 1933, § 46-102).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 492 et seq.

C.J.S. — 38 C.J.S., Garnishment, § 169 et seq.

ALR. — Constitutionality, construction, and application of statutory provisions for

recovery of damages by defendant in attachment or garnishment, 125 ALR 1219.

What constitutes malice sufficient to justify an award of punitive damages in action for wrongful attachment or garnishment, 61 ALR3d 984.

18-4-44. Service of order and summons of garnishment on defendant.

Upon the entry of an order authorizing the issuance of garnishment prior to judgment, summons of garnishment shall issue and be served as provided in Code Section 18-4-62. A copy of the order and of each summons of garnishment issued pursuant thereto shall be served upon the defendant in any manner prescribed for the service of original summons and complaints. (Code 1933, § 46-205, enacted by Ga. L. 1976, p. 1608, § 1.)

RESEARCH REFERENCES

C.J.S. — 38 C.J.S., Garnishment, §§ 185, 186, 188 et seq.

ALR. — Who may serve writ, summons, or notice of garnishment, 75 ALR2d 1433.

18-4-45. Traverse of affidavit of plaintiff by defendant; show cause order; revocation of order upon failure of plaintiff to prove grounds.

When summons of garnishment shall issue before judgment against the defendant, the defendant may at any time traverse the plaintiff's affidavit upon which the garnishment was obtained, stating that the affidavit is untrue or legally insufficient. Upon filing of the traverse, the court from which the garnishment issued shall issue a show cause order to the plaintiff requiring him to appear at a specified time, which shall not be more than ten days from the filing of the traverse, to prove the grounds for the issuance of the garnishment. If the plaintiff shall fail to carry the burden of proof, the order authorizing the garnishment prior to judgment shall be revoked. (Code 1933, § 46-206, enacted by Ga. L. 1976, p. 1608, § 1.)

RESEARCH REFERENCES

ALR. — Issues in garnishment as triable to court or to jury, 19 ALR3d 1393.

18-4-46. Personal earnings of defendant not subject to garnishment prior to judgment; statement of substance of Code section to appear on summons of garnishment.

Any other provisions of this chapter to the contrary notwithstanding, no part of the personal earnings of the defendant shall be subject to garnishment prior to judgment, whether such earnings be denominated as salary, wages, commissions, or otherwise; and each summons of garnishment which is issued pursuant to this article shall state the substance of this Code section upon the face thereof. (Code 1933, § 46-207, enacted by Ga. L. 1976, p. 1608, § 1.)

JUDICIAL DECISIONS

Preemption by federal law. — Because O.C.G.A. § 18-4-46 would have required the defendant to obtain a state court judgment prior to garnishing the plaintiff debtor's wages, the Georgia statute was preempted by the Higher Educa-

tion Act, 20 U.S.C. § 1001 et seq., because that Act hindered the defendant's ability to garnish a debtor's wages. *Bennett v. Premiere Credit of N. Am., LLC*, No. 12-12859, 2013 U.S. App. LEXIS 1828 (11th Cir. Jan. 28, 2013) (Unpublished).

18-4-47. Funds and property paid into court or subject to garnishment to be held by clerk pending judgment; exception.

When funds or other property are paid into court or subject to garnishment under this article, the funds or other property shall be held by the clerk of the court in which the garnishment proceedings are pending until final judgment is entered against the defendant in the main proceedings; provided, however, that, if the garnishment is released by filing of the bond provided for by Code Section 18-4-81, such funds or other property shall be delivered to the defendant if no claim has been filed pursuant to Code Section 18-4-95 at the time the bond is approved and filed with the clerk of the court. (Code 1933, § 46-208, enacted by Ga. L. 1976, p. 1608, § 1.)

JUDICIAL DECISIONS

Disposition of choses in action deposited with clerk. — When the garnishee returns what the garnishee has in the garnishee's hands, notes, bonds, and other evidences of debt belonging to the absent debtor, the same are directed to be deposited with the clerk; and after the plaintiff shall have established the plaintiff's demand, these choses in action, thus surrendered, are not to be sold as other

property but turned over to the agent or attorney of the creditor, to be collected, and the proceeds, or so much thereof as shall be needed for that purpose, applied to the discharge of the plaintiff's debt. *Water Processing Co. v. Toporek*, 158 Ga. App. 502, 280 S.E.2d 901, rev'd on other grounds, 248 Ga. 597, 285 S.E.2d 21 (1981).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 10A Am. Jur. Pleading and Practice Forms, Exemptions, § 2.

ALR. — Funds deposited in court as subject of garnishment, 1 ALR3d 936.

18-4-48. Proceedings subsequent to final judgment in action upon which garnishment summons issued generally; final judgment required.

After final judgment is entered in an action in which a summons of garnishment was issued prior to judgment, the garnishment proceedings shall continue in accordance with Article 4 of this chapter. The plaintiff shall not have judgment against the garnishee until he obtains final judgment against the defendant. (Code 1933, § 46-209, enacted by Ga. L. 1976, p. 1608, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 4726, and former Civil Code 1910, § 5292, are included in the annotations for this Code section.

Applicability of section. — Former provisions applied when there had been trial of issues on traverse to garnishee's answer. *Fagan v. Jackson & Orme*, 1 Ga. App. 24, 57 S.E. 1052 (1907) (decided under former Civil Code 1895, § 4726); *South Ga. Grocery Co. v. Wade Chambers Grocery Co.*, 12 Ga. App. 213, 77 S.E. 6 (1913) (decided under former Civil Code 1910, § 5292).

Judgment against defendant must be capable of present enforcement, and not an oral judgment. *Nashville, C. & St. L. Ry. v. Brown*, 3 Ga. App. 561, 60 S.E. 319 (1908) (decided under former Civil Code 1895, § 4726).

Judgment must be introduced in evidence, although the garnishee and the plaintiff agree that the claim is a proceeding upon judgment. *Mitchell v. Great Atl. & Pac. Tea Co.*, 7 Ga. App. 824, 68 S.E. 343 (1910) (decided under former Civil Code 1895, § 4726).

Discharge in bankruptcy will prevent rendition of judgment against the defendant and sureties on dissolution bond. *A. Klipstein & Co. v. Allen-Miles Co.*, 136 F. 385 (5th Cir. 1905) (decided under former Civil Code 1895, § 4726).

Joint judgment against defendant and garnishee is void as to latter. *Dent v. Dent*, 118 Ga. 853, 45 S.E. 680 (1903) (decided under former Civil Code 1895, § 4726).

Joint judgment cannot by amendment be converted into separate judgments. *Nashville, C. & St. L. Ry. v. Brown*, 3 Ga. App. 561, 60 S.E. 319 (1908) (decided under former Civil Code 1895, § 4726).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 389 et seq.

ARTICLE 4

POSTJUDGMENT GARNISHMENT PROCEEDINGS GENERALLY

Cross references. — Continuing garnishment proceedings, § 18-4-110 et seq.

Law reviews. — For annual survey on

domestic relations, see 61 Mercer L. Rev. 117 (2009).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1884-55, p. 54, former Civil Code 1895, § 4708, and former Civil Code 1910, §§ 5265 and 5268 are included in the annotations for this article. Decisions under prior law dealing with garnishment procedure generally appear in annotations at the beginning of this chapter.

Constitutionality. — Post-judgment garnishment proceedings are not unconstitutional for lack of due process. *Morgan v. Morgan*, 156 Ga. App. 726, 275 S.E.2d 673 (1980).

Postjudgment garnishment procedure meets requirements of judicial supervision and notice, and is not unconstitutional for those reasons. *Easterwood v. LeBlanc*, 240 Ga. 61, 239 S.E.2d 383 (1977); *Farmer v. Farmer*, 147 Ga. App. 387, 249 S.E.2d 106 (1978).

Parties to proceedings. — Post-judgment garnishments primarily involve a plaintiff (bank) and garnishee (employer) with a very limited right of participation by the defendant (debtor). *Flournoy v. Pate* (In re Antley), 18 Bankr. 207 (Bankr. M.D. Ga. 1982).

Defendant debtor is not a "party" to a garnishment proceeding, although provision is made in O.C.G.A. § 18-4-64 for defendant debtor to receive notice. The

defendant debtor at the defendant debtor's option may become a party by compliance with O.C.G.A. § 18-4-93 for the limited purposes set out in O.C.G.A. § 18-4-65. *Flournoy v. Pate* (In re Antley), 18 Bankr. 207 (Bankr. M.D. Ga. 1982).

Dismissal of proceeding upon notification of bankruptcy. — Judgment creditor's attorney had an affirmative duty to dismiss the garnishment proceeding upon notification of bankruptcy. *Dennis v. Pentagon Fed. Credit Union*, 17 Bankr. 558 (Bankr. M.D. Ga. 1982).

Proceedings must be based on a domestic, not a foreign judgment. *Union Inv. Co. v. Southern Ry.*, 32 Ga. App. 478, 124 S.E. 77, cert. denied, 32 Ga. App. 808, (1924) (decided under former Civil Code 1910, § 5265).

Separate affidavit and bond is required for each judgment as to which garnishment is sought. *Rich & Co. v. Kiser & Co.*, 61 Ga. 370 (1878) (decided under former Ga. L. 1884-55, p. 54).

Consolidation by assignee of two executions issued on judgments obtained in separate suits in affidavit and bond renders proceedings illegal and void. *Morgan v. Latham*, 111 Ga. 835, 36 S.E. 99 (1900) (decided under former Civil Code 1895, § 4708); *Wright v. Stewart*, 22 Ga. App. 655, 97 S.E. 193 (1918) (decided under former Civil Code 1910, § 5268).

18-4-60. Right to writ of garnishment after judgment.

In all cases where a money judgment shall have been obtained in a court of this state or in a federal court sitting in this state, the plaintiff shall be entitled to the process of garnishment. (Code 1933, § 46-101, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 1980, p. 1769, § 1.)

Law reviews. — For annual survey on domestic relations, see 61 Mercer L. Rev. 117 (2009).

For note reviewing Georgia's new garnishment procedures, see 17 Ga. St. B.J. 140 (1981).

For comment discussing due process problems with Georgia's prejudgment procedures prior to the adoption of the 1976 Acts on garnishment, in light of Hall v. Stone, 229 Ga. 96, 189 S.E.2d 403 (1972), see 9 Ga. St. B.J. 336 (1973).

JUDICIAL DECISIONS

Constitutionality. — Bank account holder whose accounts contained funds that were exempt from garnishment had standing to challenge the constitutionality of the garnishment statute as there was a substantial likelihood the account holder would suffer future garnishment proceedings and the return of the account holder's previously garnished funds did not moot the action because the "capable of repetition, yet evading review" exception applied. Strickland v. Alexander, 772 F.3d 876 (11th Cir. 2014).

Garnishment proceedings are purely statutory and cannot be extended to cases not enumerated in statute. Kirchman v. Kirchman, 212 Ga. 488, 93 S.E.2d 685 (1956).

As garnishment proceedings are purely statutory the proceedings cannot be extended to cases not enumerated in the statutes, and courts have no power to enlarge the remedy or hold under it property not made subject to process. Undercofler v. Brosnan, 113 Ga. App. 475, 148 S.E.2d 470 (1966).

Garnishment proceedings are purely statutory, in derogation of common law, and must be strictly pursued. Arnold v. Citizens' & S. Nat'l Bank, 47 Ga. App. 254, 170 S.E. 316 (1933).

Process of garnishment issued upon any ground not authorized by statute is without authority of law, and judgment based upon it is binding upon no one. Undercofler v. Brosnan, 113 Ga. App. 475, 148 S.E.2d 470 (1966).

Test as to whether funds in hands of another are subject to garnishment is whether or not the defendant in garnishment could recover such funds by suit directly against the garnishee. Morgan v. Morgan, 156 Ga. App. 726, 275 S.E.2d 673 (1980).

Judgment rendered in foreign jurisdiction. — Summons of garnishment

cannot legally issue upon judgment rendered in a foreign jurisdiction. Allman v. Hardee, Barovick, Konecky & Braun, 152 Ga. App. 551, 263 S.E.2d 489 (1979).

Judgment for alimony is a money judgment in sense that it may be enforced in the same manner as other judgments as is a judgment for child support. Thacker Constr. Co. v. Williams, 154 Ga. App. 670, 269 S.E.2d 519 (1980).

Decree of alimony is a money judgment and as such may be the subject matter of post-judgment garnishment proceeding. Morgan v. Morgan, 156 Ga. App. 726, 275 S.E.2d 673 (1980).

Burden of proof. — Burden is on the plaintiff generally to establish that the plaintiff is entitled to the garnished fund. Thacker Constr. Co. v. Williams, 154 Ga. App. 670, 269 S.E.2d 519 (1980).

Attorney subject to garnishment, when the attorney has money or other effects belonging to the defendant in the attorney's hands. Water Processing Co. v. Toporek, 158 Ga. App. 502, 280 S.E.2d 901, rev'd on other grounds, 248 Ga. 597, 285 S.E.2d 21 (1981).

Chose in action. — Proper way to reach chose in action is by garnishment. Water Processing Co. v. Toporek, 158 Ga. App. 502, 280 S.E.2d 901, rev'd on other grounds, 248 Ga. 597, 285 S.E.2d 21 (1981).

Use of garnishment procedures generally. — When the defendant defaulted and a money judgment was obtained against the defendant, there was a "judgment" on the merits, even though there was no expressly adjudicated "final judgment," and the use of post-judgment garnishment procedures, rather than prejudgment garnishment procedures, to enforce the judgment provided the defendant with the process to which it was due under the federal Constitution. Georgia Farm Bldgs., Inc. v. Willard, 597 F. Supp. 629 (N.D. Ga. 1984).

Cited in Jackson v. Jackson, 238 Ga. 76, 231 S.E.2d 48 (1976); Black v. Black, 245 Ga. 281, 264 S.E.2d 216 (1980); Dennis v. Pentagon Fed. Credit Union, 17 Bankr. 558 (Bankr. M.D. Ga. 1982); Karsman v. Portman, 170 Ga. App. 194, 316 S.E.2d 819 (1984); Stoker v. Severin, 292 Ga. App. 870, 665 S.E.2d 913 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 107.

C.J.S. — 38 C.J.S., Garnishment, § 173.

ALR. — Refusal to render judgment or garnishment in proceedings in rem, because of danger to garnishee of double liability in event of refusal of court of another jurisdiction to recognize or give effect to judgment, if rendered, 69 ALR 609.

Property of incompetent or infant under guardianship as subject of execution, attachment, or garnishment, 92 ALR 919.

Garnishment by landlord's creditor of

tenant's obligation in respect of rent, 100 ALR 307.

Garnishment as suit within rule that state may not be sued without its consent, 114 ALR 261.

Judgment in tort action as subject of assignment, attachment, or garnishment pending appeal, 121 ALR 420.

Issuance and return of execution as necessary condition of garnishment after judgment, 128 ALR 1153.

Garnishment of funds payable under building and construction contract, 16 ALR5th 548.

18-4-61. Affidavit for issuance of summons of garnishment; making and approval of affidavit.

The plaintiff, the plaintiff's attorney at law, or the plaintiff's agent shall make, on personal knowledge, an affidavit setting forth that the plaintiff has a judgment against a named defendant, the amount claimed to be due on the judgment, the name of the court which rendered the judgment, and the case number thereof. Upon the filing of the affidavit with the clerk of any court having jurisdiction over the garnishee, the clerk shall cause a summons of garnishment to issue forthwith; provided, however, that the affidavit shall first be made and be approved as containing the information required by this Code section in one of the following ways:

(1) The affidavit may be made before and approved by a judge of the court in which the garnishment proceeding is filed;

(2) The affidavit may be made before and approved by a judge of the court that rendered the judgment upon which the garnishment is based;

(3) The affidavit may be made before and approved by a judge of any court of record;

(4) The affidavit may be made before any officer authorized to administer oaths, including a notary public, provided that the affidavit is then submitted by mail or in person to any judge of a court specified in paragraph (1), (2), or (3) of this Code section and is approved by him; or

(5) The affidavit may be made before the clerk or deputy clerk of the court in which the garnishment is filed or before any officer authorized to administer oaths, including a notary public, and may be approved by the clerk or deputy clerk if the judge or judges of the court promulgate rules supervising the initiation of the garnishment proceedings and the affidavit is made and approved pursuant to such rules. No court rule or practice shall preclude a plaintiff from proceeding pursuant to paragraph (1), (2), (3), or (4) of this Code section. (Code 1933, § 46-102, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 1977, p. 159, § 1; Ga. L. 1996, p. 317, § 1.)

Law reviews. — For article discussing due process problems with Georgia’s post-judgment garnishment procedures, in light of *City Fin. Co. v. Winston*, 238 Ga. 10, 231 S.E.2d 45 (1976), see 13 Ga. St. B.J. 144 (1977). For article surveying ju-

dicial developments in Georgia’s trial practice and procedure laws, see 31 Mercer L. Rev. 249 (1979).
For note reviewing Georgia’s new garnishment procedures, see 17 Ga. St. B.J. 140 (1981).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
CONSTITUTIONALITY

General Consideration

Present obligation necessary. — Garnishment on apprehension that some amount might become due in the future is not authorized. *Kirchman v. Kirchman*, 212 Ga. 488, 93 S.E.2d 685 (1956).

Jurisdiction over garnishment of U.S. Marine Corps member’s pay. — Georgia trial court had jurisdiction to consider a wife’s garnishment of her husband’s U.S. Marine Corps pay to collect past due child support, despite the fact that the Marine Corps Finance Center (the garnishee) was located in Missouri and the husband was stationed in North Carolina. *Souza v. Souza*, 196 Ga. App. 59, 395 S.E.2d 298, cert. denied, 196 Ga. App. 909, (1990).

Claim for interest waived. — Because the plaintiffs failed to timely put an insurer on notice that the plaintiffs were seeking to garnish the interest accruing on an underlying consent judgment with the insured, the plaintiffs claim for that interest was waived under O.C.G.A. § 18-4-61. *St. Paul Reinsurance Co. v. Ross*, 276 Ga. App. 135, 622 S.E.2d 374 (2005).

Garnishee holding funds of judgment debtor. — One need not know prior to making affidavit that the garnishee holds funds or property of the judgment debtor. *Fidelity Nat’l Bank v. KM Gen. Agency, Inc.*, 244 Ga. 753, 262 S.E.2d 67 (1979).

Name of garnishee need not be stated in affidavit for garnishment. *Gainesville Feed & Poultry Co. v. Waters*, 87 Ga. App. 354, 73 S.E.2d 771 (1952).

Affidavits subscribed to before unauthorized persons. — When garnishment or attachment affidavits are subscribed to before unauthorized persons, proceedings are void ab initio rendering judgments based thereon likewise void. *Jenkins v. Community Loan & Inv. Corp.*, 120 Ga. App. 543, 171 S.E.2d 654 (1969).

Absence of a judge’s or clerk’s signature on an affidavit for garnishment did not constitute a nonamendable defect justifying the grant of a motion to set aside a judgment. *Horizon Credit Corp. v. Lanier Bank & Trust Co.*, 220 Ga. App. 362, 469 S.E.2d 452 (1996).

Fieri facias need not issue along with or follow judgment prior to issuance of summons of garnishment. *Black*

General Consideration (Cont'd)

v. Black, 245 Ga. 281, 264 S.E.2d 216 (1980).

Cited in Cohen v. Nichols, 54 Ga. App. 394, 188 S.E. 48 (1936); Gibbs v. Rhodes Furn. Co., 58 Ga. App. 352, 198 S.E. 315 (1938); Marietta Broadcasting Co. v. Advance Mktg. Research, Inc., 231 Ga. 13, 200 S.E.2d 134 (1973); Ben O'Callaghan Co. v. Rose, Silverman & Hunt, 131 Ga. App. 29, 205 S.E.2d 45 (1974); Security Mgt. Co. v. King, 132 Ga. App. 618, 208 S.E.2d 576 (1974); Morrow Elec. Co. v. Cruse, 370 F. Supp. 639 (N.D. Ga. 1974); Halpern v. Austin, 385 F. Supp. 1009 (N.D. Ga. 1974); City Fin. Co. v. Winston, 238 Ga. 10, 231 S.E.2d 45 (1976); Weems v. Sterchi Bros. Stores, Inc., 238 Ga. 77, 231 S.E.2d 48 (1976); Shepherd v. Shepherd, 141 Ga. App. 855, 234 S.E.2d 689 (1977); Easterwood v. LeBlanc, 240 Ga. 61, 239 S.E.2d 383 (1977); Coursin v. Harper, 144 Ga. App. 4, 240 S.E.2d 565 (1977);

Thacker Constr. Co. v. Williams, 154 Ga. App. 670, 269 S.E.2d 519 (1980); McKinnon v. McKinnon, 158 Ga. App. 776, 282 S.E.2d 220 (1981); LeaseFirst v. Paulk, 200 Ga. App. 497, 408 S.E.2d 707 (1991); Mobile Paint Mfg. Co. v. Johnston, 219 Ga. App. 299, 464 S.E.2d 903 (1995); Akridge v. Silva, 298 Ga. App. 862, 681 S.E.2d 667 (2009).

Constitutionality

Garnishment procedure meets due process requirements. — Constitutional due process requirements are adequately met by judicial supervision and notice to the defendant mandated by the statutory procedure for garnishments. Black v. Black, 245 Ga. 281, 264 S.E.2d 216 (1980).

Compliance of garnishment procedure with due process requirements. — See Antico v. Antico, 241 Ga. 294, 244 S.E.2d 820 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 330 et seq.

C.J.S. — 38 C.J.S., Garnishment, § 158 et seq.

ALR. — Liability of garnishee to garnisher where former pays debt or releases property pending defective garnishment proceedings, 89 ALR 975.

Resident or foreign corporation doing business within state as subject to garnishment because of indebtedness to non-resident who in turn is indebted to non-resident principal defendant, 116 ALR 387.

18-4-62. Contents and service of summons of garnishment; requirements as to filing of answer to summons.

(a) The summons of garnishment shall be directed to the garnishee, commanding the garnishee to respond stating what money or other property is subject to garnishment. Except as provided in subsection (b) or (c) of this Code section, the garnishee's answer shall be filed with the court issuing the summons not sooner than 30 days and not later than 45 days after the service of the summons and shall be accompanied by the money or other property subject to garnishment. Upon the affidavit and summons being delivered to the sheriff, marshal, constable, or like officer of the court issuing the summons, it shall be his or her duty to serve the summons of garnishment, as set forth in Code Section 18-4-23, upon the person to whom it is directed and to make an entry of service upon the affidavit and return the affidavit to the court. The summons of garnishment shall state that if the garnishee fails to file a

garnishee's answer to the summons, a judgment by default will be entered against the garnishee for the amount claimed by plaintiff against the defendant.

(b) Under circumstances where the defendant has been an employee of the garnishee, and if the defendant is no longer employed by the garnishee, and if the garnishee has no money or property of the defendant subject to garnishment, the garnishee may immediately file the garnishee's answer; provided, however, that such garnishee's answer shall be filed not later than 45 days after the service of the summons.

(c) If the garnishee is a bank or other financial institution and if the defendant does not have an active account with, and is not the owner of any money or property in the possession of, the bank or financial institution, then the garnishee may immediately file a garnishee's answer; provided, however, that such garnishee's answer shall be filed not later than 45 days after the service of the summons. (Code 1933, § 46-103, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 1983, p. 454, § 1; Ga. L. 2012, p. 2, § 7/HB 683.)

Law reviews. — For article discussing due process problems with Georgia's post-judgment garnishment procedures, in light of *City Fin. Co. v. Winston*, 238 Ga. 10, 231 S.E.2d 45 (1979), see 13 Ga. St. B.J. 144 (1977). For survey article on commercial law, see 34 Mercer L. Rev. 31 (1982). For survey article on trial practice

and procedure, see 34 Mercer L. Rev. 299 (1982). For article discussing an advisory opinion issued by the Standing Committee on the Unlicensed Practice of Law on the issue of execution and filing of an answer in the garnishment action by a nonattorney employee of the garnishee, see 16 (No. 1) Ga. St. B.J. 102 (2010).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, certain decisions under former Civil Code 1910, § 5269, and former Code 1933, §§ 46-105 and 46-301, as they read prior to revision of Title 46 by Ga. L. 1976, p. 1608, § 1, have been included in the annotations for this Code section.

Purpose of summons of garnishment. — Summons of garnishment is the process that brings the garnishee into court, and in this respect is like process in an ordinary suit, its purpose being to give notice to the garnishee of the plaintiff's claim upon the defendant's property in the garnishee's possession or upon the garnishee's indebtedness to the defendant. *Gowen v. Bell*, 113 Ga. App. 324, 148 S.E.2d 52 (1966) (decided under former

Code 1933, § 46-105, as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Substantial compliance with requirements. — Substantial compliance with the requisites of the Code, with respect to issuing and serving of process, will be sufficient, and, when notice is given, no technical or formal objection shall invalidate any process. *Gainesville Feed & Poultry Co. v. Waters*, 87 Ga. App. 354, 73 S.E.2d 771 (1952) (decided under former Code 1933, § 46-105, as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Premature answer in garnishment is amendable. — Answer in garnishment prematurely filed exists, after time for proper filing arrives, in an imperfect form, and is therefore amendable as are plead-

ings generally. *Mark Ten Homes Corp. v. First Nat'l Bank*, 115 Ga. App. 597, 155 S.E.2d 455 (1967) (decided under former Code 1933, § 46-301, as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Personal service necessary. — Former Civil Code 1910, § 5269 required that when summons of garnishment is issued, officer shall serve the summons upon person of garnishee, which means that the summons shall be served upon the garnishee personally. *Robinson v. T.A. Bryson & Sons*, 45 Ga. App. 440, 165 S.E. 158 (1932) (decided under former Civil Code 1910, § 5269).

Personal service defined. — Personal service means actual delivery of process to the defendant in person, and does not include leaving a copy at the defendant's usual place of abode, or the defendant's home, or at the defendant's office, or by delivery to someone else. *Robinson v. T.A. Bryson & Sons*, 45 Ga. App. 440, 165 S.E. 158 (1932) (decided under former Civil Code 1910, § 5269).

Availability of personal service provisions of § 9-11-4(d). — Provisions of O.C.G.A. § 9-11-4(d) concerning personal service of process are available in a garnishment case. *Alpha Transp. Serv., Inc. v. Cartwright*, 248 Ga. 701, 285 S.E.2d 713 (1982).

O.C.G.A. § 18-4-62 does not expressly state that personal service provisions of O.C.G.A. § 9-11-4(d) are unavailable, and further, § 9-11-4(j) provides that "service shall be sufficient when made in accordance with the statutes relating particularly to the proceeding or in accordance with this Code section." *Alpha Transp. Serv., Inc. v. Cartwright*, 248 Ga. 701, 285 S.E.2d 713 (1982).

Service on nonresident garnishee's agent and answer by garnishee. — When attachment process is sued out against nonresident and summons of garnishment was served on agent of garnishee, and when garnishee filed answer admitting funds, garnishee cannot legally defend against subsequent action on attachment bond on ground that the garnishee was not personally served as required. *Carrington v. Wilharbla Realty Co.*, 67 Ga. App. 898, 20 S.E.2d 860 (1942) (decided under former Code 1933,

§ 46-105, as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Return of service conclusive as to identity of person to whom summons was directed. — When it is not contended that it was irregular or incomplete in any way, return of service is conclusive as to identity of person to whom summons of garnishment was directed. *Gainesville Feed & Poultry Co. v. Waters*, 87 Ga. App. 354, 73 S.E.2d 771 (1952) (decided under former Code 1933, § 46-105, as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Amendability of return of service. — Return of service not amendable to show that person named in it was garnishee served. *Gibbs v. Rhodes Furn. Co.*, 58 Ga. App. 352, 198 S.E. 315 (1938) (decided under former Code 1933, § 46-105, as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Motion to quash filed after time for answering has expired. — When time provided by law for answering summons of garnishment has expired when garnishee files the garnishee's motion to quash, the trial court errs if the court grants the motion. *Gowen v. Bell*, 113 Ga. App. 324, 148 S.E.2d 52 (1966) (decided under former Code 1933, § 46-105, as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Garnishment by judgment creditor against defendant's insurer. — After the parents of a shooting victim obtained judgment against the owner of the property on which their son was shot, and the owner filed bankruptcy, the Court of Appeals erred in reversing the trial court and holding that the judgment debtor had no garnishment action against the owner's insurer; the insurer could contest, under O.C.G.A. § 18-4-62, the assertion that it held property belonging to the owner, namely the benefits to be paid on the owner's behalf under an insurance contract. *Ross v. St. Paul Reinsurance Co., Ltd.*, 279 Ga. 92, 610 S.E.2d 57 (2005).

Cited in *City Fin. Co. v. Winston*, 238 Ga. 10, 231 S.E.2d 45 (1976); *Weems v. Sterchi Bros. Stores, Inc.*, 238 Ga. 77, 231 S.E.2d 48 (1976); *Shepherd v. Shepherd*, 141 Ga. App. 855, 234 S.E.2d 689 (1977); *Lloyd's of London, Inc. v. Goldkist, Inc.*,

145 Ga. App. 478, 243 S.E.2d 726 (1978); *Kauffman v. Kauffman*, 145 Ga. App. 648, 244 S.E.2d 613 (1978); *Marbut Co. v. Capital City Bank*, 148 Ga. App. 664, 252 S.E.2d 85 (1979); *K. & L. Constr. Co. v. Central Bank & Trust Co.*, 151 Ga. App. 123, 258 S.E.2d 771 (1979); *Fidelity Nat'l Bank v. KM Gen. Agency, Inc.*, 244 Ga. 753, 262 S.E.2d 67 (1979); *Thacker Constr. Co. v. Williams*, 154 Ga. App. 670,

269 S.E.2d 519 (1980); *Phillips v. Phillips*, 159 Ga. App. 676, 285 S.E.2d 52 (1981); *Anderson v. Burnham*, 12 Bankr. 286 (Bankr. N.D. Ga. 1981); *Nockonwood Indus., Inc. v. Tuloka Affiliates, Inc.*, 164 Ga. App. 424, 296 S.E.2d 405 (1982); *Mobile Paint Mfg. Co. v. Johnston*, 219 Ga. App. 299, 464 S.E.2d 903 (1995); *TBF Fin., LLC v. Houston*, 298 Ga. App. 657, 680 S.E.2d 662 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 339 et seq.

C.J.S. — 38 C.J.S., Garnishment, §§ 174, 185, 186, 188 et seq.

ALR. — Money due only on further performance of contract by debtor as subject to garnishment, 2 ALR 506.

Waiver or admission by garnishee as affecting principal defendant, 64 ALR 430.

Who may serve writ, summons, or notice of garnishment, 75 ALR2d 1433.

Sufficiency, as to content, of notice of garnishment required to be served upon garnishee, 20 ALR5th 229.

18-4-63. Issue of additional summons of garnishment; dismissal of garnishment proceedings upon nonissuance of summons.

(a) Summons of garnishment may issue from time to time on the same affidavit until the judgment is paid or the garnishment proceeding is otherwise terminated in accordance with this chapter.

(b) In the event no summons of garnishment has been issued on an affidavit for two years or more, the garnishment proceeding based on that affidavit shall automatically stand dismissed. (Code 1933, § 46-104, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 1981, p. 383, § 1.)

Cross references. — Continuing garnishment proceedings, § 18-4-110 et seq.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, certain decisions under former Civil Code 1910, § 5269 have been included in the annotations for this Code section.

Additional affidavit to obtain another summons in appropriate cases. — While summons of garnishment may issue from time to time before trial, without giving an additional affidavit, the plaintiff in a garnishment proceeding is not precluded from making, if the plaintiff

so desires, an additional affidavit to obtain another summons of garnishment, when the answer of the garnishee to the first summons shows that the garnishee was indebted to the defendant in an amount less than that of the plaintiff's claim. *Johnson v. Atlanta Furn. Co.*, 47 Ga. App. 124, 169 S.E. 767 (1933) (decided under former Civil Code 1910, § 5269).

Cited in *Knox v. Knox*, 151 Ga. App. 144, 259 S.E.2d 150 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 342.

18-4-64. Service of copy of summons of garnishment upon defendant; notice of filing and issuance of summons of garnishment; time for distribution.

(a) In a garnishment based on a judgment, the defendant shall be given notice of the filing of the first summons of garnishment on an affidavit for garnishment and of the issuance of an additional summons of garnishment on such affidavit when no notice has been given to the defendant within 90 days immediately preceding the issuance of such additional summons, using any one or more of the following methods:

(1) The plaintiff, at the time the garnishment is filed with the clerk, shall commence procedures to effectuate the service of a copy of the summons of garnishment on the defendant; and service thereafter shall be made on the defendant as soon as is reasonably practicable. Service pursuant to this paragraph shall be made pursuant to Code Section 9-11-4;

(2) The plaintiff, after issuance of the summons of garnishment and not more than three business days after service of the summons of garnishment on the garnishee, shall cause a written notice to be sent to the defendant at the defendant's last known address by registered or certified mail or statutory overnight delivery, return receipt requested. Either the return receipt indicating receipt by the defendant or the envelope bearing the official notification from the United States Postal Service of the defendant's refusal to accept delivery of such registered or certified mail or statutory overnight delivery shall be filed with the clerk of the court in which the garnishment is pending. The defendant's refusal to accept such registered or certified mail or statutory overnight delivery addressed to defendant shall be deemed notice to defendant;

(3) The plaintiff, after the issuance of the summons of garnishment and not more than three business days after service of the summons of garnishment on the garnishee, shall cause a written notice to be delivered personally to the defendant by the plaintiff or by the plaintiff's attorney at law or other agent. A certification by the person making the delivery shall be filed with the clerk;

(4)(A) When the defendant resides out of the state, has departed the state, cannot, after due diligence, be found within the state, or conceals his place of residence from the plaintiff and the fact shall appear, by affidavit, to the satisfaction of the judge or clerk of the court, the levy and attachment of the lien of the garnishment shall

constitute sufficient notice to the defendant, provided such levy and attachment of the lien of garnishment alone shall constitute sufficient notice, unless the plaintiff has actual knowledge of the defendant's address, in which case, to provide sufficient notice, the plaintiff shall also mail a written notice of garnishment to the defendant at said address; or, not having such actual knowledge of the defendant's address but the address at which the defendant was served being shown on the return of service in the action resulting in the judgment, to provide sufficient notice, the plaintiff shall also mail a written notice of garnishment to the defendant at said address.

(B) A mailing of the written notice provided for in this Code section shall be made after the issuance of the summons of garnishment and not more than three business days after service of the summons of garnishment on the garnishee; and a certificate of such mailing shall be filed with the clerk by the person mailing the notice;

(5)(A) Where it shall appear by affidavit that a defendant in the garnishment action is not a resident of this state or has departed from this state, or after due diligence cannot be found in this state, or conceals his place of residence from the plaintiff, notice may be given by causing two publications of the written notice in the paper in which advertisements are printed by the sheriff in each county in which a summons of garnishment is served. Such publications must be at least six days apart; and the second publication must be made not more than 21 days after the service of the summons of garnishment on the garnishee. A certification by the person causing the notice to be published shall be filed with the clerk, provided such publication shall constitute sufficient notice alone, unless the plaintiff has actual knowledge of the defendant's address, in which case, to provide sufficient notice, the plaintiff shall also mail a written notice of garnishment to the defendant at said address.

(B) A mailing of the written notice provided for in this Code section shall be made after the issuance of the summons of garnishment and not more than three business days after service of the summons of garnishment on the garnishee; and a certificate of such mailing shall be filed with the clerk by the person mailing the notice;

(6) After issuance of the summons of garnishment and not more than three business days after service of the summons of garnishment on the garnishee, the plaintiff shall send by ordinary mail a written notice of the garnishment to the defendant at the address at which the defendant was served in the action resulting in the judgment on which the garnishment proceeding is based; provided,

however, this paragraph may be used only when the garnishment proceeding is commenced within 60 days after the judgment upon which the garnishment is based was obtained. A certification by the person mailing the notice shall be filed with the clerk;

(7) Where the defendant's address is known, the plaintiff, after issuance of the summons of garnishment and not more than three business days after service of the summons of garnishment on the garnishee, shall send to the defendant at such known address by ordinary mail a written notice of the garnishment. A certification by the person mailing the notice shall be filed with the clerk.

(b) The receiving by the defendant of actual timely notice of a summons of garnishment shall constitute notice.

(c) "Written notice," as referred to in paragraphs (2) through (7) of subsection (a) of this Code section, shall consist of a copy of the summons of garnishment or of a document which includes the names of the plaintiff and the defendant, the amount claimed in the affidavit of garnishment, a statement that a garnishment against the property and credits of the defendant has been or will be served on the garnishee, and the name of the court issuing the summons of garnishment.

(d) The methods of notification specified in subsection (a) of this Code section are cumulative and may be used in any sequence or combination. Where it appears that a plaintiff has reasonably, diligently, and in good faith attempted to use one method, another method thereafter may be utilized; and, for the time during which the attempt was being made, the time limit shall be tolled for the subsequent method.

(e) No money or other property delivered to the court by the garnishee shall be distributed; nor shall any judgment be rendered against the garnishee until after the expiration of ten days from the date of compliance with at least one method of notification provided by subsection (a) of this Code section. (Code 1933, § 46-105, enacted by Ga. L. 1977, p. 159, § 2; Ga. L. 2000, p. 1589, § 3.)

Cross references. — Issuance and service of summons of continuing garnishment, § 18-4-112.

Code Commission notes. — Pursuant

to Code Section 28-9-5, in 1991, periods were substituted for semicolons at the end of subparagraphs (a)(4)(A) and (a)(5)(A).

JUDICIAL DECISIONS

Garnishment procedure meets constitutional due process requirements.

— Constitutional due process requirements are adequately met by judicial supervision and notice to the defendant mandated by the statutory procedure for

garnishments. *Black v. Black*, 245 Ga. 281, 264 S.E.2d 216 (1980).

Garnishment proceeding as complying with procedural due process requirements. — See *Antico v. Antico*, 241 Ga. 294, 244 S.E.2d 820 (1978).

Written notice containing specified information was sufficient, although unsigned. Mahan v. Ford Motor Co., 146 Ga. App. 291, 246 S.E.2d 374 (1978).

No garnishment allowed upon out-of-state wages of nonresident. — Georgia state court was without power to enforce a Georgia child support judgment through the garnishment of the defendant's wages in another state when the defendant was not within Georgia. Nelson v. Nelson, 173 Ga. App. 546, 327 S.E.2d 529 (1985).

Court refused to dismiss consumer's claim that a debt collection agency's letter to the consumer did not comply with the requirement of O.C.G.A. § 18-4-64(c) that written notice include a statement that a garnishment against the property and credits had been or would be served on the garnishee; the collection agency, an agency employee, and a law firm failed to address that claim in their Fed. R. Civ. P. 12(b)(6) motion to dismiss. Taylor v. Heath W. Williams, L.L.C., 510 F. Supp. 2d 1206 (N.D. Ga. Feb. 23, 2007).

Dismissal of a garnishment action was proper because the judgment creditor failed to comply with the notice requirement of O.C.G.A. § 18-4-64(a)(2); the judgment debtor was

not served with notice until more than six months after the bank was served. Because there was no compliance with the notice requirements, the burden did not shift to the judgment debtor to raise improper service/notice as a defense. TBF Fin., LLC v. Houston, 298 Ga. App. 657, 680 S.E.2d 662 (2009).

Substantial compliance with three-day notice period was insufficient. — Court of Appeals erred when the court held that a judgment creditor's notification of a judgment debtor of a garnishment eight business days after service of the garnishee substantially complied with O.C.G.A. § 18-4-64(a)(7)'s requirement that notice be given within three business days. O.C.G.A. § 1-3-1 did not apply because the statute was unambiguous. Cook v. NC Two, L.P., 289 Ga. 462, 712 S.E.2d 831 (2011).

Cited in Easterwood v. LeBlanc, 240 Ga. 61, 239 S.E.2d 383 (1977); Kauffman v. Kauffman, 145 Ga. App. 648, 244 S.E.2d 613 (1978); Cartwright v. Alpha Transp. Serv., Inc., 159 Ga. App. 296, 283 S.E.2d 282 (1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, §§ 344, 353.

C.J.S. — 38 C.J.S., Garnishment, § 201 et seq.

ALR. — Content of notice to nonresi-

dent principal essential to garnishment or attachment, 92 ALR 570.

Effect of judgment in garnishment proceedings as between garnishee and principal defendant, 166 ALR 272.

18-4-65. Issues defendant may raise by traverse of plaintiff's affidavit.

(a) When garnishment proceedings are based upon a judgment, the defendant, by traverse of the plaintiff's affidavit, may challenge the existence of the judgment or the amount claimed due thereon. The defendant may plead any other matter in bar of the judgment, except as provided in subsection (b) of this Code section.

(b) The validity of the judgment upon which a garnishment is based may only be challenged in accordance with Chapter 11 of Title 9; and no such challenge shall be entertained in the garnishment case. However, where the court finds that the defendant has attacked the validity of the

judgment upon which the garnishment is based in an appropriate forum, the judge may order the garnishment released and stayed until the validity of the judgment has been determined in such forum.

(c) If the garnishment proceedings are based upon a pending action, the case shall proceed in accordance with Code Section 18-4-45. (Code 1933, § 46-403, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 1982, p. 3, § 18.)

Law reviews. — For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982).

JUDICIAL DECISIONS

Procedure for debtor asserting interest in garnishment funds. — Only O.C.G.A. §§ 18-4-65 and 18-4-93 provide how debtor may assert any “interest” the debtor may have in garnishment funds. *Flournoy v. Pate* (In re Antley), 18 Bankr. 207 (Bankr. M.D. Ga. 1982).

Defendant is not a “party” to the garnishment proceeding, although provision is made for the defendant to receive notice. *Flournoy v. Pate* (In re Antley), 18 Bankr. 207 (Bankr. M.D. Ga. 1982).

O.C.G.A. § 18-4-65 does not set a deadline by which a traverse must be filed and does not state or imply that the failure to file a traverse divests the defendant of any interest in garnished property. *Bowen v. Thompson* (In re Thompson), No. 13-52212, 2013 Bankr. LEXIS 5610 (Bankr. N.D. Ga. Apr. 29, 2013).

Challenge to validity of judgment not permitted. — In a postjudgment garnishment proceeding, the judgment debtor’s traverse asserting the judgment was void or voidable was clearly an impermissible challenge to the validity of the judgment. The trial court was not authorized to consider the debtor’s verified complaint for damages which addressed issues in bar of judgment in support of the debtor’s traverse, and the trial court improperly dismissed the proceeding by granting summary judgment on the debtor’s verified complaint without holding an evidentiary hearing on the debtor’s traverse. *Southern Land & Cattle Co. v. Brock*, 213 Ga. App. 3, 443 S.E.2d 647 (1994).

Res judicata. — Trial court properly granted a bank summary judgment in a

suit for conversion against the bank brought by a debtor because the debtor’s claim was barred by res judicata since the debtor failed to raise any challenge in the garnishment proceeding wherein the bank was a garnishee. *Copeland v. Wells Fargo Bank, N.A.*, 317 Ga. App. 669, 732 S.E.2d 536 (2012), cert. denied, No. S13C0189, 2013 Ga. LEXIS 124 (Ga. 2013).

No provision for traversing answer of garnishee. — Georgia garnishment statute and amendments thereto do not contain a specific provision whereby a defendant may traverse the answer of the garnishee. *Flournoy v. Pate* (In re Antley), 18 Bankr. 207 (Bankr. M.D. Ga. 1982). See also *Terrell v. Fuller*, 160 Ga. App. 56, 286 S.E.2d 50 (1981).

Traverse properly granted as to garnishment petition. — Because the amount a former spouse claimed the other spouse owed for health care and extracurricular activity expenses incurred by their children had not been reduced to a money judgment, and because the former spouse failed to show entitlement to the process of prejudgment garnishment under O.C.G.A. § 18-4-40 et seq., the other spouse’s traverse to the garnishment petition was properly granted. *Stoker v. Severin*, 292 Ga. App. 870, 665 S.E.2d 913 (2008).

Trial court did not err in granting a sole proprietorship’s traverse, in which it sought to become a party in a golf supplier’s garnishment action and asserted a verified claim to the funds at issue, because there was some evidence to support

the findings that the sole proprietorship was a separate and distinct entity from the corporation and that the garnishee assented to the modification of a contract to replace the corporation with the sole proprietorship as the contractor; the sole proprietorship had its own tax identification number and liability insurance, and a representative of the garnishee testified that the garnishee was aware that someone had changed the contractor's name and that the garnishee had no business dealings with the corporation. *A. M. Buckler & Assocs. v. Sanders*, 305 Ga. App. 704, 700 S.E.2d 701 (2010).

Plaintiff may not challenge judgment establishing debt. — Plaintiff in garnishment action is precluded from challenging the validity of the judgment upon which the garnishment was based. *Loftin v. Loftin*, 166 Ga. App. 778, 305 S.E.2d 641 (1983).

Deletion of the conjunction "and" between the partnership's name and the partner's name as they appear in the complaint and judgment does not mean that a judgment against the partner does not exist. *Newton, Inc. v. Alex*, 162 Ga. App. 664, 292 S.E.2d 121 (1982).

Dormancy of judgment. — In garnishment proceeding to collect arrears on child support judgment, issue of dormancy of judgment was not present when payments made by the appellant during the ten years following the divorce were more than adequate to cover the amount of any arrearages dating from over seven years in the past and the appellee had the right to consider those payments as having been applied to the oldest amounts due. *Turner v. Wood*, 162 Ga. App. 674, 292 S.E.2d 558 (1982).

Stay of garnishment pending attack on judgment. — So long as an attack on the underlying judgment is pending in a trial court or in an appellate court, the court in which the garnishment

is pending has within the court's discretion the power to order the garnishment released and stayed until the validity of such judgment has been determined. *Smith v. Smith*, 161 Ga. App. 20, 289 S.E.2d 5 (1982).

Issuance of stay, without release, relieved garnishee from filing answer. — Although a court has the authority both to release and stay a garnishment pursuant to O.C.G.A. § 18-4-65, there is nothing to prevent a court from only issuing a stay without a release, and such a stay relieves the garnishee from answering even without issuance of a release; thus, the trial court erred in entering a default judgment against a bank as the garnishee in a garnishment proceeding while a stay was in effect based on the bank's failure to file an answer to the garnishment complaint. *Chase Manhattan Bank v. LaFray*, 258 Ga. App. 183, 573 S.E.2d 435 (2002).

Failure to determine validity of underlying judgment not error. — When the trial court's written order denying the defendant's traverse is not premised upon findings as to the validity of the underlying judgment, this error presents no ground for reversal. *Loftin v. Loftin*, 166 Ga. App. 778, 305 S.E.2d 641 (1983).

Cited in *Thomas v. Firestone Tire & Rubber Co.*, 139 Ga. App. 40, 227 S.E.2d 870 (1976); *Knox v. Knox*, 151 Ga. App. 144, 259 S.E.2d 150 (1979); *Thacker Constr. Co. v. Williams*, 154 Ga. App. 670, 269 S.E.2d 519 (1980); *West v. National Bank*, 155 Ga. App. 178, 270 S.E.2d 245 (1980); *Brodie v. Brodie*, 155 Ga. App. 593, 271 S.E.2d 725 (1980); *McKinnon v. McKinnon*, 158 Ga. App. 776, 282 S.E.2d 220 (1981); *Ross v. Ross*, 159 Ga. App. 144, 282 S.E.2d 759 (1981); *Earley v. Earley*, 165 Ga. App. 483, 300 S.E.2d 814 (1983); *Christian v. M & R Collection Adjustment, Inc.*, 167 Ga. App. 712, 307 S.E.2d 523 (1983); *TBF Fin., LLC v. Houston*, 298 Ga. App. 657, 680 S.E.2d 662 (2009).

RESEARCH REFERENCES

ALR. — Payment under void order in garnishment proceedings as protection to garnishee, 49 ALR 1411.

Proceedings in one state upon a debt or other claim as affected by pendency in another state of proceedings to garnish or

attach such debt or claim, 91 ALR 959.
Issues in garnishment as triable to
court or to jury, 19 ALR3d 1393.

18-4-66. Forms for postjudgment garnishment.

For the purpose of Articles 1 through 5 of this chapter, the following forms are declared to be sufficient for garnishment after judgment, provided that nothing in this Code section shall be construed to require the use of particular forms in any proceeding under this article:

(1) Garnishment affidavit.

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

Plaintiff

)

)

)

v.)

)

)

Defendant

)

)

)

Garnishee

)

)

)

Address

)

)

Civil action
File no. _____

GARNISHMENT AFFIDAVIT

Personally appeared the undersigned affiant who on oath says that he is the above plaintiff, his agent, or his attorney at law and that the above defendant is indebted to said plaintiff on a judgment described as follows:

_____ is the case number in the _____ Court of _____ County which rendered the judgment against the defendant, \$_____ being the balance thereon.

Affiant

Sworn to and subscribed
before me this _____
day of _____, _____.

Plaintiff's attorney

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(2) Summons of garnishment.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____)	
Plaintiff)	
)	
v.	)	Civil action
	)	File no. _____
_____)	
Defendant)	
Last four digits of)	
social security number)	
)	
_____)	
Garnishee)	
)	
_____)	
Address)	

SUMMONS OF GARNISHMENT

To: _____ Garnishee

Amount claimed due by plaintiff (To be completed by plaintiff)	\$_____
Plus court costs due on the summons (To be completed by the clerk)	\$_____

YOU ARE HEREBY COMMANDED to hold immediately all prop-
erty, money, wages, except what is exempt, belonging to the defen-
dant, or debts owed to the defendant named above at the time of
service of this summons and between the time of service of this
summons and the time of making your garnishee answer. Not sooner
than 30 days but not later than 45 days after you are served with this
summons, you are commanded to file your garnishee answer in
writing with the clerk of this court and serve a copy upon the plaintiff
or the plaintiff's attorney named below. Money or other property
subject to this summons should be delivered to the court with your
garnishee answer. Should you fail to file a garnishee answer to this
summons, a judgment will be rendered against you for the amount
the plaintiff claims due by the defendant.

Witness the Honorable _____, Judge of said Court.

This _____ day of _____, _____.

Clerk,

_____ Court of _____ County

Plaintiff's attorney

Address

Service perfected on garnishee, this _____ day of _____, _____.

Deputy marshal, sheriff,
or constable

(3) Defendant's traverse and order thereon.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____)	
Plaintiff)	
)	
v.	)	Civil action
	)	File no. _____
_____)	
Defendant)	
)	
_____)	
Garnishee)	

TRAVERSE OF DEFENDANT

Now comes the defendant in the above-styled case and traverses the plaintiff's affidavit by saying the same is untrue or legally insufficient.

Defendant or his
attorney at law

ORDER

It is hereby ordered that a hearing be held upon the defendant's traverse before this court on the _____ day of _____, _____, at _____:_____.M., and that a copy of the defendant's traverse and this order be served as provided by law.

This _____ day of _____, _____.

Judge,
_____ Court of _____ County

(CERTIFICATE OF SERVICE)

(4) Answer of garnishee.

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

Plaintiff

V.

Defendant

Garnishee

Civil action
File no. _____

ANSWER OF GARNISHEE

1.

At the time of service or from the time of service to the time of this garnishee answer, garnishee had in its possession the following described property of the defendant:

2.

At the time of service or from the time of service to the time of this garnishee answer, all debt accruing from garnishee to defendant is in the amount of \$_____.

3.

\$_____ of the amount named in paragraph 2 was wages earned at the rate of \$_____ per _____ for the period beginning (date), _____, through the time of making this garnishee answer. The amount of wages which is subject to this garnishment is computed as follows:

\$ _____ Gross earnings

\$ _____ Total social security and withholding tax

\$ _____ Total disposable earnings

\$ _____ Amount of wages subject to garnishment

4.

Garnishee further states: _____.

Garnishee,
garnishee's attorney, or officer
or employee of an entity garnishee

(CERTIFICATE OF SERVICE)

(5) Plaintiff's traverse.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____)	
Plaintiff)	
)	
v.	)	Civil action
	)	File no. _____
_____)	
Defendant)	
)	
_____)	
Garnishee)	

TRAVERSE OF PLAINTIFF

Now comes the plaintiff in the above-styled case and traverses the garnishee's answer by saying the same is untrue or legally insufficient.

Plaintiff or his
attorney at law

(CERTIFICATE OF SERVICE)

(6) Release of garnishment.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____)	
Plaintiff)	
)	
v.	)	Civil action
	)	File no. _____
_____)	
Defendant)	
)	

Garnishee)
)
)

Address)
)

RELEASE OF GARNISHMENT

To: _____ Garnishee

This is to notify you that you have been released from filing a garnishee answer to any and all summons of garnishment pending as of this date in the above-styled case.

This release authorizes you to deliver to the defendant in garnishment any money or other property in your possession belonging to the defendant.

This release does not terminate the garnishment proceedings, nor does this release relieve you of any obligation placed on you by the service of a summons of garnishment subsequent to this date.

This _____ day of _____, _____.

Clerk,
_____ Court of _____ County

(7) Attachment to summons of garnishment upon a financial institution.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

Plaintiff)
)
)
v.) Civil action
) File no. _____
)

Defendant)
)
)

Other known names)
of Defendant)
)

Current and past)
addresses of Defendant)
)

Last four digits of)
social security number)

or federal tax

identification number

of Defendant

Last four digits of

account or identification

numbers of Defendant

used by Garnishee

Other allegations

Garnishee

(Code 1933, § 46-605, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 1984, p. 370, § 2; Ga. L. 1985, p. 1632, § 2; Ga. L. 1997, p. 941, § 2; Ga. L. 1999, p. 81, § 18; Ga. L. 2012, p. 2, § 8/HB 683; Ga. L. 2014, p. 482, § 8/SB 386.)

The 2014 amendment, effective July 1, 2014, substituted “Last four digits of social security number” for “Social security number” in paragraph (2) of the form; and substituted “Last four digits of social security number” for “Social security number” and substituted “Last four digits of account or identification” for “Account or identification” in paragraph (7) of the form. See editor’s notes for applicability.

Editor’s notes. — Ga. L. 2014, p. 482,

§ 10/SB 386, not codified by the General Assembly, provides, in part, that this Act shall become effective on July 1, 2014, and shall apply to any filings made on or after July 1, 2014.

Law reviews. — For article regarding “Usufructs and Estates for Years Distinguished,” see 18 Ga. St. B.J. 116 (1982). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 114 (1997).

JUDICIAL DECISIONS

Verification of garnishee’s answer. — Garnishee’s answer to a verified post-judgment garnishment petition need not be verified. *First Nat’l Bank v. Sinkler*, 170 Ga. App. 668, 317 S.E.2d 897 (1984).

Traverse is not proper vehicle for challenging the validity of a default judgment. *Ray v. Standard Fire Ins. Co.*, 168 Ga. App. 116, 308 S.E.2d 221 (1983).

Cited in *Davis v. Gamble*, 151 Ga. App. 155, 259 S.E.2d 159 (1979); *Harrison v. Harrison*, 159 Ga. App. 578, 284 S.E.2d 83 (1981); *Evans v. CIT Fin. Servs., Inc.*, 16 Bankr. 731 (Bankr. N.D. Ga. 1982); *Conner v. Mount Carmel Country Estates*, 21 Bankr. 616 (Bankr. N.D. Ga. 1982).

RESEARCH REFERENCES

ALR. — Omission of signature of issuing officer on civil process or summons as affecting jurisdiction of the person, 37 ALR2d 928.

ARTICLE 5

ANSWER BY GARNISHEE AND SUBSEQUENT PROCEEDINGS

Law reviews. — For note discussing intervention by defendants and third persons into garnishment proceedings, see 12

Ga. L. Rev. 814 (1978). For note discussing a garnishee’s answer and traverse, see 12 Ga. L. Rev. 814 (1978).

JUDICIAL DECISIONS

Cited in Thacker Constr. Co. v. Williams, 154 Ga. App. 670, 269 S.E.2d 519 (1980).

RESEARCH REFERENCES

C.J.S. — 38 C.J.S., Garnishment, § 209 et seq.
ALR. — Right of one to summon or charge himself as garnishee, 31 ALR 711; 61 ALR 1458.
Affidavit of substantial defense to the merits in an attachment or garnishment proceeding as a general appearance, 116 ALR 1215.
Removability to federal court of garnishment proceedings, 22 ALR2d 904.

Garnishee’s pleading, answering interrogatories, or the like, as affecting his right to assert court’s lack of jurisdiction, 41 ALR2d 1093.
Right of garnishee, other than bank holding deposit, to set off claims not due or certain when garnishment is served, 57 ALR2d 700.

18-4-80. Effect of release of summons of garnishment on garnishee.

A release of summons of garnishment shall relieve the garnishee from any obligation to file a garnishee answer to any summons of garnishment pending on the date of the release and shall authorize the garnishee to deliver to the defendant in garnishment any money or other property in the garnishee’s possession belonging to the defendant. A release shall not operate as a dismissal of the garnishment proceedings. (Code 1933, § 46-308, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 2012, p. 2, § 9/HB 683.)

JUDICIAL DECISIONS

Issuance of stay relieved garnishee from filing answer while stay was in effect. — Although a court has the authority both to release and stay a garnishment pursuant to O.C.G.A. § 18-4-65, there is nothing to prevent a court from only issuing a stay without a release, and such a stay relieves the garnishee from answering even without issuance of a re-

lease; thus, the trial court erred in entering a default judgment against a bank as the garnishee in a garnishment proceeding while a stay was in effect based on the bank’s failure to file an answer to the garnishment complaint. Chase Manhattan Bank v. LaFray, 258 Ga. App. 183, 573 S.E.2d 435 (2002).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 2C Am. Jur. Pleading and Practice Forms, Attachment and Garnishment, § 267.

18-4-81. Effect of defendant's traverse on garnishee; filing of bond by defendant; entry of judgment on bond.

When the defendant files his or her traverse, the garnishee is not relieved of filing a garnishee answer, nor is the garnishee relieved of delivering the money or other property of the defendant which is subject to the garnishment to the court, unless the defendant files in the clerk's office of the court where the garnishment is pending a bond with good security, in favor of the plaintiff, conditioned for the payment of any judgment that may be entered in the proceeding. The bond shall be subject to approval by the clerk of the court; and, upon receipt of a bond deemed acceptable by the clerk, it shall be the clerk's duty to issue a release of any summons of garnishment pending in the garnishment proceeding. If the plaintiff shall prevail in the proceeding, the plaintiff shall be entitled to entry of judgment upon such bond against the principal and securities therein, as judgment may be entered against securities upon appeal. If the defendant files a bond, no further garnishment process may be filed in any court by the plaintiff against the defendant until the issues raised by the defendant's pleadings are decided. (Code 1933, § 46-402, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 2012, p. 2, § 9/HB 683.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, certain decisions under former Civil Code 1895, § 4718, former Civil Code 1910, § 5280, and former Code 1933, § 46-402, as it read prior to revision by Ga. L. 1976, p. 1608, § 1, are included in the annotations for this Code section.

Availability to debtor of bond to dissolve garnishment does not substitute for notice and hearing. *Morrow Elec. Co. v. Cruse*, 370 F. Supp. 639 (N.D. Ga. 1974) (decided under former Code 1933, § 46-402).

Action on bond must be brought in name of party in whom legal interest vested. *Taylor v. Felder*, 7 Ga. App. 219, 66 S.E. 628 (1909) (decided under former Civil Code 1895, § 4718).

Judgment in main action against defendant is condition precedent to judg-

ment on dissolution bond. *Light v. Hunt*, 17 Ga. App. 491, 87 S.E. 763 (1916); *Middleton v. Johnson*, 19 Ga. App. 478, 91 S.E. 785 (1917) (decided under former Civil Code 1910, § 5280).

Judgment cannot be reviewed by certiorari. *Leake v. Tyner*, 112 Ga. 919, 38 S.E. 343 (1901) (decided under former Civil Code 1895, § 4718).

Judgment against garnishee is a condition precedent to judgment on bond given to dissolve garnishment. This includes judgment by default due to garnishee's failure to answer summons. *Smith v. Kennedy*, 125 Ga. 830, 54 S.E. 731 (1906) (decided under former Civil Code 1895, § 4718).

Recital in judgment on dissolution bond that judgment against funds garnished had been rendered is not conclusive, but may be attacked by affidavit of

illegality. *Smith v. Kennedy*, 125 Ga. 830, 54 S.E. 731 (1906) (decided under former Civil Code 1895, § 4718).

Judgment against surety may be attacked by affidavit of illegality, by proof that judgment against garnishee was not proved. *Simerly v. Brooks*, 21 Ga. App. 169, 93 S.E. 1017 (1917) (decided under former Civil Code 1910, § 5280).

Bond executed by defendant for use of named usee will not make latter party to suit. *Drought v. Poage*, 3 Ga. App. 178,

59 S.E. 728 (1907) (decided under former Civil Code 1895, § 4718).

Defendant's discharge in bankruptcy was not bar to action on garnishment bond. *Light v. Hunt*, 17 Ga. App. 491, 87 S.E. 763 (1916) (decided under former Civil Code 1910, § 5280).

Cited in *Bryant v. J. Scott Rentals, Inc.*, 144 Ga. App. 231, 241 S.E.2d 12 (1977); *Southerland v. Bedford*, 149 Ga. App. 758, 256 S.E.2d 121 (1979).

18-4-82. Contents of garnishee answer.

Within the time prescribed by Code Section 18-4-62, the garnishee shall file a garnishee answer describing what money or other property is subject to garnishment under Code Section 18-4-20. If the garnishee owes the defendant any sum for wages, the garnishee answer shall also state specifically when the wages were earned by defendant and whether they were earned as daily, weekly, or monthly wages. If the garnishee has been served with summons in more than one garnishment case involving the same defendant, the garnishee shall state in each garnishee answer that the money or other property is being delivered to the court subject to the claims of all the cases and shall give the numbers of all such cases in each garnishee answer. If the garnishee is unable to respond as provided for in this Code section, the garnishee's inability shall appear in the garnishee's answer, together with all the facts plainly, fully, and distinctly set forth, so as to enable the court to give judgment thereon. (Code 1933, § 46-501, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 2012, p. 2, § 9/HB 683.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1884-5, p. 96, former Civil Code 1895, § 4727, former Civil Code 1910, § 5293, and former Code 1933, § 46-301, as it read prior to revision by Ga. L. 1976, p. 1608, § 1, are included in the annotations for this Code section.

Garnishment action against judgment debtor's insurer was proper. — After the parents of a shooting victim obtained judgment against the owner of the property on which their son was shot, and the owner filed bankruptcy, the Court of Appeals erred in reversing the trial court and holding that the judgment debtor had no garnishment action against

the owner's insurer; the insurer could contest, under O.C.G.A. § 18-4-62, the assertion that it held property belonging to the owner, namely the benefits to be paid on the owner's behalf under an insurance contract. *Ross v. St. Paul Reinsurance Co., Ltd.*, 279 Ga. 92, 610 S.E.2d 57 (2005).

Statement in answer that garnishee is not indebted is not a conclusion, but a factual averment. *Ole Campbellton Constr. Co. v. Desert Inn & Country Club*, 154 Ga. App. 107, 267 S.E.2d 646 (1980).

Verification of answer in behalf of corporation. — Answer in behalf of corporation to summons of garnishment may

be verified by any agent who can and will depose positively to facts stated therein. *Ole Campbellton Constr. Co. v. Desert Inn & Country Club*, 154 Ga. App. 107, 267 S.E.2d 646 (1980).

Answer in garnishment is designed to show indebtedness of garnishee for two periods of time prior to the date of service of the summons, and also the period between service and answer. *Mark Ten Homes Corp. v. First Nat'l Bank*, 115 Ga. App. 597, 155 S.E.2d 455 (1967) (decided under former Code 1933, § 46-301).

Garnishee must answer concerning indebtedness and effects belonging to defendant. *Citizens Nat'l Bank v. Dasher*, 16 Ga. App. 33, 84 S.E. 482 (1915) (decided under former Civil Code 1910, § 5293).

Liability for improper answer on garnishment. — Garnishee's reliance on signature cards and the debtor's assurances that the bank accounts were trust accounts was insufficient to relieve the garnishee of liability for failing to list these accounts on the garnishment answer. *Wachovia Bank v. Unisys Fin. Corp.*, 221 Ga. App. 471, 471 S.E.2d 554 (1996).

Garnishee cannot refuse to answer and garnishee's answer must be directed to matter contained in summons. *Citizens & S. Nat'l Bank v. AVCO Fin. Servs., Inc.*, 129 Ga. App. 605, 200 S.E.2d 309 (1973) (decided under former Code 1933, § 46-301).

Bank's duty to comply with garnishment laws. — Bank was not entitled to assume that an account was a legitimate corporate account when the bank did not follow the bank's own internal procedure with respect to opening the account and, thus, the bank was not excused from complying with a summons of garnishment naming a signatory on the account, nor did the fact that the bank was unable to locate the account relieve the bank from the bank's responsibilities under the garnishment statutes. *Mobile Paint Mfg. Co. v. Johnston*, 219 Ga. App. 299, 464 S.E.2d 903 (1995).

Garnishee's determination as to status of assets is subject to contrary determination by court. *Citizens & S. Nat'l Bank v. AVCO Fin. Servs., Inc.*, 129 Ga. App. 605, 200 S.E.2d 309 (1973) (decided under former Code 1933, § 46-301).

Answer in nature of an interpleader was permitted. *Small v. Mendel, Gosling & Co.*, 96 Ga. 532, 23 S.E. 834 (1895); *Booth v. Brooke & Co.*, 6 Ga. App. 299, 64 S.E. 1103 (1909) (decided under former Civil Code 1895, § 4727).

Garnishee who is in doubt as to liability may have court resolve such doubt by presenting every element involved in the matter so that the court can make the determination and the garnishee avoid liability. *Citizens & S. Nat'l Bank v. AVCO Fin. Servs., Inc.*, 129 Ga. App. 605, 200 S.E.2d 309 (1973) (decided under former Code 1933, § 46-301).

Inability of garnishee to answer as required. — See *Estridge v. Janko*, 96 Ga. App. 246, 99 S.E.2d 682 (1957) (decided under former Code 1933, § 46-301).

Portion of section concerning garnishee's inability to answer as required, inapplicable when garnishee not indebted. — Statutory provision that when garnishee is unable to answer in what sum garnishee is indebted to defendant or what property garnishee has belonging to the defendant as required by the summon's garnishee shall so allege in the garnishee's answer setting forth all facts does not apply when the garnishee has not become indebted to the defendant. *Hardware Mut. Cas. Co. v. Scott*, 116 Ga. App. 637, 158 S.E.2d 275 (1967) (decided under former Code 1933, § 46-301).

Status of indebtedness between defendant and garnishee becomes fixed when latter files answer. — When answer of garnishee is filed, status of indebtedness between the defendant and the garnishee upon which right and quantum of plaintiff's recovery depends, becomes fixed, and the plaintiff's right of recovery is not thereafter affected, increased nor diminished by debts or demands accruing to the credit of the defendant or the garnishee against the other. *Estridge v. Janko*, 96 Ga. App. 246, 99 S.E.2d 682 (1957) (decided under former Code 1933, § 46-301).

Unless garnishee alleges inability to answer, status of indebtedness is fixed when answer is filed. — When a garnishee fails to allege, as required by former Code 1933, § 46-301, the garnishee's inability to answer whether or in

what manner the garnishee is indebted to the defendant or that a nonresident debtor owes a debt not yet due, the status of indebtedness between the nonresident and the defendant is fixed as of the time when the garnishee files an answer to the summons of garnishment. *Estridge v. Janko*, 96 Ga. App. 246, 99 S.E.2d 682 (1957) (decided under former Code 1933, § 46-301).

Garnishee's answer to summons, stating there is nothing in garnishee's possession subject thereto, is sufficient. *Citizens & S. Nat'l Bank v. AVCO Fin. Servs., Inc.*, 129 Ga. App. 605, 200 S.E.2d 309 (1973) (decided under former Code 1933, § 46-301).

Garnishee is entitled to set-off any indebtedness owed by the defendant in garnishment. *Mutual Reserve Life*

Ins. Co. v. Fowler, 2 Ga. App. 537, 59 S.E. 469 (1907) (decided under former Civil Code 1895, § 4727).

One owing wages exempt from garnishment, need not pay money into court upon being garnished, but may resist by one's answer. *Emmons, McKee & Co. v. Southern Bell Tel. & Tel. Co.*, 80 Ga. 760, 7 S.E. 232 (1888) (decided under former Ga. L. 1884-85, p. 96,).

Effect of bankruptcy of defendant. — See *Armour Packing Co. v. Wynn*, 119 Ga. 683, 46 S.E. 865 (1904) (decided under former Civil Code 1895, § 4727).

Cited in *Gibbs v. Spencer Indus., Inc.*, 244 Ga. 450, 260 S.E.2d 342 (1979); *Fidelity Nat'l Bank v. KM Gen. Agency, Inc.*, 244 Ga. 753, 262 S.E.2d 67 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 354 et seq.

ALR. — Waiver or admission by garnishee as affecting principal defendant, 64 ALR 430.

Answer on information and belief by trustee or garnishee in garnishment or trustee process, 125 ALR 253.

18-4-83. Service of answer of garnishee on plaintiff or attorney.

All garnishee answers shall, concurrently with filing, be served upon the plaintiff or the plaintiff's attorney. Service may be shown by the written acknowledgment of the plaintiff or the plaintiff's attorney, or by the certificate of the garnishee or the garnishee's attorney, attached to the garnishee's answer, that a copy of the garnishee's answer was mailed to the plaintiff or the plaintiff's attorney; provided, however, that no service shall be required unless the name and address of the plaintiff or the plaintiff's attorney shall appear on the face of the summons of garnishment; provided, further, that, if the garnishee fails to serve the plaintiff, the plaintiff shall be allowed 15 days from the time the plaintiff receives actual notice of the garnishee's answer to traverse the same. (Code 1933, § 46-502, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 2012, p. 2, § 9/HB 683.)

JUDICIAL DECISIONS

Discharge of garnishee upon plaintiff's failure to traverse answer. — By enacting a specific time limitation within which the plaintiff must traverse the garnishee's answer, the legislature expressed

a clear intent to provide for automatic discharge of the garnishee from all obligations under the summons if the plaintiff did not notify the court and garnishee otherwise within the brief prescribed time

period. *Nockonwood Indus., Inc. v. Tuloka Affiliates, Inc.*, 164 Ga. App. 424, 296 S.E.2d 405 (1982).

Answer need not be served on defendant. — Garnishee's answer must be served upon the plaintiff, but there is no requirement that the answer be served upon the defendant, since the plaintiff and the garnishee are the only parties to the garnishment action. *Flournoy v. Pate (In re Antley)*, 18 Bankr. 207 (Bankr. M.D. Ga. 1982).

Failure of plaintiff to include sufficient addresses on summons of garnishment. — In garnishment proceeding, the plaintiff was required to traverse garnishee's answer within 15 days after filing of answer even though it had not been served with a copy of the answer where it had failed to include its or its attorney's address on the summons of garnishment.

Nockonwood Indus., Inc. v. Tuloka Affiliates, Inc., 164 Ga. App. 424, 296 S.E.2d 405 (1982).

Effect of no service of answers. — When the name and address of the plaintiff's attorney appeared on the summons of garnishment, but no certificates of service were attached to the answers, and neither the plaintiff nor the plaintiff's attorney acknowledged receipt, the requirement that the plaintiff traverse the answers within 15 days of service was never triggered. *Lowery v. Dallis*, 237 Ga. App. 309, 513 S.E.2d 740 (1999).

Cited in *Mercantile Nat'l Bank v. Founders Life Assurance Co.*, 236 Ga. 71, 222 S.E.2d 368 (1976); *Akins v. Magbee Bros. Lumber & Supply Co.*, 152 Ga. App. 904, 264 S.E.2d 334 (1980); *Anderson v. Burnham*, 12 Bankr. 286 (Bankr. N.D. Ga. 1981).

18-4-84. Delivery to court of property admitted to be subject to garnishment; property in safety deposit box.

Along with the garnishee's answer, the garnishee shall deliver to the court the money or other property admitted in the garnishee's answer to be subject to garnishment. If in responding to the summons of garnishment, as provided in Code Section 18-4-82, the garnishee shall state that the property of the defendant includes property in a safe-deposit box or similar property, the garnishee shall respond to the court issuing the summons of garnishment as to the existence of such safe-deposit box and shall hold any contents of such safe-deposit box until the earlier of:

(1) Further order of said court either releasing the garnishment or specifically requiring the garnishee to open such safe-deposit box and deliver any contents thereof to said court upon conditions prescribed by said court; or

(2) The elapsing of 120 days from the date of filing of the garnishee answer to the summons of garnishment unless such time has been extended by the court. (Code 1933, § 46-503, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 1997, p. 941, § 3; Ga. L. 2012, p. 2, § 9/HB 683.)

Law reviews. — For article commenting on the 1997 amendment of this Code

section, see 14 Ga. St. U.L. Rev. 114 (1997).

JUDICIAL DECISIONS

Garnishee may admit indebtedness but claim exemption. — Garnishee can admit an indebtedness but contend and show by denial that the indebtedness admitted is exempt from the process of garnishment, and because of its denial, the garnishee can fail to pay the amount into court without subjecting itself to the pen-

alty of being subject to judgment for the entire indebtedness. *United Merchants & Mfrs., Inc. v. Citizens & S. Nat'l Bank*, 166 Ga. App. 468, 304 S.E.2d 552 (1983).

Cited in *Prudential-Bache Sec., Inc. v. Bartow County Bank*, 187 Ga. App. 530, 370 S.E.2d 751 (1988).

OPINIONS OF THE ATTORNEY GENERAL

Summons of garnishment establishes lien which attaches from date of service. — Summons of garnishment directing the garnishee to deliver any property into court that is subject to garnishment establishes a lien on the subject property that attaches from the date of service of the summons of garnishment. 1981 Op. Att'y Gen. No. U81-25.

Garnishment action remains ancillary to or dependent upon principal action between creditor and debtor, even though it establishes lien on subject property. 1981 Op. Att'y Gen. No. U81-25.

Rank of judgment on which garnishment depends determines priority. — Because of ancillary nature of gar-

nishment, the relevant factor in determining priorities of several garnishments is rank of judgment on which garnishment is dependent and not rank of garnishment lien. 1981 Op. Att'y Gen. No. U81-25.

Priority lien that initial garnishing creditor obtains by virtue of initial creditor having first served garnishee does not defeat priority of subsequent garnishing creditor with senior judgment. 1981 Op. Att'y Gen. No. U81-25.

18-4-85. Traverse of answer of garnishee by plaintiff — Time period; discharge for failure to traverse.

If the garnishee's answer is served on the plaintiff as provided for in Code Section 18-4-83, the plaintiff or claimant shall traverse the garnishee's answer within 15 days after it is served, or the garnishee shall be automatically discharged from further liability with respect to the summons so answered. (Code 1933, § 46-504, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 2012, p. 2, § 9/HB 683.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 4721, former Civil Code 1910, § 5283, and former Code 1933, § 46-303, as it read prior to revision by Ga. L. 1976, p. 1608, § 1, have been included in the annotations for this Code section.

Purpose of traverse to garnishee's answer is to give the garnishee right to

be heard and for protection of the garnishee's rights and interests in the premises. *Ole Campbellton Constr. Co. v. Desert Inn & Country Club*, 154 Ga. App. 107, 267 S.E.2d 646 (1980).

Discharge of garnishee upon plaintiff's failure to traverse answer. — By enacting a specific time limitation within which the plaintiff must traverse the garnishee's answer, the legislature expressed

a clear intent to provide for automatic discharge of the garnishee from all obligations under the summons if the plaintiff did not notify the court and the garnishee otherwise within the brief prescribed time period. *Nockonwood Indus., Inc. v. Tuloka Affiliates, Inc.*, 164 Ga. App. 424, 296 S.E.2d 405 (1982).

Party asserting superior claim must traverse garnishee's answer. — Defendant who has elected to become a party to the garnishment proceedings and who has a claim superior to that of the plaintiff to money or property in the hands of the garnishee is authorized to, and indeed must, assert such a claim and then traverse the answer of the garnishee. *Terrell v. Fuller*, 160 Ga. App. 56, 286 S.E.2d 50 (1981).

Failure of plaintiff to include sufficient addresses on summons of garnishment. — In garnishment proceeding, the plaintiff was required to traverse garnishee's answer within 15 days after filing of answer even though it had not been served with a copy of the answer where it had failed to include its or its attorney's address on the summons of garnishment. *Nockonwood Indus., Inc. v. Tuloka Affiliates, Inc.*, 164 Ga. App. 424, 296 S.E.2d 405 (1982).

Effect of failure to serve answers. — When the name and address of the plaintiff's attorney appeared on the summons of garnishment but no certificates of service were attached to the answers and neither the plaintiff nor the attorney acknowledged receipt, the requirement that the plaintiff traverse the answers within 15 days of service was never triggered. *Lowery v. Dallis*, 237 Ga. App. 309, 513 S.E.2d 740 (1999).

Garnishee's answer is accepted as true unless traversed by claimant or defendant. — When garnishee answers summons of garnishment, statements in garnishee's answer are accepted as true, and garnishee is discharged from all further liability unless either the claimant or the defendant files a traverse contesting the answer. *West v. West*, 402 F. Supp. 1189 (N.D. Ga. 1975) (decided under former Code 1933, § 46-303).

When answer is not traversed, all statements of fact appearing in answer are

taken as true. *Darlington v. Belt*, 12 Ga. App. 522, 77 S.E. 653 (1913); *Joiner v. Dougherty-Ward-Little Co.*, 14 Ga. App. 360, 80 S.E. 854 (1913); *Harris v. Exchange Bank*, 17 Ga. App. 700, 88 S.E. 40 (1916) (decided under former Civil Code 1910, § 5283).

Unqualified, though general denial of truth of answer, suffices. — Traverse may be amplified at option of the plaintiff, but nothing more is necessary to bring in question the liability of the garnishee to the garnishing creditor than an unqualified, though general, denial of the truth of the garnishee's answer. *Rainey v. Eatonton Coop. Creamery*, 69 Ga. App. 547, 26 S.E.2d 297 (1943) (decided under former Code 1933, § 46-303).

Plaintiff need not traverse answer admitting that garnishee is indebted for specified sum to the defendant. *Harris v. Exchange Bank*, 17 Ga. App. 700, 88 S.E. 40 (1916) (decided under former Civil Code 1910, § 5283).

Issue involved is whether garnishee is indebted as averred in traverse; it is not pertinent to such inquiry whether a prior judgment had been rendered against the defendant. *Whaley v. Kear*, 139 Ga. 16, 76 S.E. 390 (1912) (decided under former Civil Code 1910, § 5283).

Issue whether alleged indebtedness is mere cover for fraud may be tried. *Smith v. Dysard Constr. Co.*, 15 Ga. App. 192, 82 S.E. 761 (1914) (decided under former Civil Code 1910, § 5283).

Absent dissolution bond, defendant not party to trial of issue raised by plaintiff's traverse of garnishee's answer. *Leake v. Tyner*, 112 Ga. 919, 38 S.E. 343 (1901) (decided under former Civil Code 1895, § 4721).

At trial of traverse, plaintiff can recover from garnishee only what the defendant could have recovered from the garnishee. *Citizens & S. Nat'l Bank v. AVCO Fin. Servs., Inc.*, 129 Ga. App. 605, 200 S.E.2d 309 (1973) (decided under former Code 1933, § 46-303).

When traverse is filed, burden of proof is upon traversing party. *Citizens & S. Nat'l Bank v. AVCO Fin. Servs., Inc.*, 129 Ga. App. 605, 200 S.E.2d 309 (1973) (decided under former Code 1933, § 46-303).

When the defendant gives no bond to dissolve garnishment and there is no claim filed and the only traverse to answer of the garnishee was by the plaintiff in execution, the general rule is that the burden of proof is on the plaintiff in execution, the party traversing garnishee's answer. *Rainey v. Eatonton Coop. Creamery*, 69 Ga. App. 547, 26 S.E.2d 297 (1943) (decided under former Code 1933, § 46-303).

Burden of proof is on party traversing answer of garnishee. *Rockmart Bank v. Nix*, 14 Ga. App. 238, 80 S.E. 673 (1914) (decided under former Civil Code 1910, § 5283).

Judgment holder properly denied disbursement of funds. — In a garnishment proceeding, a trial court properly declined to disburse certain bank funds to

the judgment holder since a claimant timely filed a claim to the funds, established sole ownership to the funds, and complied with the necessary procedural requirements to become a party to the action. Further, since a dispute existed about whether the funds were properly subject to garnishment and the trial court had not yet distributed the funds to the judgment holder, the trial court did not err by resolving the dispute rather than allowing an expedited distribution. *Akridge v. Silva*, 298 Ga. App. 862, 681 S.E.2d 667 (2009).

Cited in *Martin v. Cullum*, 144 Ga. App. 886, 243 S.E.2d 108 (1978); *Akins v. Magbee Bros. Lumber & Supply Co.*, 152 Ga. App. 904, 264 S.E.2d 334 (1980); *Anderson v. Burnham*, 12 Bankr. 286 (Bankr. N.D. Ga. 1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 360.

18-4-86. Traverse of answer of garnishee by plaintiff — Contents.

The traverse of the garnishee's answer shall be a statement by the plaintiff or his attorney, or by a claimant or his attorney, that the garnishee's answer is untrue or legally insufficient. Such statement places in issue all questions of law and fact concerning the garnishee's answer. (Code 1933, § 46-505, enacted by Ga. L. 1976, p. 1608, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, certain decisions under former Code 1933, § 46-303, as it read prior to revision by Ga. L. 1976, p. 1608, § 1, have been included in the annotations for this Code section.

Unqualified, though general, denial of truth of answer suffices. — Nothing more is necessary to bring in question the liability of the garnishee to the garnishing creditor than an unqualified, though general, denial of the truth of the garnishee's answer. *Ole Campbellton Constr. Co. v. Desert Inn & Country Club*, 154 Ga. App. 107, 267 S.E.2d 646 (1980).

Motion to dismiss opposing party's answer, on the facts, constituted a traverse. — Motion to dismiss opposing party's answer constituted a statement that such answer was legally insufficient in that costs had not been paid so as to open default. As such, the motion must be considered a traverse which had been filed. *Marbut Co. v. Capital City Bank*, 148 Ga. App. 664, 252 S.E.2d 85 (1979).

Party asserting superior claim must traverse garnishee's answer. — Defendant who has elected to become a party to the garnishment proceedings and who has a claim superior to that of the plaintiff to money or property in the hands

of the garnishee is authorized to, and indeed must, assert such a claim and then traverse the answer of the garnishee. *Terrell v. Fuller*, 160 Ga. App. 56, 286 S.E.2d 50 (1981).

There is no specific statutory requirement of verification of traverse. — Although garnishment and answer thereto must be verified, there is no specific statutory requirement of verification as to traverse. *Ben O'Callaghan Co. v. Rose, Silverman & Hunt*, 131 Ga. App. 29, 205 S.E.2d 45 (1974) (decided under former Code 1933, § 46-303 as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Verification of traverse by plaintiff corporation's attorney is sufficient. *Ben O'Callaghan Co. v. Rose, Silverman & Hunt*, 131 Ga. App. 29, 205 S.E.2d 45

(1974) (decided under former Code 1933, § 46-303 as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Unqualified, though general denial of truth of answer, suffices. — Traverse may be amplified at option of the plaintiff, but nothing more is necessary to bring in question the liability of the garnishee to the garnishing creditor than an unqualified, though general, denial of the truth of the garnishee's answer. *Rainey v. Eatonton Coop. Creamery*, 69 Ga. App. 547, 26 S.E.2d 297 (1943) (decided under former Code 1933, § 46-303 as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Cited in *Gibbs v. Spencer Indus., Inc.*, 244 Ga. 450, 260 S.E.2d 342 (1979).

18-4-87. Traverse of answer of garnishee by plaintiff — Service.

A traverse shall be served in the same manner as is provided for in subsection (b) of Code Section 9-11-5 for the service of subsequent pleadings. (Code 1933, § 46-506, enacted by Ga. L. 1976, p. 1608, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5287, are included in the annotations for this Code section.

It is inadequate notice to exhibit traverse to garnishee at time it is filed. *Vaughan v. Bank of Cobbtown*, 14 Ga. App. 9, 79 S.E. 1130 (1913) (decided under former Civil Code 1910, § 5287).

18-4-88. Order of proceedings after answer of garnishee generally.

After the garnishee's answer is filed, the defendant's traverse shall be tried first, the plaintiff's traverse shall be tried second, and claims shall be tried last; provided, however, the court shall retain the money or other property subject to garnishment until trial of all claims which are filed under this chapter. (Code 1933, § 46-511, enacted by Ga. L. 1976, p. 1608, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 5283, are included in the annotations for this Code section.

Proof required of defendant to sustain traverse that defendant is not indebted in amount alleged. — See *Thacker Constr. Co. v. Williams*, 154 Ga. App. 670, 269 S.E.2d 519 (1980).

Trial of issue created by traverse should be postponed until after judgment against defendant. Whaley v. Kear, 139 Ga. 16, 76 S.E. 390 (1912) (decided under former Civil Code 1910, § 5283).

Trial of defendant's traverse or evidentiary hearing required. — In a postjudgment garnishment proceeding, the judgment debtor's traverse asserting that the judgment was void or voidable was clearly an impermissible challenge to the validity of the judgment. The trial court was not authorized to consider the debtor's verified complaint for damages which addressed issues in bar of judgment in support of the debtor's traverse, and the trial court improperly dismissed the proceeding by granting summary judgment on the debtor's verified complaint

without holding an evidentiary hearing on the debtor's traverse. Southern Land & Cattle Co. v. Brock, 213 Ga. App. 3, 443 S.E.2d 647 (1994).

Verdict for plaintiff for amount named in traverse is construed as a finding in favor of traverse. Whaley v. Kear, 139 Ga. 16, 76 S.E. 390 (1912) (decided under former Civil Code 1910, § 5283).

Cited in Kauffman v. Kauffman, 145 Ga. App. 648, 244 S.E.2d 613 (1978); Washington Loan & Banking Co. v. First Fulton Bank & Trust, 155 Ga. App. 141, 270 S.E.2d 242 (1980); West v. National Bank, 155 Ga. App. 178, 270 S.E.2d 245 (1980); Akridge v. Silva, 298 Ga. App. 862, 681 S.E.2d 667 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, §§ 379, 380.

18-4-89. Proceedings after answer of the garnishee if no traverse or claim filed.

If no traverse or claim has been filed within 15 days after the garnishee's answer is filed:

(1) If money is delivered to the court by the garnishee, the clerk shall pay the money to the plaintiff or his attorney on his application;

(2) If other property is delivered to the court by the garnishee, the sheriff, marshal, constable, or like officer of the court shall sell the property in the manner provided by law for the sale of property levied under an execution; and the proceeds of the sale shall be delivered to the plaintiff or his attorney on his application; or

(3) If money or other property admitted to be subject to the garnishment is not delivered to the court, judgment shall be entered for the plaintiff and against the garnishee for the money or other property and execution shall issue on the judgment. (Code 1933, § 46-510, enacted by Ga. L. 1976, p. 1608, § 1.)

JUDICIAL DECISIONS

Statute provides for immediate payment when no traverse or claim has been filed. Marbut Co. v. Capital City Bank, 148 Ga. App. 664, 252 S.E.2d 85 (1979).

Legislative intent behind statute was to simplify matters when there was no dispute, and therefore, no need of direct judicial supervision. Marbut Co. v. Capital City Bank, 148 Ga. App. 664, 252

S.E.2d 85 (1979).

Section inapplicable. — Ga. L. 1976, p. 1608, § 1 was inapplicable when case has proceeded beyond point where further judicial supervision is unnecessary. *Marbut Co. v. Capital City Bank*, 148 Ga. App. 664, 252 S.E.2d 85 (1979).

Burden on plaintiff to identify property subject to garnishment when garnishee does not. — When the garnishee does not identify the property subject to garnishment, the burden is on the plaintiff to demonstrate which property the garnishee holds on behalf of the debtor. *Fontaine v. Stuhler*, 172 Ga. App. 584, 323 S.E.2d 881 (1984).

No preclusion of need for court order directing clerk to disburse funds. — O.C.G.A. § 18-4-89 does not state that the passage of the 15-day period divests the defendant of any interest in the garnished funds, nor does the statute provide that failing to file a traverse within the 15-day period bars the defendant from thereafter filing one. Although the section authorizes the clerk to disburse the garnished funds, the statute does not specify when the clerk must do so and does not preclude the need for a court order direct-

ing the clerk to disburse funds. *Bowen v. Thompson (In re Thompson)*, No. 13-52212, 2013 Bankr. LEXIS 5610 (Bankr. N.D. Ga. Apr. 29, 2013).

Judgment holder properly denied disbursement of disputed funds. — In a garnishment proceeding, a trial court properly declined to disburse certain bank funds to the judgment holder since a claimant timely filed a claim to the funds, established sole ownership to the funds, and complied with the necessary procedural requirements to become a party to the action. Further, since a dispute existed about whether the funds were properly subject to garnishment and the trial court had not yet distributed the funds to the judgment holder, the trial court did not err by resolving the dispute rather than allowing an expedited distribution. *Akridge v. Silva*, 298 Ga. App. 862, 681 S.E.2d 667 (2009).

Cited in *Southerland v. Bedford*, 149 Ga. App. 758, 256 S.E.2d 121 (1979); *Gibbs v. Spencer Indus., Inc.*, 244 Ga. 450, 260 S.E.2d 342 (1979); *First Nat'l Bank v. Uniform Rental Serv., Inc.*, 151 Ga. App. 827, 261 S.E.2d 751 (1979); *West v. National Bank*, 155 Ga. App. 178, 270 S.E.2d 245 (1980).

18-4-90. Entry of default judgment upon failure of garnishee to file garnishee answer to summons; opening of default.

In case the garnishee fails or refuses to file a garnishee answer by the forty-fifth day after service of the summons, the garnishee shall automatically be in default. The default may be opened as a matter of right by the filing of a garnishee answer within 15 days of the day of default and payment of costs. If the case is still in default after the expiration of the period of 15 days, judgment by default may be entered at any time thereafter against the garnishee for the amount claimed to be due on the judgment obtained against the defendant. (Code 1933, § 46-508, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 2012, p. 2, § 10/HB 683.)

Law reviews. — For note discussing default by the garnishee, see 12 Ga. L. Rev. 814 (1978).

JUDICIAL DECISIONS

When claim for default arises. — Claim arises against the garnishee at the time the garnishee falls into default by failing to file answers in a continuing

garnishment proceeding, and is separate and distinct from any claim which may have existed prior to that time. *Fazio v. Growth Dev. Corp.*, 168 Bankr. 1009 (Bankr. N.D. Ga. 1994).

Garnishee failed to amend the defective answer as permitted by law and, pursuant to O.C.G.A. § 18-4-90, the garnishee was automatically in default. Because the garnishee failed to establish the presence of a nonamendable defect on the face of the record or pleadings, the court abused the court's discretion by granting the motion to set aside the default judgment. *Oxmoor Portfolio, LLC v. Flooring & Tile Superstore of Conyers, Inc.*, 320 Ga. App. 640, 740 S.E.2d 363 (2013).

O.C.G.A. § 18-4-91 only applicable to default judgments under O.C.G.A. § 18-4-90. — Because a debtor's principal had answered a garnishment action by a judgment creditor, denying that the principal held any money or assets of the

debtor, and the trial court entered a final judgment in favor of the creditor after holding an evidentiary hearing on the merits, it was error for the trial court to have reduced the judgment pursuant to the principal's motion under O.C.G.A. § 18-4-91, as such was only applicable when a default judgment was obtained pursuant to O.C.G.A. § 18-4-90. *United Maint., Inc. v. Wilson*, 265 Ga. App. 683, 595 S.E.2d 376 (2004).

Cited in *Apex Supply Co. v. Johnny Long Homes, Inc.*, 143 Ga. App. 699, 240 S.E.2d 171 (1977); *Legend Carpets v. Stinson*, 147 Ga. App. 58, 248 S.E.2d 48 (1978); *Marbut Co. v. Capital City Bank*, 148 Ga. App. 664, 252 S.E.2d 85 (1979); *Fidelity Nat'l Bank v. KM Gen. Agency, Inc.*, 244 Ga. 753, 262 S.E.2d 67 (1979); *Sambo's of Ga., Inc. v. First Am. Nat'l Bank*, 152 Ga. App. 899, 264 S.E.2d 330 (1980); *Loftin v. Rush*, 767 F.2d 800 (11th Cir. 1985).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 357.

18-4-91. Relief of garnishee from default judgment.

When a judgment is rendered against a garnishee under Code Section 18-4-90, on a motion filed not later than 60 days from the date the garnishee receives actual notice of the entry of the judgment against the garnishee, the garnishee may, upon payment of all accrued costs of court, have the judgment modified so that the amount of the judgment shall be reduced to an amount equal to the greater of \$50.00 or \$50.00 plus 100 percent of the amount by which the garnishee was indebted to the defendant from the time of service of the summons of garnishment through and including the last day on which a timely garnishee answer could have been made for all money, other property, or effects belonging to the defendant which came into the garnishee's hands from the time of service of the summons through and including the last day on which a timely answer could have been made and, in the case of garnishment of wages, less any exemption allowed the defendant by law. Notice to the garnishee by certified mail or statutory overnight delivery shall be sufficient notice as required in this Code section. On the trial of the motion, the burden of proof shall be upon any plaintiff who objects to the timeliness of the motion to establish that the motion was not filed within the time provided for by this Code section. (Code 1933, § 46-509, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 1977, p. 783, § 1; Ga. L.

1980, p. 1769, § 7; Ga. L. 2000, p. 1589, § 3; Ga. L. 2012, p. 2, § 10/HB 683.)

Law reviews. — For note discussing default by the garnishee, see 12 Ga. L. Rev. 814 (1978). For note reviewing Geor-

gia's new garnishment procedures, see 17 Ga. St. B.J. 140 (1981).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, certain decisions under former Code 1933, § 46-406, as it read prior to revision by Ga. L. 1976, p. 1608, § 1, have been included in the annotations for this Code section.

Purpose of section. — O.C.G.A. § 18-4-91 is a remedial statute. It provides a second chance for a garnishee who, having been personally served with a summons of garnishment, ignored its call for an answer. *Five Star Steel Contractors, Inc. v. Colonial Credit Union*, 208 Ga. App. 694, 431 S.E.2d 712 (1993).

Garnishee's failure to accept certified mail notification that a default judgment has been entered against the garnishee satisfies the requirement of "actual notice" in O.C.G.A. § 18-4-91 so as to commence the running of the 60-day period during which, upon payment of accrued costs, a garnishee may move to modify the default judgment. *Five Star Steel Contractors, Inc. v. Colonial Credit Union*, 208 Ga. App. 694, 431 S.E.2d 712 (1993).

O.C.G.A. § 18-4-91 is applicable only after a garnishee fails or refuses to file a timely answer to the summons of garnishment and a default judgment is subsequently entered against the garnishee. *Southeast Grading, Inc. v. Grissom-Harrison Corp.*, 171 Ga. App. 298, 319 S.E.2d 121 (1984).

Filing motion to reduce judgment does not amount to recognition of judgment's validity. — By filing motion to reduce amount of judgment under former Code 1933, § 46-509, the defendant does not recognize the validity of the judgment so as to be estopped from thereafter seeking to set the judgment aside. *Gibbs v. Spencer Indus., Inc.*, 244 Ga. 450, 260 S.E.2d 342 (1979).

Amendment of motion. — Prior to judgment thereon, a motion filed under O.C.G.A. § 18-4-91 may be retroactively amended to substitute the name and signature of a licensed Georgia attorney pursuant to O.C.G.A. § 9-11-15. *North Ga. Medical Ctr. v. Food Lion, Inc.*, 238 Ga. App. 78, 517 S.E.2d 799 (1999).

Payment of accrued costs within 60 days is a prerequisite to bringing a motion to modify a default judgment of garnishment. *Maley v. VanCronkite*, 220 Ga. App. 21, 467 S.E.2d 351 (1996).

Until garnishee creates prima facie showing of right to relief, plaintiff need not oppose motion. — Burden is upon garnishee in seeking relief from default judgment, and until garnishee has created prima facie showing of right to relief, the plaintiff is under no compulsion to oppose the motion. *Sambo's of Ga., Inc. v. First Am. Nat'l Bank*, 152 Ga. App. 899, 264 S.E.2d 330 (1980).

Garnisher entitled to hearing on setting aside of default and modification of judgment. — Trial court deprives garnisher of due process by failing to afford garnished a hearing on setting aside of default and propriety of modifying amount of judgment. *Apex Supply Co. v. Johnny Long Homes, Inc.*, 143 Ga. App. 699, 240 S.E.2d 171 (1977).

Trial court did not err in reclassifying the garnishee's motion entitled "Motion to Set Aside Default Judgment" as a motion for relief from judgment under O.C.G.A. § 18-4-91; however, prior to modifying the judgment, the judge should have conducted a hearing on the merits of the garnishment action. *Jova Daniels Busby, Inc. v. Greenforest Community Baptist Church, Inc.*, 240 Ga. App. 419, 523 S.E.2d 629 (1999).

Untimely motion. — Petitioner was not entitled to relief from a default judg-

ment entered in favor of the judgment creditor because the petitioner did not seek relief from the default judgment until well outside the 60-day window pursuant to O.C.G.A. § 18-4-91. *W. Ray Camp, Inc. v. Cavalry Portfolio Servs., LLC*, 308 Ga. App. 597, 708 S.E.2d 560 (2011).

Judgment setting aside default by ex parte order fails to afford garnisher a hearing as the statute required. *Apex Supply Co. v. Johnny Long Homes, Inc.*, 143 Ga. App. 699, 240 S.E.2d 171 (1977).

Pleading referred to in statute did not require verification. *Chambers v. Almond*, 146 Ga. App. 46, 245 S.E.2d 336 (1978).

Burden of proof. — The 1980 amendment to O.C.G.A. § 18-4-91, in omitting the requirement that on trial of motion for relief from judgment the burden of proof be on the garnishee, relieved a garnishee from the burden of presenting evidence in support of the garnishee's motion in the absence of a traverse thereto. *Accredited Assocs. v. Shottenfeld*, 162 Ga. App. 575, 292 S.E.2d 417 (1982).

When garnishee has affirmatively set forth in its motion such facts as would entitle it to relief under O.C.G.A. § 18-4-91, these facts must be taken as true unless traversed. *Accredited Assocs. v. Shottenfeld*, 162 Ga. App. 575, 292 S.E.2d 417 (1982).

Even though policy of O.C.G.A. § 18-4-91 is to protect garnishee against whom default judgment has been entered, it does not appear that the General Assembly intended to place the burden of proof on all issues upon the plaintiff who has traversed the garnishee's motion for relief from default judgment. *Accredited Assocs. v. Shottenfeld*, 162 Ga. App. 575, 292 S.E.2d 417 (1982).

Law did not require any reason to be shown for failure to answer originally as required by law, but in lieu thereof, exacts a penalty. *Southeast Ceramics, Inc. v. Ervin Co.*, 127 Ga. App. 346, 193 S.E.2d 262 (1972) (decided under former Code 1933, § 46-406, as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Proof required of garnishee. — Only proof required of the garnishee was to show the garnishee owed the defendant a

lesser sum, or value of property or effects, than amount of judgment rendered on default. *Southeast Ceramics, Inc. v. Ervin Co.*, 127 Ga. App. 346, 193 S.E.2d 262 (1972) (decided under former Code 1933, § 46-406, as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Modification of judgment does not prevent finality. — Former Code 1933, § 46-406 was analogous to former Code 1933, § 30-220 (see now O.C.G.A. §§ 19-6-18 and 19-6-19), which allowed the petitions to be filed to modify the terms of the permanent alimony decree, in that while the judgment may be modified, this did not prevent the judgment from being final. *Weeks v. High Point Sprinkler Co.*, 125 Ga. App. 511, 188 S.E.2d 144 (1972) (decided under former Code 1933, § 46-406, as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Only applicable to default judgments. — Because a debtor's principal answered a garnishment action by a judgment creditor, denying that the principal held any money or assets of the debtor, and the trial court entered a final judgment in favor of the creditor after holding an evidentiary hearing on the merits, it was error for the trial court to have reduced the judgment pursuant to the principal's motion under O.C.G.A. § 18-4-91, as such was only applicable when a default judgment was obtained pursuant to O.C.G.A. § 18-4-90. *United Maint., Inc. v. Wilson*, 265 Ga. App. 683, 595 S.E.2d 376 (2004).

Cited in *Boston Sea Party of Atlanta, Inc. v. Bryant Lithographing Co.*, 146 Ga. App. 294, 246 S.E.2d 350 (1978); *Tippins Bank & Trust Co. v. Atlantic Bank & Trust Co.*, 151 Ga. App. 179, 259 S.E.2d 179 (1979); *Fidelity Nat'l Bank v. KM Gen. Agency, Inc.*, 244 Ga. 753, 262 S.E.2d 67 (1979); *JA-BE Distribs., Inc. v. Williford*, 152 Ga. App. 485, 263 S.E.2d 262 (1979); *Sambo's of Ga., Inc. v. First Am. Nat'l Bank*, 152 Ga. App. 899, 264 S.E.2d 330 (1980); *Marler Oil Co. v. Citizens & S. Bank*, 153 Ga. App. 186, 265 S.E.2d 58 (1980); *Willett Lincoln-Mercury, Inc. v. Larson*, 158 Ga. App. 540, 281 S.E.2d 297 (1981); *Ray v. Standard Fire Ins. Co.*, 168 Ga. App. 116, 308 S.E.2d 221 (1983); *Georgia-Quebec Assocs., Ltd., v. Cable At-*

lanta, Inc., 172 Ga. App. 311, 323 S.E.2d 230 (1984); Loftin v. Rush, 767 F.2d 800 (11th Cir. 1985); Fazio v. Growth Dev. Corp., 168 Bankr. 1009 (Bankr. N.D. Ga. 1994); Lewis v. Capital Bank, 311 Ga. App. 795, 717 S.E.2d 481 (2011).

RESEARCH REFERENCES

ALR. — Liability of garnishee to garnishing creditor for depreciation in value of property pending contest, 32 ALR 572.

18-4-92. Effect of garnishee's failure to respond properly to summons of garnishment.

On the trial of the plaintiff's traverse, if the court finds the garnishee has failed to respond properly to the summons of garnishment, the court shall disallow any expenses claimed by the garnishee and enter a judgment for any money or other property delivered to the court with the garnishee's answer, plus any money or other property the court finds subject to garnishment which the garnishee has failed to deliver to the court; provided, however, that the total amount of such judgment shall in no event exceed the amount claimed due by the plaintiff, together with the costs of the garnishment proceeding. (Code 1933, § 46-514, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 2012, p. 2, § 10/HB 683.)

JUDICIAL DECISIONS

General litigation expenses statute, O.C.G.A. § 13-6-11, does not apply in garnishment proceedings. Worsham Bros. Co. v. FDIC, 167 Ga. App. 163, 305 S.E.2d 816 (1983).

Attorney fees are not included in "costs." Worsham Bros. Co. v. FDIC, 167 Ga. App. 163, 305 S.E.2d 816 (1983).

Attorney fees must be included in the amount claimed or those fees will be stricken. Worsham Bros. Co. v. FDIC, 167 Ga. App. 163, 305 S.E.2d 816 (1983).

Trial court must specifically find that the garnishee had money owing to or belonging to the judgment debtor; the garnishee's refusal to produce records to rebut allegations that the debtor was the garnishee's employee did not satisfy the creditor's burden of showing that the garnishee had money of the debtor. W.R. Leasing, Inc. v. Aetna Cas. & Sur., 211 Ga. App. 818, 440 S.E.2d 714 (1994).

Excessive award. — Trial court's or-

der in garnishment proceeding was defective since the order failed to indicate what monies were due the judgment debtor from the garnishees and, therefore, failed to find what money was subject to garnishment, and when, due to an award of interest, the total amount of judgment exceeded amount claimed due by the plaintiff. Stone v. George F. Richardson, Inc., 163 Ga. App. 86, 293 S.E.2d 746 (1982).

Disposition of funds paid into court when plaintiff loses in determination on merits of traverse. — See Marbut Co. v. Capital City Bank, 148 Ga. App. 664, 252 S.E.2d 85 (1979).

Cited in Stone v. George F. Richardson, Inc., 169 Ga. App. 232, 312 S.E.2d 339 (1983); Wachovia Bank v. Unisys Fin. Corp., 221 Ga. App. 471, 471 S.E.2d 554 (1996); Carrier411 Servs. v. Insight Tech., Inc., 322 Ga. App. 167, 744 S.E.2d 356 (2013).

18-4-92.1. Relief of garnishee from liability; definitions.

(a) A garnishee may be relieved from liability for failure to file a garnishee answer properly to the summons of garnishment if the plaintiff failed to provide the information required by subsection (i) of Code Section 18-4-20 that would reasonably enable the garnishee to respond properly to the summons of garnishment and a good faith effort to locate the requested property was made by the garnishee based on the information provided by the plaintiff. In determining whether a garnishee may be relieved of liability imposed by Code Section 18-4-92, the court shall consider and compare the accuracy and quantity of the information supplied by the plaintiff pursuant to subsection (i) of Code Section 18-4-20 with the manner in which the garnishee maintains and locates its records, the compliance by the garnishee with its own procedures, and the conformity of the record systems and procedures with reasonable commercial standards prevailing in the area in which the garnishee is located.

(b) A garnishee and a plaintiff shall not be subject to liability to any party or nonparty to the garnishment at issue arising from the attachment of a lien, the freezing, payment, or delivery into court of property, money, or effects reasonably believed to be that of the defendant if such attachment, freezing, payment, or delivery is reasonably required by a good faith effort to comply with the summons of garnishment. In determining whether such compliance by a garnishee is reasonable, the court shall proceed in the manner prescribed in subsection (a) of this Code section by comparing the efforts of the plaintiff to comply with subsection (i) of Code Section 18-4-20 and the garnishee's record system and procedures.

(c)(1) As used in this subsection, the term:

(A) "Association account" means any account, or any safe-deposit box or similar property, maintained by a corporation, statutory close corporation, limited liability company, partnership, limited partnership, limited liability partnership, foundation, trust, a national, state, or local government or quasi-government entity, or any other incorporated or unincorporated association.

(B) "Fiduciary account" means any account, or any safe-deposit box, maintained by any party in a fiduciary capacity for any other party other than the defendant in garnishment. Without limiting the foregoing, for purposes of this subsection, the term fiduciary account shall include any "trust account" as defined in Code Section 7-1-810, any account created pursuant to a transfer governed by Code Section 44-5-119, and any agency account or safe-deposit box governed by a power of attorney or other written designation of authority.

(2)(A) A garnishee shall not be liable for failure to deliver to the court property, money, or effects in an association account that may be subject to garnishment by reason of the fact that a defendant is an authorized signer on such association account, unless the summons of garnishment alleges that the association account is being used by the defendant for an improper or unlawful purpose.

(B) A garnishee shall not be liable for failure to deliver to the court property, money, or effects in a fiduciary account that may be subject to garnishment if such account specifically is exempted from garnishment by the laws of this state.

(C) A garnishee shall not be liable for failure to deliver to the court property, money, or effects in a fiduciary account that may be subject to garnishment by reason of the fact that a defendant is a fiduciary of the fiduciary account, unless the summons of garnishment is against the defendant in the defendant's capacity as a fiduciary of the fiduciary account or the summons of garnishment alleges that the fiduciary account is being used by the defendant for an improper or unlawful purpose. (Code 1981, § 18-4-92.1, enacted by Ga. L. 1997, p. 941, § 4; Ga. L. 2012, p. 2, § 11/HB 683.)

Law reviews. — For article commenting on the 1997 enactment of this Code section, see 14 Ga. St. U.L. Rev. 114 (1997).

For annual survey article discussing commercial and banking law, see 49 Mercer L. Rev. 95 (1997).

JUDICIAL DECISIONS

Res judicata. — Trial court properly granted a bank summary judgment in a suit for conversion against the bank brought by a debtor because the debtor's claim was barred by res judicata since the debtor failed to raise any challenge in the

garnishment proceeding wherein the bank was a garnishee. *Copeland v. Wells Fargo Bank, N.A.*, 317 Ga. App. 669, 732 S.E.2d 536 (2012), cert. denied, No. S13C0189, 2013 Ga. LEXIS 124 (Ga. 2013).

18-4-93. Right of defendant to become a party to garnishment proceedings; procedure.

A garnishment proceeding is an action between the plaintiff and the garnishee; but, at any time before a judgment is entered on the garnishee's answer or before money or other property subject to garnishment is distributed, the defendant may become a party to the garnishment for the purposes set out in Code Section 18-4-65 by filing a traverse to the plaintiff's affidavit stating that the affidavit is untrue or legally insufficient; and he shall be a party to all proceedings thereafter. Upon the filing of the defendant's traverse, and at the defendant's application therefor, a judge of the court in which the case is pending shall order a hearing to be held not more than ten days from

the date the traverse is filed. The hearing shall be available to the defendant as a matter of right after filing his traverse; and no further summons of garnishment may issue nor may any money or other property delivered to the court as subject to garnishment be disbursed until the hearing shall be held. (Code 1933, § 46-401, enacted by Ga. L. 1976, p. 1608, § 1.)

Law reviews. — For article surveying judicial developments in Georgia's trial practice and procedure laws, see 31 Mercer L. Rev. 249 (1979).

For note reviewing Georgia's new garnishment procedures, see 17 Ga. St. B.J. 140 (1981).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, certain decisions under former Code 1933, § 46-401, as it read prior to revision by Ga. L. 1976, p. 1608, § 1, have been included in the annotations for this Code section.

O.C.G.A. § 18-4-93 is inapplicable to different garnishment proceedings based on same debt, but prohibits only further issuance of any summons of garnishment in same proceeding in which traverse is filed, pending hearing on traverse. *Cale v. Cale*, 160 Ga. App. 434, 287 S.E.2d 362 (1981).

Defendant is not a "party" to the garnishment proceeding, although provision is made at O.C.G.A. § 18-4-64 for the defendant to receive notice. *Flournoy v. Pate* (In re Antley), 18 Bankr. 207 (Bankr. M.D. Ga. 1982).

Defendant may become party to garnishment. — Present garnishment statutes do not contain a specific provision whereby a defendant may traverse the answer of the garnishee. However, while there is no express provision authorizing a defendant to traverse the garnishee's answer, it is provided that a defendant may become a party to the garnishment. *Terrell v. Fuller*, 160 Ga. App. 56, 286 S.E.2d 50 (1981).

Defendant is not party to garnishment. — When garnishment action is filed, the plaintiff and garnishee are the only parties. Defendant is not a party to garnishment. *Stone v. Peoples Bank*, 127 Ga. App. 588, 194 S.E.2d 276 (1972) (decided under former Code 1933, § 46-401, as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

For defendant to become a party it is a condition precedent that garnishment be dissolved. *Stone v. Peoples Bank*, 127 Ga. App. 588, 194 S.E.2d 276 (1972) (decided under former Code 1933, § 46-401, as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Interest of a defendant or a third party in garnished funds. — As O.C.G.A. § 18-4-93 and a court of appeals holding make clear, the interest of a defendant or that of a third party in garnished funds cannot be extinguished prior to a distribution or a judgment directing a distribution of garnished funds. *Bowen v. Thompson* (In re Thompson), No. 13-52212, 2013 Bankr. LEXIS 5610 (Bankr. N.D. Ga. Apr. 29, 2013).

Defendant wishing to contest garnishment should follow procedure outlined in statute. *Powell v. Powell*, 95 Ga. App. 122, 97 S.E.2d 193 (1957) (decided under former Code 1933, § 46-401, as it read prior to revision by Ga. L. 1976, p. 1608, § 1).

Procedure available to debtor. — Only O.C.G.A. §§ 18-4-65 and 18-4-93 provide how debtor may assert any "interest" debtor may have in garnishment funds. *Flournoy v. Pate* (In re Antley), 18 Bankr. 207 (Bankr. M.D. Ga. 1982).

Res judicata. — Trial court properly granted a bank summary judgment in a suit for conversion against the bank brought by a debtor because the debtor's claim was barred by res judicata since the debtor failed to raise any challenge in the garnishment proceeding wherein the bank was a garnishee. *Copeland v. Wells Fargo Bank, N.A.*, 317 Ga. App. 669, 732

S.E.2d 536 (2012), cert. denied, No. S13C0189, 2013 Ga. LEXIS 124 (Ga. 2013).

Challenge to validity of judgment not permitted. — In a postjudgment garnishment proceeding, the judgment debtor's traverse asserting that the judgment was void or voidable was clearly an impermissible challenge to the validity of the judgment. The trial court was not authorized to consider the debtor's verified complaint for damages which addressed issues in bar of judgment in support of the debtor's traverse, and the trial court improperly dismissed the proceeding by granting summary judgment on the debtor's verified complaint without holding an evidentiary hearing on the debtor's traverse. *Southern Land & Cattle Co. v. Brock*, 213 Ga. App. 3, 443 S.E.2d 647 (1994).

Brokerage service account owner's assignee's claims against the service that it had unlawfully allowed disbursement of the funds in the account, pursuant to a garnishment judgment, after the owner had sought to close the account, were barred by *res judicata* under O.C.G.A. § 9-12-40 after it was noted that the owner had filed a traverse in the garnishment proceeding and, accordingly, the owner could have raised the same issues at that time, pursuant to O.C.G.A. § 18-4-93. The owner, as the debtor in the garnishment proceeding, was required to assert any claim that the owner's right to the funds was superior to that of the judgment creditor, pursuant to O.C.G.A. § 18-4-95. *Lamb v. First Union Brokerage Servs.*, 263 Ga. App. 733, 589 S.E.2d 300 (2003).

Judgment debtor not party to proceedings unless debtor files a traverse to plaintiff's affidavit. — When president of judgment debtor did not file a traverse to the plaintiff's affidavit to become a party to garnishment proceeding pursuant to O.C.G.A. § 18-4-93, the president failed to satisfy statutory mandate and did not become a party to the garnishment proceeding. *Travelers Ins. Co. v. Trans State, Inc.*, 172 Ga. App. 763, 324 S.E.2d 585 (1984).

Individual's wages wrongfully garnished. — Claim by an individual whose

wages are wrongfully garnished, but who is not the defendant in a garnishment proceeding, can not be asserted in the garnishment proceeding. *Baptist Convention v. Henry*, 187 Ga. App. 551, 370 S.E.2d 813 (1988).

Traverse properly granted. — Trial court did not err in granting a sole proprietorship's traverse, in which it sought to become a party in a golf supplier's garnishment action and asserted a verified claim to the funds at issue, because there was some evidence to support the findings that the sole proprietorship was a separate and distinct entity from the corporation and that the garnishee assented to the modification of a contract to replace the corporation with the sole proprietorship as contractor; the sole proprietorship had its own tax identification number and liability insurance, and a representative of the garnishee testified that the garnishee was aware that someone had changed the contractor's name and that the garnishee had no business dealings with the corporation. *A. M. Buckler & Assocs. v. Sanders*, 305 Ga. App. 704, 700 S.E.2d 701 (2010).

Relationship to bankruptcy law. — Chapter 7 debtor was entitled to claim that funds the debtor's employer withheld from the debtor's wages and remitted to a Georgia court were exempt from creditors' claims under O.C.G.A. § 44-13-100(a)(6) because the debtor still had the right at the time the debtor declared bankruptcy to file a traverse under O.C.G.A. § 18-4-93 to an affidavit a creditor filed when the creditor garnished the debtor's wages. Because the debtor retained an interest in the funds, the funds became property of the debtor's bankruptcy estate under 11 U.S.C. § 541(a)(1) and could be exempted from the creditors' claims, and a lien the creditor held on the funds could be avoided under 11 U.S.C. § 522(f). *In re Williams*, 460 B.R. 915 (Bankr. N.D. Ga. 2011).

Cited in *Rainey v. Eatonton Coop. Creamery*, 69 Ga. App. 547, 26 S.E.2d 297 (1943); *Veneer Mfg. Co. v. Hill*, 72 Ga. App. 28, 32 S.E.2d 838 (1945); *McKenzie v. Bank of Ga.*, 76 Ga. App. 539, 46 S.E.2d 356 (1948); *Stephens v. Zakas*, 129 Ga. App. 917, 201 S.E.2d 627 (1973); *Security*

Mgt. Co. v. King, 132 Ga. App. 618, 208 S.E.2d 576 (1974); Morrow Elec. Co. v. Cruse, 370 F. Supp. 639 (N.D. Ga. 1974); City Fin. Co. v. Winston, 238 Ga. 10, 231 S.E.2d 45 (1976); Kauffman v. Kauffman, 145 Ga. App. 648, 244 S.E.2d 613 (1978); Antico v. Antico, 241 Ga. 294, 244 S.E.2d

820 (1978); Thacker Constr. Co. v. Williams, 154 Ga. App. 670, 269 S.E.2d 519 (1980); West v. National Bank, 155 Ga. App. 178, 270 S.E.2d 245 (1980); TBF Fin., LLC v. Houston, 298 Ga. App. 657, 680 S.E.2d 662 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, §§ 362, 363.

18-4-94. Procedure where defendant prevails generally; establishment of interests in money or other property in court by parties filing claims thereto; distribution of money or other property.

(a) Where the defendant prevails upon the trial of the issues made by his traverse, the garnishment case shall be dismissed by the court; and any money or other property belonging to the defendant in the possession of the court shall be restored to the defendant unless a claim thereto has been filed.

(b) If a claim has been filed, all parties of record may introduce evidence to establish their respective interests in the money or other property in court; and the court shall direct that the money or other property be distributed in accordance with the laws governing priority of claims. (Code 1933, § 46-512, enacted by Ga. L. 1976, p. 1608, § 1.)

JUDICIAL DECISIONS

Property interest. — Because the debtor had a property interest in the debtor's claim against the debtor's employer, it followed that the debtor had a property interest in garnished funds. O.C.G.A. § 18-4-94(a) reflected this conclusion. Bowen v. Thompson (In re Thompson), No.

13-52212, 2013 Bankr. LEXIS 5610 (Bankr. N.D. Ga. Apr. 29, 2013).

Cited in Kauffman v. Kauffman, 145 Ga. App. 648, 244 S.E.2d 613 (1978); Marbut Co. v. Capital City Bank, 148 Ga. App. 664, 252 S.E.2d 85 (1979).

18-4-95. Right of claimants of property subject to garnishment to become parties; procedure.

At any time before judgment is entered on the garnishee's answer or money or other property subject to garnishment is distributed, any person may file a claim in writing under oath stating that he has a claim superior to that of the plaintiff to the money or other property in the hands of the garnishee subject to the process of garnishment; and the claimant shall be a party to all further proceedings upon the

garnishment. (Code 1933, § 46-404, enacted by Ga. L. 1976, p. 1608, § 1.)

Law reviews. — For article surveying developments in Georgia domestic relations law from mid-1980 through

mid-1981, see 33 Mercer L. Rev. 109 (1981).

JUDICIAL DECISIONS

Section to be strictly construed. — O.C.G.A. § 18-4-95 is in derogation of common law and thus must be strictly construed. *Terrell v. Fuller*, 160 Ga. App. 56, 286 S.E.2d 50 (1981).

Appellant must file claim in writing under oath. — When an appellant does not file a claim in writing under oath to funds paid by the garnishee, the appellant fails to comply with necessary procedural requirements to enable the appellant to assert a claim to the allegedly exempt wages and thus a traverse of the garnishee's answer is a mere nullity. *Terrell v. Fuller*, 160 Ga. App. 56, 286 S.E.2d 50 (1981).

Garnishment claims are required to be filed under oath. *National Loan Investors v. Satran*, 231 Ga. App. 21, 497 S.E.2d 627 (1998).

Failure to file a verified complaint in a garnishment action is more than a mere technicality in the context of *res judicata*. *Lamb v. T-Shirt City, Inc.*, 272 Ga. App. 298, 612 S.E.2d 108 (2005).

Summary judgment was proper on the ground of *res judicata* because: (1) the gist of the assignee's complaint was that the individual's claim to the garnished funds was superior to that of the corporation; (2) this was the very issue that the individual raised in the motion to intervene in the garnishment proceeding; (3) the garnishment court denied the motion to intervene, finding that the individual failed to file the claim under oath as required by O.C.G.A. § 18-4-95; (4) by failing to file a verified claim, the individual failed to present the necessary evidence to prove that the individual held a superior claim; and (5) thus, it was the individual's failure of proof that deprived the garnishment court of jurisdiction to consider the claim, and the denial of the motion to intervene had the effect of a negative adjudication

on the merits barring any subsequent claims to the garnished funds. *Lamb v. T-Shirt City, Inc.*, 272 Ga. App. 298, 612 S.E.2d 108 (2005).

Claim timely. — Because a sole proprietorship filed a claim before the trial court entered judgment in the garnishment action or ordered the distribution of the money at issue, the claim was timely under O.C.G.A. § 18-4-95, and the trial court did not err in considering the claim. *A. M. Buckler & Assocs. v. Sanders*, 305 Ga. App. 704, 700 S.E.2d 701 (2010).

Traverse properly granted. — Trial court did not err in granting a sole proprietorship's traverse, in which it sought to become a party in a golf supplier's garnishment action and asserted a verified claim to the funds at issue, because there was some evidence to support the findings that the sole proprietorship was a separate and distinct entity from the corporation and that the garnishee assented to the modification of a contract to replace the corporation with the sole proprietorship as contractor; the sole proprietorship had its own tax identification number and liability insurance, and a representative of the garnishee testified that the garnishee was aware that someone had changed the contractor's name and that the garnishee had no business dealings with the corporation. *A. M. Buckler & Assocs. v. Sanders*, 305 Ga. App. 704, 700 S.E.2d 701 (2010).

Party asserting superior claim must traverse garnishee's answer. — Defendant who has elected to become a party to the garnishment proceedings and who has a claim superior to that of the plaintiff to money or property in the hands of the garnishee is authorized to, and indeed must, assert such a claim and then traverse the answer of the garnishee. *Terrell v. Fuller*, 160 Ga. App. 56, 286 S.E.2d 50 (1981).

Brokerage service account owner's assignee's claims against the service that it had unlawfully allowed disbursement of the funds in the account, pursuant to a garnishment judgment, after the owner had sought to close the account, were barred by *res judicata* under O.C.G.A. § 9-12-40 after it was noted that the owner had filed a traverse in the garnishment proceeding and, accordingly, the owner could have raised the same issues at that time, pursuant to O.C.G.A. § 18-4-93. The owner, as the debtor in the garnishment proceeding, was required to assert any claim that the owner's right to the funds was superior to that of the judgment creditor pursuant to O.C.G.A. § 18-4-95. *Lamb v. First Union Brokerage Servs.*, 263 Ga. App. 733, 589 S.E.2d 300 (2003).

Judgment holder properly denied disbursement of disputed funds. — In

a garnishment proceeding, a trial court properly declined to disburse certain bank funds to the judgment holder since a claimant timely filed a claim to the funds, established sole ownership to the funds, and complied with the necessary procedural requirements to become a party to the action. Further, since a dispute existed about whether the funds were properly subject to garnishment and the trial court had not yet distributed the funds to the judgment holder, the trial court did not err by resolving the dispute rather than allowing an expedited distribution. *Akridge v. Silva*, 298 Ga. App. 862, 681 S.E.2d 667 (2009).

Cited in *Rainey v. Eatonton Coop. Creamery*, 69 Ga. App. 547, 26 S.E.2d 297 (1943); *Cale v. Hale*, 157 Ga. App. 412, 277 S.E.2d 770 (1981); *Southern Keyboards, Inc. v. Wagon Constr. & Eng'g Co.*, 163 Ga. App. 590, 295 S.E.2d 558 (1982).

18-4-96. Procedure where money or other property in court subject to conflicting cases.

Where money or other property in court is subject to the claims of more than one garnishment case, any interested party to any one of the garnishment cases may make a motion to the court in his case for the distribution of the money or other property. Each party of interest in each case and the clerk of the court shall be served with a copy of the motion. Upon hearing the motion, the court shall enter an order directing that the clerk be paid the court cost of each garnishment proceeding first, and all remaining money or other property shall be distributed in accordance with the law governing the relative priorities of claims, judgments, and liens. (Code 1933, § 46-513, enacted by Ga. L. 1976, p. 1608, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1895, § 4724, are included in the annotations for this Code section.

Effect of garnishment proceedings on creditor's liens. — Merely suing out garnishment proceedings will not alter priority of creditor's liens against bank deposits. *Patterson v. Beck*, 133 Ga. 701, 66 S.E. 911 (1910) (decided under former Civil Code 1895, § 4724).

By initiating garnishment proceeding, junior judgment creditor acquires no priority over senior judgment creditor. *Citizens & S. Nat'l Bank v. Wray*, 144 Ga. App. 769, 242 S.E.2d 365 (1978).

Judgment holder properly denied disbursement of disputed funds. — In a garnishment proceeding, a trial court properly declined to disburse certain bank funds to the judgment holder since a claimant timely filed a claim to the funds, established sole ownership to the funds,

and complied with the necessary procedural requirements to become a party to the action. Further, since a dispute existed about whether the funds were properly subject to garnishment and the trial court had not yet distributed the funds to the judgment holder, the trial court did not err by resolving the dispute rather than allowing an expedited distribution. *Akridge v. Silva*, 298 Ga. App. 862, 681 S.E.2d 667 (2009).

Exception to no lien rule exists in alimony cases when there is an execution against the property or an attachment of the proceeds of the sale of the defendant's property for past due installments. *Cale v. Hale*, 157 Ga. App. 412, 277 S.E.2d 770 (1981).

An ex-wife's fi. fa. and summons of garnishment relate back to original divorce judgment entered against her ex-husband and she takes priority as the holder of oldest judgment; but she can take priority only in that portion of the garnishment fund which represents ex-husband's arrearage on the date of the second creditor's judgment because she does not have a lien at the latter date for future installments that were not yet payable. *Cale v. Hale*, 157 Ga. App. 412, 277 S.E.2d 770 (1981).

Cited in *Davidson v. Smith Can. Peat, Inc.*, 163 Ga. App. 367, 294 S.E.2d 582 (1982).

OPINIONS OF THE ATTORNEY GENERAL

Summons of garnishment establishes lien which attaches from date of service. — Summons of garnishment directing garnishee to deliver any property into court that is subject to garnishment establishes lien on subject property that attaches from date of service of summons of garnishment. 1981 Op. Att'y Gen. No. U81-25.

Garnishment action remains ancillary to or dependent upon principal action between creditor and debtor, even though it establishes lien on subject property. 1981 Op. Att'y Gen. No. U81-25.

Rank of judgment on which garnishment depends determines priority. — Because of ancillary nature of garnishment, the relevant factor in determining priorities of several garnish-

ments is rank of judgment on which garnishment is dependent and not rank of garnishment lien. 1981 Op. Att'y Gen. No. U81-25.

Priority lien that initial garnishing creditor obtains by virtue of initial creditor's having first served garnishee does not defeat priority of subsequent garnishing creditor with senior judgment. 1981 Op. Att'y Gen. No. U81-25.

When two or more judgment creditors claim priority to money or property that is paid into court pursuant to summons of garnishment, the garnishing creditor whose judgment is founded on senior judgment has priority over garnishing creditor whose judgment is founded on junior judgment. 1981 Op. Att'y Gen. No. U81-25.

18-4-97. Right of garnishee to actual reasonable expenses in making true garnishee answer of garnishment; procedure for collection; reimbursement.

(a) The garnishee shall be entitled to the garnishee's actual reasonable expenses, including attorney's fees, in preparing and filing a garnishee's answer to a summons of garnishment. The amount so incurred shall be taxed in the bill of costs and shall be paid by the party upon whom the cost is cast, as costs are cast in other cases. The garnishee may deduct \$50.00 or 10 percent of the amount paid into court, whichever is greater, not to exceed \$100.00, as reasonable attorney's fees or expenses.

(b) If the garnishee can show that the garnishee's actual attorney's fees or expenses exceed the amount provided for in subsection (a) of this Code section, the garnishee shall petition the court for a hearing at the time of filing the garnishee's answer without deducting from the amount paid into court. Upon hearing from the parties, the court may enter an order for payment of actual attorney's fees or expenses proven by the garnishee to have been incurred reasonably in preparing and filing the garnishee's answer.

(c) In the event the garnishee makes the deduction permitted in subsection (a) of this Code section but the costs are later cast upon the garnishee, the garnishee shall forthwith refund to the defendant the funds deducted; and, if the costs are later cast against the plaintiff, the court shall enter judgment in favor of the defendant and against the plaintiff for the amount of the deductions made by the garnishee.

(d) Nothing in this Code section shall limit the reimbursement of costs incurred by a financial institution as provided by Code Section 7-1-237. (Code 1933, § 46-507, enacted by Ga. L. 1976, p. 1608, § 1; Ga. L. 1985, p. 1632, § 3; Ga. L. 1997, p. 941, § 5; Ga. L. 2012, p. 2, § 12/HB 683.)

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 114 (1997). For article discussing an advisory opinion issued by the Standing Commit-

tee on the Unlicensed Practice of Law on the issue of execution and filing of an answer in the garnishment action by a nonattorney employee of the garnishee, see 16 (No. 1) Ga. St. B.J. 102 (2010).

JUDICIAL DECISIONS

Garnishee's recovery limited where garnishee fails to employ statutory procedure. — Garnishee's recovery of attorney's fees or expenses was limited to \$50 after the garnishee failed to employ procedure specified in O.C.G.A. § 18-4-97; garnishee's award in excess of \$50 was, therefore, erroneous. *Travelers Ins. Co. v.*

Trans State, Inc., 172 Ga. App. 763, 324 S.E.2d 585 (1984).

Cited in *Fidelity Nat'l Bank v. KM Gen. Agency, Inc.*, 244 Ga. 753, 262 S.E.2d 67 (1979); *Washington Loan & Banking Co. v. First Fulton Bank & Trust*, 155 Ga. App. 141, 270 S.E.2d 242 (1980).

ARTICLE 6

CONTINUING GARNISHMENT PROCEEDINGS

Law reviews. — For note reviewing Georgia's new garnishment procedures, see 17 Ga. St. B.J. 140 (1981).

18-4-110. Right of plaintiff who has obtained money judgment to process of continuing garnishment; methods, practices, and procedures for continuing garnishment generally.

In addition to garnishment proceedings otherwise available under this chapter, in cases where a money judgment has been obtained in a court of this state or a federal court sitting in this state, the plaintiff shall be entitled to the process of continuing garnishment against any garnishee who is an employer of the defendant against whom the judgment has been obtained. Unless otherwise specifically provided in this article, the methods, practices, and procedures for continuing garnishment shall be the same as for any other garnishment as provided in this chapter, including, but not limited to, those proceedings after a garnishee's answer as provided in Code Section 18-4-89. (Code 1933, § 46-701, enacted by Ga. L. 1980, p. 1769, § 8; Ga. L. 1981, p. 383, § 2; Ga. L. 1985, p. 1632, § 4; Ga. L. 2012, p. 2, § 13/HB 683.)

JUDICIAL DECISIONS

Only employers subject to continuing garnishment. — Purpose of O.C.G.A. § 18-4-110 is to ensure that only employers will be subject to continuing garnishment and that nonemployer garnishees will be automatically discharged with regard to the continuing aspect of the action; however, the section does not purport to discharge a nonemployer garnishee from such general garnishment liability as existed at time original answer was filed. *Melnick v. Fund Mgt., Inc.*, 172 Ga. App. 773, 324 S.E.2d 595 (1984).

Restitution order is a money judgment for purposes of continuing garnishment under O.C.G.A. § 18-4-110. *Cameron v. Pickering*, 219 Ga. App. 877, 467 S.E.2d 210 (1996).

Garnishment action properly allowed. — Trial court did not err by allowing a garnishment action to proceed because the garnishor was not pursuing a reverse-piercing claim, or any other equitable action, against the garnishee; rather, the action arose from a garnishment action expressly authorized by law. *Carrier411 Servs. v. Insight Tech., Inc.*, 322 Ga. App. 167, 744 S.E.2d 356 (2013).

Garnished funds as property of debtor's bankruptcy estate. — Funds in the amount of \$475.86 which a debtor's employer remitted to a Georgia magistrate court after the debtor's landlord filed a garnishment action to collect unpaid rent were property of the debtor's bankruptcy estate under 11 U.S.C. § 541 because the magistrate court still held the funds at the time the debtor declared bankruptcy; although the courts were divided on the issue of whether funds that were paid to a state court under Georgia's garnishment statute were property of a debtor's bankruptcy estate, the better rule was that a judgment defendant in a Georgia garnishment proceeding retained title to wages garnished from the defendant and deposited into the registry of the garnishment court until such wages were distributed by the court. *Shubert v. Murray (In re Shubert)*, 525 B.R. 536 (Bankr. M.D. Ga. 2015).

Cited in *Elder v. City of Thomasville*, 12 Bankr. 491 (Bankr. M.D. Ga. 1981); *Prudential-Bache Sec., Inc. v. Bartow County Bank*, 187 Ga. App. 530, 370 S.E.2d 751 (1988).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, §§ 2, 326 et seq.

C.J.S. — 38 C.J.S., Garnishment, § 140 et seq.

18-4-111. Property, money, or effects subject to continuing garnishment.

(a) All debts owed by the garnishee to the defendant at the time of service of summons of continuing garnishment upon the garnishee and all debts accruing from the garnishee to the defendant from such date of service to and including the one hundred seventy-ninth day thereafter shall be subject to process of continuing garnishment; and no payment made by the garnishee to the defendant or to his order or by any arrangement between the defendant and the garnishee after the date of the service of the summons of continuing garnishment upon the garnishee shall defeat the lien of such garnishment.

(b) All property, money, or effects of the defendant in the possession or control of the garnishee at the time of service of the summons of continuing garnishment upon the garnishee or coming into the possession or control of the garnishee at any time from the date of such service to and including the one hundred seventy-ninth day thereafter shall be subject to process of continuing garnishment, except in the case of collateral securities in the hands of a creditor. Such securities shall not be subject to continuing garnishment so long as there is an amount owed on the debt for which such securities were given as collateral.

(c) Notwithstanding this Code section, the exemptions from garnishment required or allowed by law, including, but not limited to, exemptions provided by Code Sections 18-4-20 and 18-4-22, shall be applicable to a continuing garnishment. (Code 1933, § 46-702, enacted by Ga. L. 1980, p. 1769, § 8.)

JUDICIAL DECISIONS

Unpaid retirement benefits not subject to garnishment. — Retirement benefits paid into registry of trial court by garnishee were not subject to garnishment because the defendant never received actual possession of benefits. *Birchfield v. Birchfield*, 165 Ga. App. 101, 299 S.E.2d 409 (1983).

Garnishment subject to bankruptcy stay. — Clearly all debts owed by the garnishees to the debtor and all property, money, or effects of the debtor in possession or control of the garnishees at the time of service of the summons of

continuing garnishment are portions of the estate of the debtor so that garnishment proceedings directed at these assets are subject to the automatic stay of 11 U.S.C. § 362 (bankruptcy). *Stone v. George F. Richardson, Inc.*, 169 Ga. App. 232, 312 S.E.2d 339 (1983).

Independent liability of the garnishees arises when the garnishees are no longer in possession due to some arrangement between the defendant and the garnishees after the date of the service of the summons of continuing garnishment upon the garnishees, designed to

defeat the lien of such garnishment. *Stone v. George F. Richardson, Inc.*, 169 Ga. App. 232, 312 S.E.2d 339 (1983).

Garnished funds as property of debtor's bankruptcy estate. — Funds in the amount of \$475.86 which a debtor's employer remitted to a Georgia magistrate court after the debtor's landlord filed a garnishment action to collect unpaid rent were property of the debtor's bankruptcy estate under 11 U.S.C. § 541 because the magistrate court still held the funds at the time the debtor declared bankruptcy; although courts were divided on the issue of whether funds that were

paid to a state court under Georgia's garnishment statute were property of a debtor's bankruptcy estate, the better rule was that a judgment defendant in a Georgia garnishment proceeding retained title to wages garnished from the debtor and deposited into the registry of the garnishment court until such wages were distributed by the court. *Shubert v. Murray* (In re Shubert), 525 B.R. 536 (Bankr. M.D. Ga. 2015).

Cited in *Worsham Bros. Co. v. FDIC*, 167 Ga. App. 163, 305 S.E.2d 816 (1983); *Brazier v. Travelers Ins. Co.*, 602 F. Supp. 541 (N.D. Ga. 1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 69 et seq. 31 Am. Jur. 2d, Exemptions, § 277.

C.J.S. — 38 C.J.S., Garnishment, § 110 et seq.

18-4-112. Filing and contents of affidavit for continuing garnishment; issuance of summons; notice and service of summons.

(a) In addition to the information required by Code Section 18-4-61, an affidavit for continuing garnishment shall state that the plaintiff believes that the garnishee is or may be an employer of the defendant and subject to continuing garnishment and shall request that a summons of continuing garnishment shall issue. Upon the filing of the affidavit with the clerk of any court having jurisdiction over the garnishee, the clerk shall cause a summons of continuing garnishment to issue forthwith, provided that the affidavit shall first be made and approved as containing the information required by Code Section 18-4-61 and by this Code section in one of the ways provided for in Code Section 18-4-61.

(b) Only one summons of continuing garnishment may issue on one affidavit for continuing garnishment, and the defendant shall be given notice of the issuance of the summons using any method provided for in Code Section 18-4-64.

(c) The plaintiff, using either forms provided by the court or forms prepared by the plaintiff, shall cause forms sufficient for seven garnishee answers to a summons of continuing garnishment to be served on the garnishee along with the summons. (Code 1933, § 46-703, enacted by Ga. L. 1980, p. 1769, § 8; Ga. L. 2012, p. 2, § 14/HB 683.)

JUDICIAL DECISIONS

Cited in *Melnick v. Fund Mgt., Inc.*, 172 Ga. App. 773, 324 S.E.2d 595 (1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 326 et seq.

C.J.S. — 38 C.J.S., Garnishment, § 173 et seq.

18-4-113. Contents of summons of continuing garnishment; filing and contents of garnishee answers.

(a) The summons of continuing garnishment shall be directed to the garnishee, who shall be required:

(1) To file a first garnishee answer no later than 45 days after service of summons of continuing garnishment, which garnishee answer shall state what property, money, or other effects of the defendant are subject to continuing garnishment from the time of service through and including the day of the first garnishee answer;

(2) To file further garnishee answers for the remaining period covered by the summons of continuing garnishment. Further garnishee answers shall be filed no later than 45 days after the previous garnishee answer date. Further garnishee answers shall state what property, money, or other effects of the defendant are subject to continuing garnishment from the previous garnishee answer date through and including the date on which that next garnishee answer is filed. No subsequent garnishee answers shall be required on a summons of continuing garnishment if the last garnishee answer filed states what property, money, or other effects of the defendant are subject to continuing garnishment from the previous garnishee answer date to and including the one hundred seventy-ninth day after service of summons of continuing garnishment. The last garnishee answer shall be filed, notwithstanding the other provisions of this paragraph, no later than the one hundred ninety-fifth day after service. For purposes of this paragraph, “previous garnishee answer date” means the date upon which the immediately preceding garnishee answer to the summons of continuing garnishment was filed as provided in this subsection; and

(3) To accompany all such garnishee answers with any property, money, or other effects of the defendant admitted in the garnishee answer to be subject to continuing garnishment.

(b) The summons of continuing garnishment shall state the requirements of subsection (a) of this Code section and shall inform the garnishee that failure to comply with such requirements may result in

a judgment against the garnishee for the entire amount claimed due on the judgment against the defendant. (Code 1933, § 46-704, enacted by Ga. L. 1980, p. 1769, § 8; Ga. L. 2012, p. 2, § 15/HB 683.)

JUDICIAL DECISIONS

Garnishee may admit indebtedness but claim exemption. — Garnishee can admit an indebtedness but contend and show by denial that the indebtedness admitted is exempt from the process of garnishment, and because of the garnishee's denial, the garnishee can fail to pay the amount into court without subjecting itself to the penalty of being subject to judgment for the entire indebtedness. *United Merchants & Mfrs., Inc. v. Citizens & S. Nat'l Bank*, 166 Ga. App. 468, 304 S.E.2d 552 (1983).

Default judgment. — Because a default judgment can be entered pursuant to O.C.G.A. § 18-4-115(a) only when the garnishee fails to timely file an answer, and by the plain terms of O.C.G.A. § 18-4-113(a)(1), the time in which an answer must be filed is triggered by the service of a summons of continuing garnishment, a default judgment is entered as provided in § 18-4-115(a) only after the garnishee has been served with proper

process or has waived service of process, and § 18-4-115(b) provides relief, therefore, only when process has been served or waived; when a court enters a default judgment in a continuing garnishment proceeding in which the garnishee has not been served with a summons of continuing garnishment and the court has not obtained jurisdiction of the person of the garnishee, the default judgment is not one entered as provided in § 18-4-115(a), and § 18-4-115(b) affords no relief, and in such a case, the garnishee is entitled to bring a motion to set aside the default judgment under O.C.G.A. § 9-11-60(d)(1). *Lewis v. Capital Bank*, 311 Ga. App. 795, 717 S.E.2d 481 (2011).

O.C.G.A. § 18-4-117 is not intended to obviate a nonemployer-garnishee's compliance with O.C.G.A. § 18-4-113. *Melnick v. Fund Mgt., Inc.*, 172 Ga. App. 773, 324 S.E.2d 595 (1984).

Cited in *Fazio v. Growth Dev. Corp.*, 168 Bankr. 1009 (Bankr. N.D. Ga. 1994).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 339 et seq.

C.J.S. — 38 C.J.S., Garnishment, § 173 et seq.

18-4-114. Traverse of garnishee answer by plaintiff.

If the garnishee's answer is served on the plaintiff as provided in Code Section 18-4-83, the plaintiff shall traverse the garnishee answer within 15 days after it is served, or the garnishee shall be automatically discharged from further liability with respect to the summons so answered. (Code 1933, § 46-707, enacted by Ga. L. 1980, p. 1769, § 8; Ga. L. 2012, p. 2, § 15/HB 683.)

JUDICIAL DECISIONS

Answers not timely traversed stand as true and may not be subsequently challenged. *Worsham Bros. Co. v. FDIC*, 167 Ga. App. 163, 305 S.E.2d 816 (1983).

Discharge does not preclude use of evidence in subsequent garnishment. — Although O.C.G.A. § 18-4-114 automatically discharges the garnishee from

liability with regard to those periods covered by untraversed answers, it does not immunize the garnishee from evidence obtained during those periods that is pro-

bative toward liability in a subsequent period. *Worsham Bros. Co. v. FDIC*, 167 Ga. App. 163, 305 S.E.2d 816 (1983).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, §§ 360, 361.

C.J.S. — 38 C.J.S., Garnishment, § 301 et seq.

18-4-115. Entry of default judgment against garnishee; relief from default judgment.

(a) If the garnishee fails or refuses to file a garnishee answer at least once every 45 days, the garnishee shall automatically become in default. The default may be opened as a matter of right by the filing of the required garnishee answer within 15 days after the day of default upon payment of costs. If the case is still in default after the expiration of such period of 15 days, judgment by default may be entered at any time thereafter against garnishee for the amount claimed to be due on the judgment obtained against the defendant.

(b) The garnishee may obtain relief from default judgment entered as provided in subsection (a) of this Code section upon the same conditions as provided in Code Section 18-4-91. (Code 1933, § 46-708, enacted by Ga. L. 1980, p. 1769, § 8; Ga. L. 2012, p. 2, § 15/HB 683.)

JUDICIAL DECISIONS

Garnishable wages of federal employee. — Payment of a default judgment entered against the United States pursuant to state law for the full amount of unpaid child support was not authorized by federal law. Only those wages due to the garnished federal employee at the time process was served were subject to

superimposed state garnishment laws. *Loftin v. Rush*, 767 F.2d 800 (11th Cir. 1985).

Cited in *Ray v. Standard Fire Ins. Co.*, 168 Ga. App. 116, 308 S.E.2d 221 (1983); *Fazio v. Growth Dev. Corp.*, 168 Bankr. 1009 (Bankr. N.D. Ga. 1994).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 386.

C.J.S. — 38 C.J.S., Garnishment, § 416 et seq.

18-4-116. Effect of and proceedings upon filing of traverse by defendant.

(a) In a continuing garnishment proceeding, upon the filing of a traverse by defendant pursuant to Code Section 18-4-93, no further summons of garnishment may issue nor may any money delivered to the court as subject to garnishment be disbursed until the hearing is

held upon defendant's traverse. The filing of a traverse by the defendant does not relieve the garnishee of the duties of filing a garnishee answer, of withholding property, money, or other effects subject to continuing garnishment, or of delivering to the court any property, money, or other effects subject to continuing garnishment.

(b) Nothing in this Code section shall affect the right of the defendant to file bond under this chapter. (Code 1933, § 46-705, enacted by Ga. L. 1980, p. 1769, § 8; Ga. L. 2012, p. 2, § 15/HB 683.)

JUDICIAL DECISIONS

Motion to vacate garnishment analogous to traverse. — Motion to vacate a garnishment is analogous to a traverse of the garnishment, and, in turn, the same legal principle regarding the finality of

judgment may be applied in both situations. *Georgia Farm Bldgs., Inc. v. Willard*, 169 Ga. App. 394, 313 S.E.2d 112 (1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, §§ 360, 361.

C.J.S. — 38 C.J.S., Garnishment, § 301 et seq.

18-4-117. Effect of termination of employment relationship between garnishee and defendant.

Notwithstanding the requirements of Code Section 18-4-113, if the employment relationship between the garnishee and the defendant does not exist at the time of the service of summons of continuing garnishment or terminates during the continuing garnishment, in any garnishee answer required by this article, the garnishee may state that the employment relationship between the garnishee and defendant does not exist or has been terminated, giving the date of termination if terminated on or after service of this summons of continuing garnishment. If no traverse is filed within 15 days after the garnishee answer is served as provided in Code Section 18-4-83, the garnishee shall be automatically discharged from further liability and obligation under Code Section 18-4-113 for that summons with respect to the period of continuing garnishment remaining after the employment relationship is terminated. (Code 1933, § 46-706, enacted by Ga. L. 1980, p. 1769, § 8; Ga. L. 2012, p. 2, § 15/HB 683.)

Law reviews. — For article surveying recent developments in remedies in 1984-1985, see 37 Mercer L. Rev. 503 (1985).

JUDICIAL DECISIONS

Nonemployer garnishee not discharged from general garnishment liability. — Purpose of O.C.G.A. § 18-4-117 is to ensure that only employers will be subject to continuing garnishment and that nonemployer garnishees will be automatically discharged with re-

gard to the continuing aspect of the action; however, that section does not purport to discharge a nonemployer garnishee from such general garnishment liability as existed at the time the original answer was filed. *Melnick v. Fund Mgt., Inc.*, 172 Ga. App. 773, 324 S.E.2d 595 (1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 142 et seq.

C.J.S. — 38 C.J.S., Garnishment, §§ 118, 119.

18-4-118. Forms for continuing garnishment.

For purposes of this article, the following forms are declared to be sufficient, along with those provided in Code Section 18-4-66, for continuing garnishment, provided that nothing in this Code section shall be construed to require the use of particular forms in any proceeding under this article:

(1) Affidavit of continuing garnishment.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____)	
Plaintiff)	
)	
v.	)	Civil action
	)	File no. _____
_____)	
Defendant)	
)	
_____)	
Garnishee)	
)	
_____)	
Address)	

AFFIDAVIT OF CONTINUING GARNISHMENT

Personally appeared the undersigned affiant who on oath says that he is the above plaintiff, his agent, or his attorney at law and that the above defendant is indebted to said plaintiff on a judgment described as follows:

_____ is the case number in the _____ Court of _____ County which rendered the judgment against the defendant, \$_____ being the balance thereon.

Affiant further states that affiant believes that garnishee is or may be an employer of the defendant and subject to continuing garnishment.

Affiant

Sworn to and subscribed
before me this _____
day of _____, _____.

Plaintiff's attorney

(2) Summons of continuing garnishment.

IN THE _____ COURT OF _____ COUNTY
STATE OF GEORGIA

_____)	
Plaintiff)	
)	
v.	)	Civil action
	)	File no. _____
_____)	
Defendant)	
Last four digits of)	
social security number)	
_____)	
Garnishee)	
)	
_____)	
Address)	

SUMMONS OF CONTINUING GARNISHMENT

To: _____ Garnishee

Amount claimed due by plaintiff _____
(To be completed by plaintiff)

Plus court costs due on this summons _____
(To be completed by clerk)

YOU ARE HEREBY COMMANDED to hold immediately all property, money, wages, except what is exempt, belonging to the defendant, or debts owed to the defendant named above at the time of service of this summons and between the time of service of this summons to and including the one hundred seventy-ninth day thereafter. Not later than 45 days after you are served with this summons, you are commanded to file your garnishee answer in

writing with the clerk of this court and serve a copy upon the plaintiff or his attorney named below. This garnishee answer shall state what property, money, and wages, except what is exempt, belonging to the defendant, or debts owed to the defendant, you hold or owe at the time of service of this summons and between the time of such service and the time of making your first garnishee answer. Thereafter, you are required to file further garnishee answers no later than 45 days after your last garnishee answer. Every further garnishee answer shall state what property, money, and wages, except what is exempt, belonging to the defendant, or debts owed to the defendant, you hold or owe at and from the time of the last garnishee answer to the time of the current garnishee answer. The last garnishee answer required by this summons shall be filed no later than the one hundred ninety-fifth day after you receive this summons. Money or other property admitted in a garnishee answer to be subject to continuing garnishment shall be delivered to the court with your garnishee answers. Should you fail to file garnishee answers as required by this summons, a judgment will be rendered against you for the amount the plaintiff claims due by the defendant.

Witness the Honorable _____, Judge of said Court.

This _____ day of _____, _____.

Clerk,

_____ Court of _____ County

Plaintiff's attorney

Address

Service perfected on garnishee, this _____ day of _____, _____.

Deputy marshal, sheriff,
or constable

(3) Garnishee answer of continuing garnishment.

IN THE _____ COURT OF _____ COUNTY

STATE OF GEORGIA

Plaintiff

v.

Defendant

Civil action

File no. _____

Garnishee

Address

)
)
)
)
)

GARNISHEE ANSWER OF CONTINUING GARNISHMENT

1.

From the time of service of this summons of continuing garnishment, if this is the first garnishee answer to such summons, otherwise from the time of the last garnishee answer to this summons of continuing garnishment, until the time of this garnishee answer, garnishee had in garnishee's possession the following described property of the defendant:

2.

From the time of service of this summons of continuing garnishment, if this is the first garnishee answer to such summons, otherwise from the time of the last garnishee answer to this summons of continuing garnishment, until the time of this garnishee answer, all debts accruing from garnishee to the defendant are in the amount of \$_____.

3.

\$_____ of the amount named in paragraph 2 was wages earned at the rate of \$____ per _____ for the period beginning (date), _____, through the time of making this garnishee answer. The amount of wages which is subject to this garnishment is computed as follows:

- \$_____ Gross earnings

\$_____ Total social security and withholding tax

\$_____ Total disposable earnings

\$_____ Amount of wages subject to continuing garnishment

4.

() If checked, defendant is not presently employed by this garnishee and, if employed by garnishee on or after service of this summons of continuing garnishment, was most recently terminated as of the _____ day of _____, _____.

5.

() If checked, this is the last garnishee answer this garnishee is required to file to the presently pending summons of continuing garnishment in the above-styled case.

6.

Garnishee further states: _____.

Garnishee,
garnishee’s attorney, or officer
or employee of an entity garnishee

(CERTIFICATE OF SERVICE)

(Code 1933, § 46-709, enacted by Ga. L. 1980, p. 1769, § 8; Ga. L. 1985, p. 1632, § 5; Ga. L. 1999, p. 81, § 18; Ga. L. 2012, p. 2, § 16/HB 683; Ga. L. 2014, p. 482, § 9/SB 386.)

The 2014 amendment, effective July 1, 2014, substituted “Last four digits of social security number” for “Social security number” in paragraph (2) of the form. See editor’s note for applicability.
Editor’s notes. — Ga. L. 2014, p. 482, § 10/SB 386, not codified by the General Assembly, provides in part, that this Act shall become effective on July 1, 2014, and shall apply to any filings made on or after July 1, 2014.

JUDICIAL DECISIONS

Cited in Evans v. CIT Fin. Servs., Inc., 16 Bankr. 731 (Bankr. N.D. Ga. 1982); Conner v. Mount Carmel Country Estates, 21 Bankr. 616 (Bankr. N.D. Ga. 1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, §§ 331, 337 et seq., 354, 360. **C.J.S.** — 38 C.J.S., Garnishment, §§ 177 et seq., 202, 206.

ARTICLE 7

CONTINUING GARNISHMENT FOR SUPPORT

Cross references. — Entry of continuing garnishment provision in support orders, § 19-6-30. Enforcement of duty of support generally, T. 19, C. 11.

18-4-130. Continuing garnishment for family support; issuance of writ of garnishment.

In addition to garnishment proceedings otherwise available in this chapter, a writ of garnishment shall issue for the continuing withholding of earnings for the enforcement of a judgment for periodic support of a family member. Unless otherwise specifically provided in this

article, the methods, practices, and procedures for continuing garnishment for support shall be the same as for any other garnishment as provided in this chapter, including, but not limited to, procedures relative to default of a garnishee and relief from default and provisions relative to fees and expenses. (Code 1981, § 18-4-130, enacted by Ga. L. 1985, p. 785, § 2.)

18-4-131. Definitions.

As used in this article, the term:

(1) “Accruing on a daily basis” means the amount of support computed by conversion of the periodic amount to an annual sum, divided by 365.

(2) “Department” means the Department of Human Services.

(3) “Earnings” means any periodic form of payment due to an individual, regardless of source, including without limitation wages, salary, commission, bonus, workers’ compensation, disability, payments pursuant to a pension or retirement program, and interest.

(4) “Family member” means any minor child of the defendant or a spouse or former spouse of the defendant.

(5) “Judgment” means any order or judgment of a court of this state, any order or judgment of a court of another state which has been registered pursuant to Code Section 19-11-77 or otherwise, any order of a court of this state entered pursuant to a proceeding under Chapter 10 of Title 19, any final administrative order for support issued by the department, or any final administrative order issued by another state.

(6) “Periodic support” means support required by the terms of a court order or judgment or an administrative order to be paid regularly on a daily, weekly, monthly, or other similar specified frequency. (Code 1981, § 18-4-131, enacted by Ga. L. 1985, p. 785, § 2; Ga. L. 1997, p. 1613, § 5; Ga. L. 2009, p. 453, § 2-2/HB 228.)

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

18-4-132. Contents of affidavit for a continuing garnishment for support; attachment of certified copy of judgment; amendment of affidavit.

(a) The contents of the affidavit for continuing garnishment for support shall be substantially identical to those set forth in Code Section 18-4-112, but in addition thereto, the plaintiff shall attach a

certified copy of the judgment to be enforced and shall also state the following in the affidavit:

(1) That the defendant is in arrears on the obligation of support in an amount equal to or in excess of one month's obligation as decreed in said judgment;

(2) The amount of arrearage which exists under said judgment as of the date of the execution of the affidavit;

(3) The periodic amount of support due under the judgment for each obligee named therein, taking into account the possible attainment of majority or emancipation or death of any minor child named in the judgment; and

(4) The date of the termination of the obligation of support of each obligee named in the order or judgment of support, based upon the terms of said order or judgment, or, as to any obligee who is a minor child, the date each such obligee shall attain the age of 18 years.

(b) Such affidavit may be amended from time to time by subsequent affidavits of any party showing a modification or other amendment to the original judgment sought to be enforced. Such amended or subsequent affidavits shall include a certified copy of any such modification or amendment and shall contain the information required by paragraphs (1) through (4) of subsection (a) of this Code section. (Code 1981, § 18-4-132, enacted by Ga. L. 1985, p. 785, § 2.)

18-4-133. Service of summons; requirements as to filing of first garnishee answer accompanied by money; application of money.

(a) The summons of continuing garnishment for support shall be directed to the garnishee who shall be required to file a first garnishee answer no later than 45 days after service, which garnishee answer shall state what earnings were payable to the defendant from the time of service through and including the day of the first garnishee answer and the basis for the computation of same, including the rate of pay and hours worked, or salaries, commissions, or other basis of compensation.

(b) The garnishee shall accompany such initial garnishee answer with money of the defendant admitted in the garnishee answer to be subject to continuing garnishment for support. In computing the amounts subject to this article, the provisions of subsection (f) of Code Section 18-4-20 shall control.

(c) The money paid into court with the initial garnishee answer, after deduction for costs, shall be first applied to the periodic support payment accrued on a daily basis from the date of the affidavit of the

plaintiff to the date of the initial garnishee answer. All sums in excess of such periodic payment shall be applied to the original arrearage. Original arrearage shall mean those arrears existing as of the date of the making of the plaintiff's affidavit, plus any amounts includable pursuant to subsection (b) of Code Section 18-4-134. (Code 1981, § 18-4-133, enacted by Ga. L. 1985, p. 785, § 2; Ga. L. 2012, p. 2, § 17/HB 683.)

18-4-134. Filing further garnishee answers and tendering money; application of money; filing of final garnishee answer by garnishee upon termination of defendant's employment.

(a) If the amount claimed as original arrearage as of the date of the making of the plaintiff's affidavit is not satisfied by the money payable into court under the initial garnishee answer, after application of the funds as set forth in subsection (c) of Code Section 18-4-133, the garnishee shall file further garnishee answers no later than 45 days after the previous garnishee answer date, stating the earnings accrued and the basis of their accrual and tendering such money accruing in such period. The amounts paid into court pursuant to subsequent garnishee answers, over and above the periodic payment accruing within such period, shall be applied to the original arrearage until the same is retired.

(b) If the earnings paid into court pursuant to any garnishee answer are less than the sums due under the periodic support requirement accruing over the same period of time, after allowance for any costs deductible from same, the resulting difference shall be added to the amount due as original arrearage until the same is retired by subsequent payments.

(c) The garnishee shall file additional garnishee answers until the original arrearage is retired and all periodic support payments are current.

(d) Upon the termination of employment of the defendant by the garnishee, the garnishee shall be required to file a final garnishee answer stating the date and reason for the defendant's termination from employment and stating, to the best of the garnishee's information, the defendant's present residential address and employer. (Code 1981, § 18-4-134, enacted by Ga. L. 1985, p. 785, § 2; Ga. L. 2012, p. 2, § 17/HB 683.)

18-4-135. Period of attachment of writ of garnishment; garnishee's reliance upon information in affidavit of garnishment.

The writ of garnishment described in this article shall attach for so long as the defendant is employed by the garnishee and shall not terminate until the original arrearage is retired. The garnishee may rely upon the information as to the termination date of the duty of support of any individual claimed in the affidavit of garnishment, the amount of the duty of periodic support to be paid, any sums paid by the defendant between the date of the filing of the plaintiff's affidavit and the date of the initial garnishee answer, and the amount of the original arrearage existing as of the date of the affidavit of garnishment, unless the same are traversed by the defendant and the court enters any finding otherwise. (Code 1981, § 18-4-135, enacted by Ga. L. 1985, p. 785, § 2; Ga. L. 2012, p. 2, § 17/HB 683.)

CHAPTER 5

DEBT ADJUSTMENT

Sec.		Sec.	
18-5-1.	Definitions.		appropriate creditors; trust account required.
18-5-2.	Debt adjusting permitted.		
18-5-3.	Exemption for debt adjustment by certain individuals or entities.	18-5-4.	Penalty for unlawfully engaging in business of debt adjusting.
18-5-3.1.	Annual requirements for persons engaged in debt adjusting; designation of repository office.	18-5-5.	Role of Attorney General in promulgating rules and regulations.
18-5-3.2.	Timing of disbursements to ap-		

OPINIONS OF THE ATTORNEY GENERAL

Organizations exempt from taxation under § 501(3)(c) of the Internal Revenue Code, although exempt from the credit repair law, O.C.G.A. § 16-9-59, are prohibited from engaging in activities proscribed by O.C.G.A. Ch. 5, T. 14. 1997 Op. Att’y Gen. No. U97-6.

RESEARCH REFERENCES

ALR. — Legislation regulating, taxing, or forbidding business of debt adjusting, 95 ALR2d 1354.

18-5-1. Definitions.

As used in this chapter, the term:

(1) “Debt adjusting” means doing business in debt adjustments, budget counseling, debt management, or debt pooling service or holding oneself out, by words of similar import, as providing services to debtors in the management of their debts and contracting with a debtor for a fee to:

(A) Effect the adjustment, compromise, or discharge of any account, note, or other indebtedness of the debtor; or

(B) Receive from the debtor and disburse to his or her creditors any money or other thing of value.

(2) “Person” means an individual, corporation, partnership, trust, association, or other legal entity.

(3) “Resides” means to live in a particular place, whether on a temporary or permanent basis. (Ga. L. 1956, p. 797, § 1; Ga. L. 2003, p. 392, § 1; Ga. L. 2015, p. 1088, § 18/SB 148.)

Cross references. — Operation of credit repair services organization, § 16-9-59.

Editor’s notes. — Ga. L. 2015, p. 1088, § 18/SB 148, effective July 1, 2015, reenacted this Code section without change.

JUDICIAL DECISIONS

Forum selection provision invalid when denying debtor rights. — Trial court erred in granting a Texas corporation’s motion to dismiss a debtors’ action alleging that the debt adjustment services a Texas corporation provided them violated Georgia statutes specifically regulating the business of “debt adjusting” as set forth in O.C.G.A. § 18-5-1 et seq. on the ground that the parties’ contract contained a provision selecting Texas as the forum for any dispute because, if enforced, the contract’s forum selection and choice of law provisions requiring the debtors to bring their action before a Texas court

applying Texas law would operate in tandem to deprive the debtors of specific statutory protections set forth in § 18-5-1 et seq., relating to debt adjustment agreements; because that would violate Georgia’s public policy established in those provisions the forum selection and choice of law provisions in the contract were invalid and unenforceable. *Moon v. CSA--Credit Solutions of Am., Inc.*, 304 Ga. App. 555, 696 S.E.2d 486 (2010).
Cited in *Penso Holdings, Inc. v. Cleveland*, 324 Ga. App. 259, 749 S.E.2d 821 (2013).

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Collection and Credit Agencies, §§ 2, 23.

18-5-2. Debt adjusting permitted.

In the course of engaging in debt adjusting, it shall be unlawful for any person to accept from a debtor who resides in this state, either directly or indirectly, any charge, fee, contribution, or combination thereof in an amount in excess of 7.5 percent of the amount paid monthly by such debtor to such person for distribution to creditors of such debtor; provided, however, no provision of this chapter shall prohibit any person, in the course of engaging in debt adjusting, from imposing upon a debtor who resides in this state a reasonable and separate charge or fee for insufficient funds transactions. (Ga. L. 1956, p. 797, § 2; Ga. L. 2003, p. 392, § 2; Ga. L. 2015, p. 1088, § 18/SB 148.)

Editor’s notes. — Ga. L. 2015, p. 1088, § 18/SB 148, effective July 1, 2015, reenacted this Code section without change.

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Collection and Credit Agencies, §§ 2, 23.

18-5-3. Exemption for debt adjustment by certain individuals or entities.

Nothing in this chapter shall apply to those situations involving debt adjusting incurred in the practice of law in this state. Nothing in this chapter shall apply to those persons or entities who incidentally engage in debt adjustment to adjust the indebtedness owed to said person or entity. Nothing in this chapter shall apply to the following entities or their subsidiaries: the Federal National Mortgage Association; the Federal Home Loan Mortgage Corporation; a bank, bank holding company, trust company, savings and loan association, credit union, credit card bank, or savings bank that is regulated and supervised by the Office of the Comptroller of the Currency, the Federal Reserve, the Federal Deposit Insurance Corporation, the National Credit Union Administration, or the Georgia Department of Banking and Finance; or persons as defined in Code Section 7-3-3 operating under Chapter 3 of Title 7, the “Georgia Industrial Loan Act.” (Ga. L. 1956, p. 797, § 4; Ga. L. 2003, p. 392, § 3; Ga. L. 2015, p. 5, § 18/HB 90; Ga. L. 2015, p. 1088, § 18/SB 148.)

The 2015 amendments. — The first 2015 amendment, effective March 13, 2015, part of an Act to revise, modernize, and correct the Code, deleted “the Office of Thrift Supervision,” preceding “the Fed-

eral Reserve” in the last sentence. The second 2015 amendment, effective July 1, 2015, reenacted this Code section without change.

RESEARCH REFERENCES

Am. Jur. 2d. — 15A Am. Jur. 2d, Collection and Credit Agencies, § 24.

18-5-3.1. Annual requirements for persons engaged in debt adjusting; designation of repository office.

(a) Any person engaged in debt adjusting for debtors residing in this state shall meet the following annual requirements:

(1) Obtain from an independent third party certified public accountant an annual audit of all accounts of such person in which the funds of debtors are deposited and from which payments are made to creditors on behalf of debtors. A copy of the summary results of such annual audit shall be made available upon written request to any party so requesting a copy for a charge not to exceed the cost of the reproduction of the annual audit; and

(2) Obtain and maintain at all times insurance coverage for employee dishonesty, depositor’s forgery, and computer fraud in an amount not less than the greater of \$100,000.00 or 10 percent of the monthly average for the immediately preceding six months of the

aggregate amount of all deposits made with such person by all debtors. The deductible on such coverage shall not exceed 10 percent of the face amount of the policy coverage. Such policy shall be issued by a company rated at least “A-” or its equivalent by a nationally recognized rating organization and such policy shall provide for 30 days’ advance written notice of termination of the policy to be provided to the Attorney General’s office.

(b) A copy of the annual audits and insurance policies required by this Code section shall be filed annually with the Attorney General’s office.

(c) The Attorney General’s office shall act as a repository for the audits, insurance, and termination notices furnished to such office pursuant to this Code section. No oversight responsibility shall be imposed upon such office by virtue of its receipt of such documents. (Code 1981, § 18-5-3.1, enacted by Ga. L. 2003, p. 392, § 4; Ga. L. 2015, p. 1088, § 18/SB 148.)

The 2015 amendment, effective July 1, 2015, substituted “Attorney General’s office” for “Governor’s Office of Consumer Affairs” throughout this Code section.

18-5-3.2. Timing of disbursements to appropriate creditors; trust account required.

(a) Any person engaged in debt adjusting shall disburse to the appropriate creditors all funds received from a debtor, less any fees authorized by this chapter, within 30 days of receipt of such funds.

(b) Any person engaged in debt adjusting shall maintain a separate trust account for the receipt of any and all funds from debtors and the disbursement of such funds on behalf of debtors. (Code 1981, § 18-5-3.2, enacted by Ga. L. 2003, p. 392, § 5.)

Editor’s notes. — Ga. L. 2015, p. 1088, § 18/SB 148, effective July 1, 2015, purported to amend Chapter 5 of Title 18 but omitted this Code section, and therefore this Code section is treated as reenacted without change.

18-5-4. Penalty for unlawfully engaging in business of debt adjusting.

(a) Any person who engages in debt adjusting in violation of this chapter shall be guilty of a misdemeanor.

(b) Without limiting the applicability of subsection (a) of this Code section:

(1) Any person who engages in debt adjusting in violation of the provisions of Code Section 18-5-3.1 or subsection (b) of Code Section

18-5-3.2 shall further be liable for a civil fine of not less than \$50,000.00; and

(2) Any person who engages in debt adjusting in violation of the provisions of Code Section 18-5-2 or subsection (a) of Code Section 18-5-3.2 shall further be liable to the debtor in an amount equal to the total of all fees, charges, or contributions paid by the debtor plus \$5,000.00. Such debtor shall have the right to bring a cause of action directly against such person for violation of the provisions of this chapter.

(c) The Attorney General and prosecuting attorneys shall have the authority to conduct the criminal prosecution of all cases arising under this chapter and to conduct civil prosecution of cases arising under this chapter.

(d) A violation of Code Section 18-5-2, 18-5-3.1, or 18-5-3.2 shall additionally be a violation of Part 2 of Article 15 of Chapter 1 of Title 10, the “Fair Business Practices Act of 1975.” (Ga. L. 1956, p. 797, § 3; Ga. L. 2003, p. 392, § 6; Ga. L. 2004, p. 631, § 18; Ga. L. 2015, p. 1088, § 18/SB 148.)

Editor’s notes. — Ga. L. 2015, p. 1088, § 18/SB 148, effective July 1, 2015, reenacted this Code section without change.

RESEARCH REFERENCES

ALR. — Legislation regulating, taxing, or forbidding business of debt adjusting, 95 ALR2d 1354.

18-5-5. Role of Attorney General in promulgating rules and regulations.

The Attorney General shall have the authority to promulgate rules and regulations and establish procedures necessary to carry into effect, implement, and enforce the provisions of this chapter. The authority granted to the Attorney General pursuant to this Code section shall be exercised at all times in conformity with Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.” (Code 1981, § 18-5-5, enacted by Ga. L. 2015, p. 1088, § 18/SB 148.)

Effective date. — This Code section became effective July 1, 2015.

TITLE 19

DOMESTIC RELATIONS

Chap.

1. General Provisions, 19-1-1 through 19-1-6.
2. Domicile, 19-2-1 through 19-2-6.
3. Marriage Generally, 19-3-1 through 19-3-68.
4. Annulment of Marriage, 19-4-1 through 19-4-5.
5. Divorce, 19-5-1 through 19-5-17.
6. Alimony and Child Support, 19-6-1 through 19-6-53.
7. Parent and Child Relationship Generally, 19-7-1 through 19-7-54.
8. Adoption, 19-8-1 through 19-8-43.
9. Child Custody Proceedings, 19-9-1 through 19-9-129.
10. Abandonment of Spouse or Child, 19-10-1 through 19-10-2.
- 10A. Safe Place for Newborns, 19-10A-1 through 19-10A-7.
11. Enforcement of Duty of Support, 19-11-1 through 19-11-191.
12. Change of Name, 19-12-1 through 19-12-4.
13. Family Violence, 19-13-1 through 19-13-56.
14. Trust Fund, 19-14-1 through 19-14-23.
15. Child Abuse, 19-15-1 through 19-15-7.

Cross references. — Powers and duties of Department of Human Resources, county boards of health, and other agencies, regarding family-planning services, T. 49, C. 7.

Editor's notes. — Ga. L. 1979, p. 466, § 1, not codified by the General Assembly, provides that no contract made or judgment, order, or decree rendered prior to April 4, 1979, should be overturned, modified, or disturbed by reason of the 1979 Act and that no such contract, judgment, order, or decree should be overturned, modified, or disturbed except to the extent absolutely required by the Constitution of this state or of the United States. The

section also provides that nothing in the 1979 Act shall be construed to prohibit modification of judgments, decrees, or orders to the extent such modification is expressly authorized by statute, and that nothing in the Act shall be construed to authorize any court to entertain any claim of constitutional right which claim is barred because it was not timely raised in any previous judicial proceeding.

Ga. L. 1979, p. 466, § 49, not codified by the General Assembly, provides that the Act shall govern all proceedings and actions brought after it takes effect and also all further proceedings in actions then pending.

The following sections were affected by the 1979 Act: O.C.G.A. §§ 19-3-9, 19-3-10, 19-5-7, 19-5-12, 19-5-17, 19-6-1, 19-6-2, 19-6-3, 19-6-4, 19-6-5, 19-6-6, 19-6-7, 19-6-8, 19-6-9, 19-6-10, 19-6-13, 19-6-14, 19-6-15, 19-6-16, 19-6-17, 19-6-18, 19-6-19, 19-6-20, 19-6-21, 19-6-22, 19-6-23, 19-6-24, 19-6-26, 19-6-27, 19-7-1, 19-7-2, 19-7-24, 19-9-2, 19-11-42, 19-11-43.

Law reviews. — For annual survey on domestic relations, see 36 Mercer L. Rev. 167 (1984). For article surveying domestic relations law in 1984-1985, see 37 Mercer L. Rev. 221 (1985). For annual survey of domestic relations law, see 39 Mercer L. Rev. 199 (1987). For annual survey of law of domestic relations, see 40 Mercer L. Rev. 211 (1988). For annual survey article on domestic relations law, see 45 Mercer

L. Rev. 215 (1993). For annual survey article on domestic relations law, see 46 Mercer L. Rev. 223 (1994).

For annual survey article on domestic relations law, see 49 Mercer L. Rev. 135 (1997).

For annual survey article on domestic relations, see 50 Mercer L. Rev. 217 (1998). For annual survey article discussing developments in domestic relations law, see 51 Mercer L. Rev. 263 (1999). For annual survey article discussing developments in domestic relations law, see 52 Mercer L. Rev. 213 (2000). For article, "The Nature of Family, The Family of Nature: The Surprising Liberal Defense of the Traditional Family in the Enlightenment," see 64 Emory L.J. 591 (2014).

RESEARCH REFERENCES

ALR. — Family court jurisdiction to hear contract claims, 46 ALR5th 735.

Pre-emptive effect of Employee Retirement Income Security Act (ERISA) provi-

sions (29 USCS §§ 1056(d)(3), 1144(a), and 1144(b)(7)) with respect to orders entered in domestic relations proceedings, 116 ALR Fed. 503.

CHAPTER 1

GENERAL PROVISIONS

Sec.		Sec.
19-1-1.	Injunctions and restraining orders authorized in domestic relations actions.	19-1-2 through 19-1-6. [Repealed].

19-1-1. Injunctions and restraining orders authorized in domestic relations actions.

(a) As used in this Code section, the term “domestic relations action” shall include any action for divorce, alimony, equitable division of assets and liabilities, child custody, child support, legitimation, annulment, determination of paternity, termination of parental rights in connection with an adoption proceeding filed in a superior court, any contempt proceeding relating to enforcement of a decree or order, a petition in respect to modification of a decree or order, an action on a foreign judgment based on alimony or child support, and adoption. The term “domestic relations action” shall also include any direct or collateral attack on a judgment or order entered in any such action.

(b) Upon the filing of any domestic relations action, the court may issue a standing order in such action which:

(1) Upon notice, binds the parties in such action, their agents, servants, and employees, and all other persons acting in concert with such parties;

(2) Enjoins and restrains the parties from unilaterally causing or permitting the minor child or children of the parties to be removed from the jurisdiction of the court without the permission of the court, except in an emergency which has been created by the other party to the action;

(3) Enjoins and restrains each party from doing or attempting to do or threatening to do any act which injures, maltreats, vilifies, molests, or harasses or which may, upon judicial determination, constitute threats, harassment, or stalking the adverse party or the child or children of the parties or any act which constitutes a violation of other civil or criminal laws of this state; and

(4) Enjoins and restrains each party from selling, encumbering, trading, contracting to sell, or otherwise disposing of or removing from the jurisdiction of the court, without the permission of the court, any of the property belonging to the parties except in the ordinary course of business or except in an emergency which has been created by the other party to the action.

(c) Upon written motion of a party, the standing order provided for in this Code section shall be reviewed by the court at any rule nisi hearing. (Code 1981, § 19-1-1, enacted by Ga. L. 1994, p. 1161, § 1.)

Editor's notes. — Former Code Section 19-1-1, repealed and reserved by Ga. L. 1991, p. 94, § 19, and redesignated as

Code Section 19-15-1, was based on Ga. L. 1990, p. 1785, § 1.

19-1-2 through 19-1-6.

Reserved. Repealed by Ga. L. 1991, p. 94, § 19, effective March 14, 1991.

Editor's notes. — Ga. L. 1991, p. 94, § 19, effective March 14, 1991, repealed the Code sections formerly codified at this chapter and redesignated them as Chapter 15 of this title. The former chapter,

relating to child abuse consisted of Code Sections 19-1-1 through 19-1-6 and was based on Ga. L. 1987, p. 1065, § 1; Ga. L. 1988, p. 474, § 1; and Ga. L. 1990, p. 1785, § 1.

CHAPTER 2

DOMICILE

Sec.		Sec.	
19-2-1.	Place of domicile; how domicile changed, generally.	19-2-5.	Domicile of person under guardianship.
19-2-2.	Election between two or more domiciles; domicile of transients.	19-2-6.	Change of domicile which is dependent on that of another; change of ward's domicile affecting inheritance.
19-2-3.	Domicile of married person.		
19-2-4.	Domicile of minor.		

RESEARCH REFERENCES

ALR. — Creditor's right to prevent or debtor's election to take under will, 39 debtor's renunciation of benefit under will ALR4th 633.

19-2-1. Place of domicile; how domicile changed, generally.

(a) The domicile of every person who is of full age and is laboring under no disability is the place where the family of the person permanently resides, if in this state. If a person has no family or if his family does not reside in this state, the place where the person generally lodges shall be considered his domicile.

(b) The domicile of a person sui juris may be changed by an actual change of residence with the avowed intention of remaining at the new residence. Declaration of an intention to change one's domicile is ineffectual for that purpose until some act is done in execution of the intention. (Laws 1838, Cobb's 1851 Digest, p. 530; Code 1863, §§ 1644, 1650; Code 1868, §§ 1689, 1694; Code 1873, §§ 1690, 1695; Code 1882, §§ 1690, 1695; Civil Code 1895, §§ 1824, 1829; Civil Code 1910, §§ 2181, 2186; Code 1933, §§ 79-401, 79-406.)

Law reviews. — For note discussing nonresident tuition fees charged by state the constitutional implications of higher universities, see 8 Ga. St. B.J. 86 (1971).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
ROLE OF JURY
APPLICATION

General Consideration

Applicability of section. — Law was not intended to apply in determining whether person had lost domicile acquired in this state and has become domiciled in some other state. Williams v. Williams, 191 Ga. 437, 12 S.E.2d 352 (1940).

General Consideration (Cont'd)

Establishment of residence. — Law required both act and intent to establish residence, and either without the other was insufficient. *Bufford v. Bufford*, 223 Ga. 133, 153 S.E.2d 718 (1967).

Domicile of man having family. — Domicile of man having family was place where family shall permanently reside, if in this state. *Grimaud v. Knox-Georgia Homes, Inc.*, 210 Ga. 514, 81 S.E.2d 476 (1954).

"Family" defined. — No definition of the word "family" as used in the law would be satisfactory that does not convey the idea of unity of the household in which were gathered the members of the family as one collective body under the management or control of the head thereof. *Forlaw v. Augusta Naval Stores Co.*, 124 Ga. 261, 52 S.E. 898 (1905).

Meaning of the word "family" is not necessarily identical with the meaning of the same word as used in the homestead and exemption laws, and there was a still further variation from the meaning in criminal laws and police regulations. *Forlaw v. Augusta Naval Stores Co.*, 124 Ga. 261, 52 S.E. 898 (1905).

"Permanently" defined. — Word "permanently" is used in these provisions in contradistinction from the word "temporarily." *Alvaton Mercantile Co. v. Caldwell*, 34 Ga. App. 151, 128 S.E. 781 (1925); *Grimaud v. Knox-Georgia Homes, Inc.*, 210 Ga. 514, 81 S.E.2d 476 (1954).

"Residence" and "domicile" were not synonymous and convertible terms. *Worsham v. Ligon*, 144 Ga. 707, 87 S.E. 1025 (1916); *Avery v. Bower*, 170 Ga. 202, 152 S.E. 239 (1930); *Bass v. Bass*, 222 Ga. 378, 149 S.E.2d 818 (1966); *Pugh v. Jones*, 131 Ga. App. 600, 206 S.E.2d 650 (1974).

Trial court erred in finding that venue was proper in Effingham County, Georgia because the defendant, who maintained residences in both Effingham County and Chatham County, Georgia, was domiciled in Chatham County. *Oglesby v. Deal*, 311 Ga. App. 622, 716 S.E.2d 749 (2011).

"Domicile," unlike "residence," means permanent place of abode, whereas "residence" is not necessarily permanent, and may be at some place other

than the place of domicile. *Avery v. Bower*, 170 Ga. 202, 152 S.E. 239 (1930).

Actual residence and intention to remain. — There must be concurrence of actual residence and intention to remain to acquire domicile. *Forlaw v. Augusta Naval Stores Co.*, 124 Ga. 261, 52 S.E. 898 (1905); *Worsham v. Ligon*, 144 Ga. 707, 87 S.E. 1025 (1916); *Avery v. Bower*, 170 Ga. 202, 152 S.E. 239 (1930); *Sorrells v. Sorrells*, 247 Ga. 9, 274 S.E.2d 314 (1981).

Prerequisites to change of domicile. — In order to change a person's domicile, a person must actually remove to another place with a present intention of remaining there as that person's place of domicile, or having removed, avow that person's intention of remaining there as the person's place of domicile, but such avowal may be proved by express declaration or acts equivalent thereto. *Worsham v. Ligon*, 144 Ga. 707, 87 S.E. 1025 (1916); *Bass v. Bass*, 222 Ga. 378, 149 S.E.2d 818 (1966).

For a person to change that person's domicile, it is essential that the person should have a bona fide intent to make the change. In addition, the person must also declare an intent to change the person's domicile and do some act in execution of such intent. *Brandt v. Buckley*, 147 Ga. 389, 94 S.E. 233 (1917).

To effect a change of domicile there must be an avowed intent, which may be shown by declarations or acts equivalent thereto, and an actual removal. *Bellamy v. Bellamy*, 187 Ga. 804, 2 S.E.2d 413 (1939).

Person may have several residences, but only one domicile. *Avery v. Bower*, 170 Ga. 202, 152 S.E. 239 (1930).

Change in domicile involves exercise of volition and choice. — As to a person sui juris, the matter of making a change in domicile is one involving the exercise of volition and choice. *Stanfield v. Hursey*, 36 Ga. App. 394, 136 S.E. 826 (1927).

There must be either tacit or explicit intention to change one's domicile before there is a change of legal residence. *Sorrells v. Sorrells*, 247 Ga. 9, 274 S.E.2d 314 (1981).

When length of stay away from domicile immaterial. — When an individual travels away from that individual's

domicile for a time, it is immaterial whether such a stay is for one month or any number of months, provided it does not become so extended that it could be reasonably inferred that there is an actual intention to make a change of domicile. *Venable v. Long Realty Co.*, 46 Ga. App. 803, 169 S.E. 322 (1933).

There may be residence for long time at place not intended as permanent abode. — See *Bush v. State*, 10 Ga. App. 544, 73 S.E. 697 (1912).

Rules stated in this section determine where suit should be instituted. *Daniel v. Sullivan*, 46 Ga. 277 (1872).

Domicile for purpose of legal action. — Domicile or legal residence for the purpose of action exists when there has been a concurrence of an actual residence and an intention to remain there permanently, which intention may be proved by acts. *Mayo v. Ivan Allen-Marshall Co.*, 51 Ga. App. 250, 180 S.E. 20 (1935).

One's legal residence for purpose of being sued was necessarily the same county as the person's domicile where domicile was determined by this statute. *Pugh v. Jones*, 131 Ga. App. 600, 206 S.E.2d 650 (1974) (see O.C.G.A. § 19-2-1).

Role of Jury

Question of domicile is mixed question of law and fact, and is ordinarily one for jury and should not be determined by the court as a matter of law except in plain and palpable cases. *Williams v. Williams*, 226 Ga. 734, 177 S.E.2d 481 (1970); *Pugh v. Jones*, 131 Ga. App. 600, 206 S.E.2d 650 (1974); *Milton v. Wilkes*, 152 Ga. App. 362, 262 S.E.2d 624 (1979).

Question of bona fides of intent to change domicile is one for jury determination. *Brandt v. Buckley*, 147 Ga. 389, 94 S.E. 233 (1917).

Residence was a question of fact to be determined by the jury, so far as it involves ascertainment of the intention of the party. *Jordan v. Carter*, 60 Ga. 443 (1878); *Battle v. Braswell*, 107 Ga. 128, 32 S.E. 838 (1899); *Forlaw v. Augusta Naval Stores Co.*, 124 Ga. 261, 52 S.E. 898 (1905); *Mims v. Jones*, 135 Ga. 541, 69 S.E. 824 (1910); *Smith v. Smith*, 136 Ga. 197, 71 S.E. 158 (1911).

Defendant's liability to suit. — Whether defendant was liable to suit as resident was question for jury. *Jordan v. Carter*, 60 Ga. 443 (1878).

Question of domicile may be withdrawn from jury only if the evidence demands a finding that there has not been a change of domicile. *Milton v. Wilkes*, 152 Ga. App. 362, 262 S.E.2d 624 (1979).

Application

Change of domicile not shown. — Trial court did not err when the court denied the father's motion to move a child custody action from Gwinnett County to DeKalb County because the father had not proved domicile in DeKalb County; while the father testified that the father moved to DeKalb County, the father's driver's license showed a Gwinnett County address eight months later and the father had not notified the father's homeowner's insurance company or the Internal Revenue Service of the move. *Goyal v. Fifadara*, 324 Ga. App. 567, 751 S.E.2d 190 (2013).

Dismissal for lack of residency affirmed. — Trial court's finding that a wife was not a resident of DeKalb County, Georgia, and its order dismissing her DeKalb County divorce case were affirmed where the parties had sold their home in Georgia six months before the divorce was filed, and the wife's tax forms stated that she did not maintain a home in the United States, but rather that her bona fide residence was in South Africa; although the wife claimed that she intended to return to DeKalb County, the trial court properly applied the principle that the testimony of a party who offered herself as a witness in her own behalf at trial was to be construed most strongly against her when it was self-contradictory, vague, or equivocal. *Conrad v. Conrad*, 278 Ga. 107, 597 S.E.2d 369 (2004).

Person's domicile is not changed merely by the person's enlistment in Army and that person's transfer or assignment by military order to another jurisdiction. *Squire v. Vazquez*, 52 Ga. App. 712, 184 S.E. 629 (1936).

Father did not reside in Georgia for purposes of recording and modifying an Alabama child support order under

Application (Cont'd)

O.C.G.A. § 19-11-172(a) of the Uniform Interstate Family Support Act, O.C.G.A. § 19-11-100 et seq., because while the father had been stationed in Georgia in the Army, the father was registered to vote in Alabama, had a driver's license there, and lived in Alabama with his wife, two sons, and his father; thus, the father was domiciled in Alabama for the purposes of O.C.G.A. § 19-2-1. *Kean v. Marshall*, 294 Ga. App. 459, 669 S.E.2d 463 (2008).

Military personnel may change domicile. — It is as competent for a soldier to abandon the soldier's domicile or residence and acquire a new one as it is for any other citizen to do so. *Engram v. Faircloth*, 205 Ga. 577, 54 S.E.2d 598 (1949); *Smiley v. Davenport*, 139 Ga. App. 753, 229 S.E.2d 489 (1976).

Effect of transfer to mental hospital on domicile. — Person's domicile is not changed merely by the person's transference to a mental hospital located in another jurisdiction, nor by an adjudication of a court of competent jurisdiction that the person is of unsound mind, remanding the person to a hospital for the insane, nor is the person's domicile changed by the appointment of a guardian for the person's estate. *Squire v. Vazquez*, 52 Ga. App. 712, 184 S.E. 629 (1936).

Mentally incompetent person may lack capacity to intend change of domicile. — Person who is mentally incompetent and who moves from one place to another may lack the mental capacity to change his or her domicile. *Sorrells v. Sorrells*, 247 Ga. 9, 274 S.E.2d 314 (1981).

Boarding. — When a single person boards and lodges four nights in the week in a certain district for the purpose of teaching school such district will constitute the person's residence. *Hinton v. Lindsay*, 20 Ga. 746 (1856).

Criminal flight from state. — Change of domicile is not effected by a person fleeing from the state after wounding another when the person's family continues to live in the former state. *Barrett & Williford v. Black, Cobb & Co.*, 25 Ga. 151 (1858).

Domicile of convict sent to a penitentiary in a county other than that of the

convict's domicile is not changed by this reason. *Barton v. Barton*, 74 Ga. 761 (1885).

Effect of abandoning family. — When a man has a family but has abandoned the family, the man's residence must be determined under the latter part of the section, namely, that pertaining to persons with no family. *Gilmer v. Gilmer*, 32 Ga. 685 (1861); *Smith v. Smith*, 136 Ga. 197, 71 S.E. 158 (1911).

Change of residence by wife. — Wife cannot, in the absence of the husband, and without his consent, change the family residence so as to change the husband's venue. *Sindall v. H.C. Thacker & Co.*, 56 Ga. 51 (1876).

Pendency of divorce proceeding in another state. — Mere pendency of a suit for divorce in another state, which was dismissed only a short time before the filing of a suit for divorce in this state, does not disprove the positive testimony of the plaintiff that the plaintiff had been a bona fide resident of this state for 12 months prior to the filing of the plaintiff's suit. *Bellamy v. Bellamy*, 187 Ga. 804, 2 S.E.2d 413 (1939).

Residence taken upon marital separation not domicile when husband disavows as such. — When the husband had lived with the wife in the county in which a suit for divorce and alimony was filed and took an apartment in another county upon their separation which he disavowed as his domicile, he did not abandon the former county as his domicile. *Smith v. Smith*, 223 Ga. 551, 156 S.E.2d 916 (1967).

In a family violence case in which the respondent has left the family home but has not avowed an intention to remain in that new location, venue is proper both in the county of the family's residence and in the county to which the respondent has relocated. *Davis-Redding v. Redding*, 246 Ga. App. 792, 542 S.E.2d 197 (2000).

No intention to abandon residence. — Man having a permanent residence in one county does not lose such residence by accepting a contract in another county, and renting a house in the latter county to which he moved his family, when it is not his intention to abandon his former domicile in the county first referred to. *Knight*

v. Bond, 112 Ga. 828, 38 S.E. 206 (1901).

Second house rented for special purpose not domicile. — Fact that defendant removed to another county and there rented a house did not constitute a change of domicile since the removal was for the purpose of educating children, the former home was maintained, the incidents of citizenship there discharged, and there was at no time an intention to provide a fixed place of abode in the place of removal, or to there establish permanent residence. *Alvaton Mercantile Co. v. Caldwell*, 34 Ga. App. 151, 128 S.E. 781 (1925).

Temporary departure from domicile. — If a person leaves the place of the person's domicile temporarily, or for a particular purpose, and does not actually remove to another place with the intention of remaining there indefinitely, the person will not be considered as having changed the person's legal residence. *Venable v. Long Realty Co.*, 46 Ga. App. 803, 169 S.E. 322 (1933); *Smith v. Smith*, 223 Ga. 551, 156 S.E.2d 916 (1967).

Temporary absence from county by man who has no family does not oper-

ate to change domicile. *Bellamy v. Bellamy*, 187 Ga. 804, 2 S.E.2d 413 (1939).

Cited in *Smith v. Ellabelle-Eldora School Dist.*, 40 Ga. App. 561, 150 S.E. 454 (1929); *Cunningham v. Spurway*, 50 Ga. App. 550, 178 S.E. 762 (1935); *Mayo v. Ivan Allen-Marshall Co.*, 51 Ga. App. 250, 180 S.E. 20 (1935); *Bellamy v. Bellamy*, 187 Ga. 56, 199 S.E. 745 (1938); *Adams v. Adams*, 191 Ga. 537, 13 S.E.2d 173 (1941); *Stewart v. Stewart*, 195 Ga. 460, 24 S.E.2d 672 (1943); *Foster v. Foster*, 207 Ga. 519, 63 S.E.2d 318 (1951); *Patterson v. Patterson*, 208 Ga. 7, 64 S.E.2d 441 (1951); *Sikes v. Sims*, 212 Ga. 391, 93 S.E.2d 6 (1956); *Stanton v. Stanton*, 213 Ga. 545, 100 S.E.2d 289 (1957); *Allen v. McDermott*, 110 Ga. App. 536, 139 S.E.2d 143 (1964); *Odom v. Beard*, 114 Ga. App. 364, 151 S.E.2d 468 (1966); *Davis v. Mullis*, 296 F. Supp. 1345 (S.D. Ga. 1969); *Brady v. Stephenson*, 227 Ga. 461, 181 S.E.2d 387 (1971); *Clark v. Hammock*, 228 Ga. 157, 184 S.E.2d 581 (1971); *Hatcher v. Hatcher*, 229 Ga. 249, 190 S.E.2d 533 (1972); *Midkiff v. Midkiff*, 275 Ga. 136, 562 S.E.2d 177 (2002); *Sastre v. McDaniel*, 293 Ga. App. 671, 667 S.E.2d 896 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Domicile is broader and more fundamental concept than mere residence. 1958-59 Op. Att'y Gen. p. 91.

Domicile means one's fixed and permanent place of abode, to which, when one is absent therefrom, one intends to return. 1958-59 Op. Att'y Gen. p. 91; 1963-65 Op. Att'y Gen. p. 375.

Person's domicile is principally question of intent; one acquires domicile by residing in a particular place with the intention of remaining there indefinitely; taking up temporary residence in other places, even for long periods of time, will not result in loss of one's domicile as long as the intent to return prevails. 1962 Op. Att'y Gen. p. 144.

Residence and domicile distinguished. — Residence means living in a particular locality; domicile means living in that locality with the intent to make it a fixed and permanent home. Residence requires only physical presence as an in-

habitant in a given place, while domicile requires presence in that place as well as an intention to make it a domicile. A new domicile cannot be acquired simply by change of residence without an intention to abandon the old domicile. A person may continue to be domiciled in this state even though actually residing in another state. 1965-66 Op. Att'y Gen. No. 65-22.

One cannot change domicile by merely assuming residence in new location without intention to remain there; physical presence in the new location must coexist with the requisite intention to remain there. 1958-59 Op. Att'y Gen. p. 91; 1963-65 Op. Att'y Gen. p. 375.

Change of domicile requires physical move and intention to remain. — In order to change one's domicile it is necessary that one move from one's old domicile and become a resident in the proposed new domicile with the intention to remain there permanently or at least indefinitely. 1958-59 Op. Att'y Gen. p. 91.

Domicile retained until officially established elsewhere. — Person, having established domicile within this state, will retain the person's domicile here until the person officially establishes domicile in another state. 1976 Op. Att'y Gen. No. 76-70.

Temporary residence does not change domicile. — Temporary residence of a person with the person's family in another county while the person was performing a contract in that county does not result in a change of domicile. 1958-59 Op. Att'y Gen. p. 92.

Temporary residence of wife and family for special purpose. — While it is provided that the domicile of a married man shall be the place where his family resides, the wife or the wife and family may, for purposes of temporary convenience or for the purpose of educating the children, reside for a long time at a place not intended as a permanent abode, without effecting any change of legal residence; this for the reason that while there is a physical removal, there was never, on the part of those who moved, an intention to abandon a former domicile. 1958-59 Op. Att'y Gen. p. 92.

One may have two or more residences at same time, but every person has but one domicile. 1958-59 Op. Att'y Gen. p. 91.

Extension of land into district immaterial as to domicile. — Fact that a candidate's land extends into a district is immaterial; in order to qualify as a candidate from that district, one's house must

be within the boundaries of that district and one must be physically present in that district. 1968 Op. Att'y Gen. No. 68-273.

Members of armed forces never lose their domicile merely by joining service, and in response to military orders, moving about from state to state or abroad; they retain the domicile they held at the time they entered the service, unless they indicate that it is their intention to remove their domicile to some other state in which they are residing. 1958-59 Op. Att'y Gen. p. 91.

While a person in military service may change the person's domicile, the mere enlistment in the armed forces and transfer by military order does not necessarily change the domicile. 1965-66 Op. Att'y Gen. No. 65-22.

No change effected when military personnel have no intent to change domicile. — That a legal resident of a county is absent from the county in the military service of the United States for a long period of time with no intent to change the person's residence does not effect a change. 1945-47 Op. Att'y Gen. p. 478.

Military personnel intending to remain in Georgia. — If one moved to Georgia with intention of remaining when returning from military, one may consider Georgia one's domicile. 1965-66 Op. Att'y Gen. No. 66-190.

Noncitizens of United States may acquire domicile in Georgia for purposes of attending state supported college or university. 1960-61 Op. Att'y Gen. p. 128.

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Domicile, §§ 1, 19 et seq.

Am. Jur. Proof of Facts. — Nonestablishment of Domicil in Foreign Jurisdiction, 4 POF2d 595.

Establishment of Person's Domicil, 39 POF2d 587.

C.J.S. — 28 C.J.S., Domicil, §§ 2, 15 et seq.

ALR. — Acquisition of domicile in countries (such as China, Turkey, and Egypt) granting extraterritorial privileges to foreigners, 39 ALR 1155.

Significance of place where one votes or

registers to vote on question as to his domicile or residence for other purposes, 107 ALR 448.

Change of domicile by public officer or employee, 129 ALR 1382.

Residence or domicile for purposes of venue statute of student, teacher, or inmate of institution, 132 ALR 509.

Domicile or residence of person in the armed forces, 150 ALR 1468; 151 ALR 1465; 152 ALR 1462; 153 ALR 1434; 154 ALR 1460; 155 ALR 1461; 156 ALR 1459; 157 ALR 1457; 158 ALR 1464.

Effect on jurisdiction of court to grant

divorce, of plaintiff's change of residence pendente lite, 7 ALR2d 1414.

Acquisition of domicile by sending wife or family to new home, 31 ALR2d 775.

Validity and application of provisions

governing determination of residency for purpose of fixing fee differential for out-of-state students in public college, 56 ALR3d 641.

19-2-2. Election between two or more domiciles; domicile of transients.

(a) If a person resides indifferently at two or more places in this state, the person shall have the privilege of electing which of such places shall be his domicile. If the election is made known generally among those with whom the person transacts business in this state, the place chosen shall be the person's domicile. If no such election is made or if an election is made but is not generally known among those with whom the person transacts business in this state, third persons may treat any one of the places in which the person resides as his domicile and it shall be so held; and in all such cases a person who habitually resides a portion of the year in one county and another portion of the year in another shall be deemed a resident of both, so far as to subject him to actions in either for contracts made or torts committed in such county.

(b) Transient persons whose business or pleasure causes a frequent change of residence and who have no family permanently residing at one place in this state shall be deemed, as to third persons, to be domiciled at such place as they at the time temporarily occupy. (Orig. Code 1863, § 1645; Code 1868, § 1690; Code 1873, § 1691; Code 1882, § 1691; Civil Code 1895, § 1825; Civil Code 1910, § 2182; Code 1933, § 79-402.)

JUDICIAL DECISIONS

Words "all such cases" refer to preceding portion of subsection (a) of this section dealing with persons who "reside indifferently at two or more places in this state." *Jackson v. Taylor*, 49 Ga. App. 261, 175 S.E. 259 (1934).

Juror living on county line may serve in county claimed as domicile. — Juror living in a house which is partly in one county and partly in another is competent to serve in the county in which the juror claims residence, votes, and pays the juror's taxes. *Chancey v. State*, 141 Ga. 54, 80 S.E. 287 (1913).

In a family violence case in which the respondent has left the family home but has not avowed an intention to remain in that new location, venue is proper both in

the county of the family's residence and in the county to which the respondent has relocated. *Davis-Redding v. Redding*, 246 Ga. App. 792, 542 S.E.2d 197 (2000).

Railroads may be residents of several counties. *Watson v. Richmond & D.R.R.*, 91 Ga. 222, 18 S.E. 306 (1892).

Jury instructions when evidence shows residence in two places. — In a trial of a plea to the jurisdiction, when the evidence might support a finding of the defendant's residence in either of two places it is not error for the court to charge the provisions of this statute relative to the situation where one resides indifferently in two or more places. *Allen v. McDermott*, 110 Ga. App. 536, 139 S.E.2d 143 (1964).

Transients. — Venue and jurisdiction were properly laid in Fulton County when, at time of service, transient defendant had resided temporarily at several places in Fulton County. *Patterson v. Citizens & S. Bank*, 163 Ga. App. 539, 294 S.E.2d 730 (1982).

Cited in *Crawford v. Wilson*, 142 Ga. 734, 83 S.E. 667 (1914); *Smith v. Ellabelle-Eldora School Dist.*, 40 Ga. App.

561, 150 S.E. 454 (1929); *Georgia Cresoting Co. v. Moody*, 41 Ga. App. 701, 154 S.E. 294 (1930); *Cunningham v. Spurway*, 50 Ga. App. 550, 178 S.E. 762 (1935); *Bell v. Stevens*, 100 Ga. App. 281, 111 S.E.2d 125 (1959); *Grey v. Roboscope Int'l, Ltd. of Ga., Inc.*, 122 Ga. App. 725, 178 S.E.2d 334 (1970); *Stewman v. Magley*, 138 Ga. App. 545, 227 S.E.2d 277 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Domicil, §§ 6, 25.

C.J.S. — 28 C.J.S., Domicile, §§ 5 et seq., 13, 14.

ALR. — Significance of place where one votes or registers to vote on question as to his domicile or residence for other purposes, 107 ALR 448.

Domicile or residence of person in the armed forces, 148 ALR 1413; 149 ALR 1471; 150 ALR 1468; 151 ALR 1468; 152 ALR 1471; 153 ALR 1442; 155 ALR 1466; 156 ALR 1465; 157 ALR 1462; 158 ALR 1474.

19-2-3. Domicile of married person.

The domicile of a married person shall not be presumed to be the domicile of that person's spouse. (Orig. Code 1863, § 1646; Code 1868, § 1691; Code 1873, § 1692; Code 1882, § 1692; Civil Code 1895, § 1826; Civil Code 1910, § 2183; Code 1933, § 79-403; Ga. L. 1982, p. 805, §§ 1, 2.)

JUDICIAL DECISIONS

Section unconstitutional insofar as it might prevent voting registration. — Joint operation of former Code 1933, §§ 79-403 and 79-407 (see now O.C.G.A. §§ 19-2-3 and 19-2-6) and former Code 1933, § 34-632, insofar as it established an irrebuttable presumption that the domicile and residence of a married woman was that of her husband, and thereby prevented her from registering to vote in Georgia, violated U.S. Const., amend. 19. *Kane v. Fortson*, 369 F. Supp. 1342 (N.D. Ga. 1973).

Words "voluntary separation" and "living apart," do not necessarily mean mutual agreement for separation; for when husband has been guilty of such dereliction of duty in the marital relation as entitles the wife to have it either partially or totally dissolved, she may acquire a separate domicile of her own for the

purpose of conferring jurisdiction on the proper tribunal in a proceeding for divorce or separation. *Pearlstine v. Pearlstine*, 148 Ga. 756, 98 S.E. 264 (1919); *Abou-Issa v. Abou-Issa*, 229 Ga. 77, 189 S.E.2d 443 (1972).

Duty of wife to follow husband. — Wife is bound to go with her husband to reside on a farm despite an antenuptial contract to the contrary. *Pace v. Pace*, 154 Ga. 712, 115 S.E. 65 (1922); *Perkerson v. Perkerson*, 157 Ga. 589, 122 S.E. 53 (1924).

Domicile not presumed to be spouse's domicile. — In a case involving the residency requirements of O.C.G.A. §§ 21-2-217(a) and 46-2-1(b), the trial court properly granted a commissioner's motion for summary judgment because the evidence established the commissioner's residence in District Two at least 12

months prior to the commissioner's election to the Public Service Commission; pursuant to O.C.G.A. § 19-2-3, the domicile of the commissioner's spouse in another district was not presumed to be the commissioner's domicile. *Dozier v. Baker*, 283 Ga. 543, 661 S.E.2d 543 (2008).

Cited in *Porter v. Chester*, 208 Ga. 309, 66 S.E.2d 729 (1951); *Stanton v. Stanton*, 213 Ga. 545, 100 S.E.2d 289 (1957); *Bufford v. Bufford*, 223 Ga. 133, 153 S.E.2d 718 (1967); *Lance v. Safwat*, 170 Ga. App. 694, 318 S.E.2d 86 (1984).

OPINIONS OF THE ATTORNEY GENERAL

Eligibility of married woman to register to vote. — Married woman whose husband has legal residence in Georgia may register to vote even though not physically domiciled within the state. 1975 Op. Att'y Gen. No. 75-77.

Military personnel stationed in Georgia. — Member of the military stationed in Georgia may claim an exemption

on her automobile pursuant to the Soldiers and Sailors Relief Act [50 U.S.C. App. § 574] regardless of her husband's claiming homestead exemption on his house in Georgia, unless other conduct on her part establishes an intent to change her residency to Georgia. 1990 Op. Att'y Gen. No. U90-15.

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Domicil, § 36.

C.J.S. — 28 C.J.S., Domicile, §§ 28, 29. 41 C.J.S., Husband and Wife, §§ 8, 9.

ALR. — Separate domicile of wife for purposes of jurisdiction over subject-matter of suit by her for divorce or separation, 39 ALR 710.

Effect of marriage of alien woman to one then an American citizen on right to enter or remain in this country, 71 ALR 1213.

Separate domicile of wife for purposes other than suit for divorce, separation, or maintenance, 75 ALR 1254; 90 ALR 358; 128 ALR 1422.

Effect on jurisdiction of court to grant divorce, of plaintiff's change of residence pendente lite, 7 ALR2d 1414.

Domicile for state tax purposes of wife living apart from husband, 82 ALR3d 1274.

19-2-4. Domicile of minor.

(a) If a minor child's parents are domiciled in the same county, the domicile of that child shall be that of the parents. If a minor child's parents are divorced, separated, or widowed, or if one parent is not domiciled in the same county as the other parent, the child's domicile shall be that of the custodial parent. The domicile of a minor child born out of wedlock shall be that of the child's mother.

(b) Where a child's parents have voluntarily relinquished custody of the child to a third person or have been deprived of custody by court order, the child's domicile shall be that of the person having legal custody of the child. If there is no legal custodian, the child's domicile shall be that of his guardian if the guardian is domiciled in this state. If there is neither a legal custodian nor a guardian, the domicile of the child shall be determined as if he were an adult. (Orig. Code 1863, § 1647; Code 1868, § 1692; Code 1873, § 1693; Code 1882, § 1693;

Civil Code 1895, § 1827; Civil Code 1910, § 2184; Code 1933, § 79-404; Ga. L. 1984, p. 612, § 1; Ga. L. 1988, p. 1720, § 1.)

Cross references. — Determination of domicile of non-minor university student based on domicile of parents, §§ 20-3-66, 39-1-1.

JUDICIAL DECISIONS

Domicile of parents at time of birth is domicile of child, and remains the child's domicile until changed in some manner as provided by law, either by a change of the domicile of the parents or of the parent whose domicile controls that of the child before the child reaches majority, or by a change in the domicile of the child. *Squire v. Vazquez*, 52 Ga. App. 712, 184 S.E. 629 (1936).

Husband and wife separated. — When husband and wife are separated, the county of the husband's residence is that of the minor children, unless he has consented otherwise. *Hunt v. Hunt*, 94 Ga. 257, 21 S.E. 515 (1894).

Children removed from state by widowed mother. — When children had been removed from the state by their widowed mother, who had married again but they frequently avowed an intention of returning to their former home, on an application for homestead out of their father's property in the county in which the father dies resident, the question of domicile was for the jury, and a verdict in favor of the minor's rights will not be disturbed. *Harkins v. Arnold*, 46 Ga. 656 (1872).

Child's domicile changed to that of mother when father abandoned family. — That a father left his wife and minor child in Georgia to obtain employment for himself in Michigan and failed to provide for the family, except sending the family about \$12.00 for about two years, authorized a finding that the father had voluntarily relinquished his parental authority over the child to the mother, thereby rendering the domicile of the child that of the child's mother. Thus, a Michigan divorce decree awarding him the custody of the child was void for lack of jurisdiction, even though the mother filed an answer in the divorce proceeding, asking that she be awarded the child. *Elliott v. Elliott*, 181 Ga. 545, 182 S.E. 846 (1935).

Child's domicile changed to that of guardians when father relinquished custody. — Giving full faith and credit to the decree of a Tennessee court to which father of child relinquished his parental authority, which decree committed child to petitioners, residents of this state, it is clear that the child's domicile was changed from Tennessee to Georgia. *Herrin v. Graham*, 87 Ga. App. 291, 73 S.E.2d 572 (1952), overruled on other grounds, *Davey v. Evans*, 156 Ga. App. 698, 275 S.E.2d 769 (1980).

Minor leaving home with parental consent. — Change of domicile does not result from the minor's leaving home with the father's consent, to live in another county and conduct a partnership business there in the minor's own name for the minor and the minor's father. *Jackson v. Southern Flour & Grain Co.*, 146 Ga. 453, 91 S.E. 481 (1917).

Choice by minor. — When a minor has neither father, mother, nor guardian, the minor may change the minor's residence at will. *Dampier v. McCall*, 78 Ga. 607, 3 S.E. 563 (1887).

Residence of ward who has come to years of discretion. — When ward has come to years of discretion, residence of guardian is not residence of ward, unless the ward chooses to make it the ward's residence. *Roberts v. Walker*, 18 Ga. 5 (1855).

Service of process on illegitimate child's mother gives juvenile court jurisdiction. — Service of process on the mother in the county in which the mother of an illegitimate child resides is sufficient to give the county juvenile court jurisdiction over both the mother and the child, regardless of whether there was a "detention" of the child, and in spite of the fact that a welfare worker had obtained possession of the child outside of the state. *Sanchez v. Walker County Dep't of Family*

& Children Servs., 148 Ga. App. 49, 225 S.E.2d 441, rev'd on other grounds, 237 Ga. 406, 229 S.E.2d 66 (1976).

Cited in Hayslip v. Gillis, 123 Ga. 263, 51 S.E. 325 (1905); Portman v. Mobley, 158 Ga. 269, 123 S.E. 695 (1924); Beavers v. Williams, 199 Ga. 114, 33 S.E.2d 343 (1945); Altree v. Head, 90 Ga. App. 601, 83 S.E.2d 683 (1954); Ethel Harpst Home, Inc. v. Haithcock, 214 Ga. 297, 104 S.E.2d 459 (1958); Sailors v. Spainhour, 98 Ga. App. 475, 106 S.E.2d 82 (1958); Springstead v. Cook, 215 Ga. 154, 109 S.E.2d 508 (1959); Mathews v. Murray,

101 Ga. App. 216, 113 S.E.2d 232 (1960); Ingle v. Rubenstein, 112 Ga. App. 767, 146 S.E.2d 367 (1965); Giles v. State, 123 Ga. App. 700, 182 S.E.2d 140 (1971); Burnett v. Hope, 124 Ga. App. 273, 183 S.E.2d 505 (1971); Griffin v. State Farm Mut. Auto. Ins. Co., 129 Ga. App. 179, 199 S.E.2d 101 (1973); Mathis v. Sapp, 232 Ga. 620, 208 S.E.2d 446 (1974); Huff v. Moore, 144 Ga. App. 668, 242 S.E.2d 329 (1978); Abrams v. Daffron, 155 Ga. App. 182, 270 S.E.2d 278 (1980); Whitlock v. Barrett, 158 Ga. App. 100, 279 S.E.2d 244 (1981).

OPINIONS OF THE ATTORNEY GENERAL

Domicile of child for school purposes can be altered by voluntary relinquishment of parental authority if proper legal action has been taken or circumstances are present which secure to the person with whom the child is residing some legal obligation as to the child's

welfare and education. 1970 Op. Att'y Gen. No. U70-8.

Relinquished parental control of child. — If parental control of a child is relinquished to Georgia residents, the child is legally domiciled in this state. 1965-66 Op. Att'y Gen. No. 66-190.

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Domicil, § 37 et seq.

C.J.S. — 28 C.J.S., Domicile, § 22 et seq. 39 C.J.S., Guardian and Ward, § 14.

ALR. — Emancipation by parent as affecting right of infant to change domicile or settlement, 5 ALR 949.

Approximation to maturity as affecting the rule that an infant cannot change his domicile, 5 ALR 958.

Separate domicile of married woman or divorced woman as affecting citizenship, domicile, residence, or inhabitancy of children, 53 ALR 1160.

Does child, upon death of parent to

whom custody had been awarded by decree of divorce, take the domicile of the other parent, 136 ALR 914.

Separate domicile of mother as affecting domicile or residence of infant, 13 ALR2d 306.

Domicile of infant on death of both parents; doctrine of natural guardianship, 32 ALR2d 863.

Validity and application of provisions governing determination of residency for purpose of fixing fee differential for out-of-state students in public college, 56 ALR3d 641.

19-2-5. Domicile of person under guardianship.

Persons of full age who for any cause are placed under the power of a guardian have the same domicile as the guardian. (Orig. Code 1863, § 1648; Code 1868, § 1693; Code 1873, § 1694; Code 1882, § 1694; Civil Code 1895, § 1828; Civil Code 1910, § 2185; Code 1933, § 79-405.)

Cross references. — Guardians, T. 29, C. 2.

JUDICIAL DECISIONS

When ward is inmate at state hospital when guardian appointed. — Law did not refer to situations where ward was inmate at state hospital at time of guardian's appointment, was never in the custody of the guardian, and had been declared sane some years prior to the ward's death, and the sole remaining contact with the guardian at the time of the ward's death was with reference to

whether a certain disbursement made by the guardian was proper. *Fuller v. Weekes*, 105 Ga. App. 790, 125 S.E.2d 662, rev'd on other grounds, 218 Ga. 515, 128 S.E.2d 715 (1962).

Cited in *Ocean Accident & Guarantee Co. v. Lovern*, 90 Ga. App. 708, 83 S.E.2d 862 (1954); *Bennet v. Bennet*, 212 Ga. 292, 92 S.E.2d 11 (1956); *Edwards v. Lampkin*, 112 Ga. App. 128, 144 S.E.2d 119 (1965).

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Domicil, § 47 et seq.

C.J.S. — 28 C.J.S., Domicile, § 31.

ALR. — Determination of dwelling

place and living conditions of one adjudged incompetent, 131 ALR 289.

Change of state or national domicile of mental incompetent, 96 ALR2d 1236.

19-2-6. Change of domicile which is dependent on that of another; change of ward's domicile affecting inheritance.

(a) A person whose domicile for any reason is dependent upon that of another cannot effect a change of his own domicile.

(b) A guardian cannot change the domicile of his ward by a change of his own domicile or in any other fashion so as to interfere with the rules of inheritance or succession or otherwise to affect the rights of inheritance of third persons. (Orig. Code 1863, § 1651; Code 1868, § 1695; Code 1873, § 1696; Code 1882, § 1696; Civil Code 1895, § 1830; Civil Code 1910, § 2187; Code 1933, § 79-407.)

JUDICIAL DECISIONS

Section unconstitutional insofar as it might prevent voting registration.

— The joint operation of former Code 1933, § 79-407 (see O.C.G.A. § 19-2-6) and former Code 1933, § 34-632, insofar as it established an irrebuttable presumption that the domicile and residence of a married woman is that of her husband, and thereby prevents her from registering to vote in Georgia, violates U.S. Const., amend. 19. *Kane v. Fortson*, 369 F. Supp. 1342 (N.D. Ga. 1973).

Minor has no power to bring about change of domicile. *Jackson v. Southern Flour & Grain Co.*, 146 Ga. 453, 91 S.E. 481 (1917).

Person adjudged insane cannot, by the person's own act or volition, effect

change in domicile. *Stanfield v. Hursey*, 36 Ga. App. 394, 136 S.E. 826 (1927).

Change of domicile by incompetent. — Whether incompetent may change domicile depends on extent to which reason is impaired; a comparatively slight degree of understanding is required and it is sufficient if the person understands the nature and effect of the person's act. *Davis v. Mullis*, 296 F. Supp. 1345 (S.D. Ga. 1969).

Cited in *Harkins v. Arnold*, 46 Ga. 656 (1872); *Griffin v. State Farm Mut. Auto. Ins. Co.*, 129 Ga. App. 179, 199 S.E.2d 101 (1973); *Davenport v. Aetna Cas. & Sur. Co.*, 144 Ga. App. 474, 241 S.E.2d 593 (1978); *Wilson v. Willard*, 183 Ga. App. 204, 358 S.E.2d 859 (1987).

OPINIONS OF THE ATTORNEY GENERAL

Previous marriage of minor female allows change in her domicile. — Previous marriage of minor female, with or without parents' consent, not only eman-

cipates her from her parents' control, but also allows a change in her domicile. 1981 Op. Att'y Gen. No. U81-5.

RESEARCH REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d, Domicile, § 37 et seq.

C.J.S. — 28 C.J.S., Domicile, § 21 et seq. 39 C.J.S., Guardian and Ward, § 14.

ALR. — Emancipation by parent as affecting right of infant to change domicile or settlement, 5 ALR 949.

Approximation to maturity as affecting

the rule that an infant cannot change his domicile, 5 ALR 958.

Domicile of infant on death of both parents; doctrine of natural guardianship, 32 ALR2d 863.

Change of state or national domicile of mental incompetent, 96 ALR2d 1236.

CHAPTER 3

MARRIAGE GENERALLY

Article 1		Sec.	
General Provisions			
Sec.		19-3-33.1.	Use of surname in application for marriage license.
19-3-1.	Prerequisites to valid marriage.	19-3-34.	Application to be filed; use as evidence; transmission to the state registrar.
19-3-1.1.	Common-law marriage; effectiveness.	19-3-35.	Issuance of license to applicants otherwise eligible.
19-3-2.	Who may contract marriage; parental consent.	19-3-35.1.	AIDS brochures; listing of HIV test sites; acknowledgment of receipt.
19-3-3.	Degrees of relationship within which intermarriage prohibited; penalty; effect of prohibited marriage.	19-3-36.	Proof of age of applicants.
19-3-3.1.	Marriages between persons of same sex prohibited; marriages not recognized.	19-3-37.	Parental consent to marriage of underage applicants; when necessary; how obtained.
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19-3-5.	What marriages void; legitimacy of issue; effect of later ratification.	19-3-39.	Certification and recordation of marriage after publication of banns.
19-3-6.	Effect of restraints on marriage; when valid.	19-3-40.	Blood test for sickle cell disease; information to be provided.
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19-3-11.	Gift from spouse allowed, but not presumed [Repealed].	19-3-45.	Forfeiture for improper issuance of marriage license; by whom and when action brought; attorney's fee and court costs; disposition of balance of recovery.
Article 2		19-3-46.	Forfeiture for officiating at marriage without license or banns.
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19-3-30.	Issuance, return, and recording of license.	19-3-48.	Penalty for officiating at illegal marriage ceremony.
19-3-30.1.	Premarital education.		
19-3-31.	Issuance of licenses at satellite courthouses in certain counties.		
19-3-32.	Penalty for improper issuance of license.		
19-3-33.	Application for marriage license; contents; supplement marriage report.		

Sec. 19-3-49.	Acceptance by judges of tips, consideration, or gratuities.	Sec. 19-3-65.	Powers of superior court judge in appointing and removing trustees and protecting trust estate; recordation of proceedings.
Article 3		19-3-66.	In whose favor marriage contracts, postnuptial settlements, and marriage articles enforced.
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19-3-60.	Marriage as valuable consideration.	19-3-68.	Application for order compelling recordation; effect of application; liability of trustee refusing to record.
19-3-61.	Effect of minority of party.		
19-3-62.	“Marriage articles” defined; enforceable in equity; executed contracts distinguished.		
19-3-63.	Construction of marriage contract; attestation.		
19-3-64.	Voluntary execution of antenuptial agreement; conveyance of property during marriage.		

Cross references. — Recognition of marriage, Ga. Const. 1983, Art. I, Sec. IV. Performance of sterilization procedure upon request, § 31-20-2. Presumption of gift when person pays purchase money for property which is conveyed to spouse, § 53-12-28.

Law reviews. — For article, “Lochner, Lawrence, and Liberty,” see 27 Ga. St. U.L. Rev. 609 (2011). For article, “The Nature of Family, The Family of Nature: The Surprising Liberal Defense of the Traditional Family in the Enlightenment,” see 64 Emory L.J. 591 (2014).

For comment, “By the Power Vested in Me? Licensing Religious Officials to Solemnize Marriage in the Age of Same-Sex Marriage,” see 63 Emory L.J. 979 (2014).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Criminal Law — The Battered Woman Defense, 34 POF2d 1.

ALR. — Necessity of physical injury to support cause of action for loss of consortium, 16 ALR4th 537.

Modern status of rule that husband is primarily or solely liable for necessities furnished wife, 20 ALR4th 196.

Spouse’s liability, after divorce, for community debt contracted by other spouse during marriage, 20 ALR4th 211.

ARTICLE 1

GENERAL PROVISIONS

19-3-1. Prerequisites to valid marriage.

To constitute a valid marriage in this state there must be:

(1) Parties able to contract;

(2) An actual contract; and

(3) Consummation according to law. (Orig. Code 1863, § 1653; Code 1868, § 1697; Code 1873, § 1698; Code 1882, § 1698; Civil Code 1895, § 2411; Civil Code 1910, § 2930; Code 1933, § 53-101.)

Law reviews. — For article discussing changes in and case application of statutes concerning marriage, divorce, and custody law in 1976 to 1977, see 29 Mercer L. Rev. 103 (1977). For article, "Georgia

Inheritance Rights of Children Born Out of Wedlock," see 23 Ga. St. B.J. 28 (1986).

For article, "A Holy Secular Institution," see 58 Emory L.J. 1123 (2009).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

EVIDENCE

COMMON-LAW MARRIAGE

COHABITATION

SAME SEX MARRIAGE

General Consideration

O.C.G.A. § 19-3-1 applies equally to both ceremonial and common-law marriages. Metropolitan Life Ins. Co. v. Lucas, 761 F. Supp. 130 (M.D. Ga. 1991).

"According to law" had reference to common law as expounded in Askew v. Dupree, 30 Ga. 173 (1860), and recognized by the legislature as then existing, but which on that feature was intended to be "regulated" by statute. Drewry v. State, 208 Ga. 239, 65 S.E.2d 916 (1951), adopting dissenting opinion in Lefkoff v. Sicro, 189 Ga. 554, 6 S.E.2d 687 (1939).

In order for valid marriage to exist there must be ceremonial marriage or common-law marriage entered into in good faith. Kersey v. Gardner, 264 F. Supp. 887 (M.D. Ga. 1967).

To constitute valid marriage in this state, there must be parties able to contract. Connor v. Rainwater, 200 Ga. 866, 38 S.E.2d 805 (1946).

Marriage is in law complete when parties able to contract have actually contracted to be man and wife in the forms and with the solemnities required by law. Pitts v. State, 147 Ga. 801, 95 S.E. 706 (1918).

Discussion of the presumption of validity or invalidity of second marriage. See Scott v. Jefferson, 174 Ga. App. 651, 331 S.E.2d 1 (1985).

Cited in White v. White, 41 Ga. App. 394, 153 S.E. 203 (1930); Peacock v. Pea-

cock, 196 Ga. 441, 26 S.E.2d 608 (1943); Graves v. Carter, 207 Ga. 308, 61 S.E.2d 282 (1950); Drewry v. State, 208 Ga. 239, 65 S.E.2d 916 (1951); Goza v. State, 91 Ga. App. 842, 87 S.E.2d 232 (1955); Hobby v. Burke, 227 F.2d 932 (5th Cir. 1955); Wolverine Ins. Co. v. Leach, 100 Ga. App. 570, 112 S.E.2d 10 (1959); Toole v. Gallion, 221 Ga. 494, 144 S.E.2d 360 (1965); Shepherd v. Shepherd, 233 Ga. 228, 210 S.E.2d 731 (1974); Lavender v. Wilkins, 237 Ga. 510, 228 S.E.2d 888 (1976); Riddle v. Riddle, 240 Ga. 515, 241 S.E.2d 214 (1978); Kickasola v. Jim Wallace Oil Co., 144 Ga. App. 758, 242 S.E.2d 483 (1978); Thompson v. Brown, 254 Ga. 191, 326 S.E.2d 733 (1985); Dennis v. State, 220 Ga. App. 420, 469 S.E.2d 494 (1996); Wright v. Goss, 229 Ga. App. 393, 494 S.E.2d 23 (1997); Finch v. Dasgupta, 251 Ga. App. 637, 555 S.E.2d 22 (2001).

Evidence

Evidence presented must show present intent to marry; an agreement to marry in the future is not sufficient. Fireman's Fund Ins. Co. v. Smith, 151 Ga. App. 270, 259 S.E.2d 675 (1979).

All presumptions necessary to make marriage valid attach on proof of formal ceremony and cohabitation by the parties under the belief that the parties were lawfully married. Fanning v. State, 46 Ga. App. 716, 169 S.E. 60 (1933); Brewer v. Interstate Life & Accident Co.,

56 Ga. App. 720, 193 S.E. 909 (1937).

Presumption of capacity to contract marriage. — When marriage is regularly solemnized and parties live together, there is a presumption of capacity to contract marriage, and of the existence of all other facts necessary to render the marriage valid; and this presumption prevails until the contrary appears. *Fanning v. State*, 46 Ga. App. 716, 169 S.E. 60 (1933); *Brewer v. Interstate Life & Accident Co.*, 56 Ga. App. 720, 193 S.E. 909 (1937); *Addison v. Addison*, 186 Ga. 155, 197 S.E. 232 (1938); *Brown v. Hogan*, 72 Ga. App. 691, 34 S.E.2d 619 (1945); *Carter v. Graves*, 206 Ga. 234, 56 S.E.2d 917 (1949).

Presumption of validity of marriage. — Law favors validity of marriages, and marriage is presumed to be valid until the marriage's validity is negated by disproving every reasonable possibility of the marriage's validity. *Brown v. State*, 208 Ga. 304, 66 S.E.2d 745 (1951).

O.C.G.A. § 19-3-1 reflects Georgia's policy favoring the validity of marriages; validity is presumed absent proof negating the possibility of validity. *Metropolitan Life Ins. Co. v. Lucas*, 761 F. Supp. 130 (M.D. Ga. 1991).

Absence of proof of entry into a present marriage contract as required by O.C.G.A. § 19-3-1 supported the finding that a petitioner for year's support was not the decedent's common-law spouse. *Holmes v. Holmes*, 232 Ga. App. 434, 502 S.E.2d 294 (1998).

Burden to show marriage invalid. — Burden is upon one who attacks validity of marriage to show that the marriage is invalid by clear, distinct, positive, and satisfactory proof. *Fanning v. State*, 46 Ga. App. 716, 169 S.E. 60 (1933); *Brewer v. Interstate Life & Accident Co.*, 56 Ga. App. 720, 193 S.E. 909 (1937); *Addison v. Addison*, 186 Ga. 155, 197 S.E. 232 (1938); *Brown v. Hogan*, 72 Ga. App. 691, 34 S.E.2d 619 (1945).

Whether or not common law marriage exists is question of fact, requiring proof of simultaneous existence of all elements of O.C.G.A. § 19-3-1. *Gregg v. Barnes*, 203 Ga. App. 549, 417 S.E.2d 206, cert. denied, 203 Ga. App. 906, 417 S.E.2d 206 (1992); *Dixon v. State*, 217 Ga. App.

267, 456 S.E.2d 758 (1995).

Act of living together as man and wife. — Marriage may be shown by such circumstances as act of living together as man and wife, holding themselves out to the world as such, and repute in the vicinity and among neighbors and visitors that they are such, and indeed all such facts as usually accompany the marriage relation and indicate the factum of the marriage and the evidence in each case is for the jury. *Murray v. Clayton*, 151 Ga. App. 720, 261 S.E.2d 455 (1979); *Fireman's Fund Ins. Co. v. Smith*, 151 Ga. App. 270, 259 S.E.2d 675 (1979).

Relationship cannot be partial or periodic. — Evidence that parties held themselves out as married when it was to their benefit and maintained their non-marital status when it was to their benefit supported finding that there was no marriage as such legal relationship cannot be partial or periodic. *Baynes v. Baynes*, 219 Ga. App. 848, 467 S.E.2d 195 (1996).

Agreement on which common-law marriage is founded must contain mutual intent to be married in praesenti, not a present intent to marry in the future. *Hubbard v. State*, 145 Ga. App. 714, 244 S.E.2d 639 (1978).

Immediate agreement to become husband and wife. — To constitute a valid marriage per verba de praesenti there must be an agreement to become husband and wife immediately from the time when the mutual consent is given. An express future condition is absolutely fatal to a claim of marriage, and cannot be explained away by circumstances, as it shows mental reservations which are incompatible with consent, whether the condition relates to the creation of the marriage status, or to the duration of the relations of the parties. *Peacock v. Peacock*, 196 Ga. 441, 26 S.E.2d 608 (1943).

General repute in community. — Marriage is matter of public interest, and general repute in community is admissible upon such an issue. *Murray v. Clayton*, 151 Ga. App. 720, 261 S.E.2d 455 (1979).

Party asserting marriage has burden of proving end of illicit relationship. — When the relationship between the parties begins as an illicit arrange-

Evidence (Cont'd)

ment, the burden is on the party asserting the validity of the marriage to show that the illicit relationship ended and that the parties did actually enter a marriage contract. *Brown v. Brown*, 234 Ga. 300, 215 S.E.2d 671 (1975); *Fireman's Fund Ins. Co. v. Smith*, 151 Ga. App. 270, 259 S.E.2d 675 (1979).

Party seeking to prove prior marriage founded upon cohabitation must show every element necessary to validity of such a prior marriage by proving not only that the prior marriage was consummated in accordance with the rules of law, but that such alleged former spouse was single and possessing every other qualification for a valid marriage. *Addison v. Addison*, 186 Ga. 155, 197 S.E. 232 (1938).

Inconsistent acts do not overcome direct proof of common-law marriage. — When a common-law marriage has been satisfactorily proved, inconsistent acts and declarations of the parties subsequent thereto, although entitled to consideration, do not overcome the direct proof of the existence of the marriage. *Evans v. Marbut*, 140 Ga. App. 329, 231 S.E.2d 94 (1976), cert. dismissed, 238 Ga. 583, 234 S.E.2d 506 (1977).

Presumption as valid contract, arising from cohabitation and repute, yields to proof of subsequent ceremonial marriage of one of the parties. *Addison v. Addison*, 186 Ga. 155, 197 S.E. 232 (1938); *Carter v. Graves*, 206 Ga. 234, 56 S.E.2d 917 (1949).

Ceremonial marriage will not prevail over properly proven previous common-law marriage. *Carter v. Graves*, 206 Ga. 234, 56 S.E.2d 917 (1949), later appeal, 207 Ga. 308, 61 S.E.2d 282 (1950).

Rules of estoppel between parties cannot be invoked to determine validity of marriage. *Bell v. Bell*, 206 Ga. 194, 56 S.E.2d 289 (1949).

Georgia does not allow the validity of a marriage to be challenged through estoppel. *Hayes v. Schweiker*, 575 F. Supp. 402 (N.D. Ga.), aff'd, 723 F.2d 918 (11th Cir. 1983), cert. denied, 466 U.S. 953, 104 S. Ct. 2160, 80 L. Ed. 2d 545 (1984).

Evidence supported jury's determination that common-law marriage existed. See *Ridley v. Grandison*, 260 Ga. 6, 389 S.E.2d 746 (1990).

Conflicting evidence allowed the jury to find evidence of a common-law marriage between a decedent and a widower, which began before January 1, 1997, when common-law marriages were no longer recognized in Georgia, and continued to the date of the decedent's death, because they were able to contract as the decedent was a widow and the widower was divorced, they had a sexual relationship and shared a bedroom, they agreed to be married and the decedent accepted a ring from the widower which she wore daily until her last hospitalization, the widower referred to the decedent as his wife, they opened joint financial accounts, to which they both contributed monies, and shared household expenses, they opened separate individual retirement accounts, designating each other as sole beneficiaries, they incurred debt together, they bought land which was titled in both of their names, he signed consents for her last hospitalization, and they introduced each other to others as husband or wife. *In re Estate of Love*, 274 Ga. App. 316, 618 S.E.2d 97 (2005).

When a couple had not agreed to live together as man and wife and had not held themselves out to the world as husband and wife, but had, on the contrary, frequently referred to themselves as engaged to be married, there was no common-law marriage. *In re Estate of Wilson*, 236 Ga. App. 496, 512 S.E.2d 383 (1999).

Common-law Marriage

Common-law marriage is valid marriage in this state. *Steed v. State*, 80 Ga. App. 360, 56 S.E.2d 171 (1949).

There is no common-law marriage de futuro cum copula in this state. *Peacock v. Peacock*, 196 Ga. 441, 26 S.E.2d 608 (1943).

Elements of common-law marriage. — By the common law and the law of this state a mutual agreement to be husband and wife, by parties able to contract, followed by cohabitation, is recognized as a valid marriage. *Askew v. Dupree*, 30 Ga.

173 (1860); *Dillon v. Dillon*, 60 Ga. 204 (1878); *Wynne v. State*, 17 Ga. App. 263, 86 S.E. 823 (1915); *Stewart v. Price*, 89 Ga. App. 62, 81 S.E.2d 28 (1954).

To establish a common-law marriage in Georgia three requisites must be met. There must be: (1) parties able to contract; (2) an actual contract of marriage; and (3) consummation by cohabitation in Georgia. *Kersey v. Gardner*, 264 F. Supp. 887 (M.D. Ga. 1967).

In order for a common-law marriage to come into existence, the parties must be able to contract, must agree to live together as man and wife, and must consummate the agreement. *Georgia Osteopathic Hosp. v. O'Neal*, 198 Ga. App. 770, 403 S.E.2d 235 (1991).

Georgia law allows proof of common-law marriage by proof of cohabitation in conjunction with the husband and wife holding themselves out to the world as married. *Metropolitan Life Ins. Co. v. Lucas*, 761 F. Supp. 130 (M.D. Ga. 1991).

In a will contest, in which it was disputed whether the decedent was married by common law to her purported widower, a son's requested jury charge that a common-law marriage could not be partial or periodic was adequately covered in the trial court's charge on the elements of a common-law marriage under O.C.G.A. § 19-3-1. *In re Estate of Love*, 274 Ga. App. 316, 618 S.E.2d 97 (2005).

In order for a common law marriage to come into existence, the parties must be able to contract, must agree to live together as man and wife, and must consummate the agreement, and all three of these elements as set forth in O.C.G.A. § 19-3-1 must be met simultaneously. *In re Estate of Love*, 274 Ga. App. 316, 618 S.E.2d 97 (2005).

Evidence tending to show the existence of a common law marriage may include such circumstances as the act of living together as man and wife, holding themselves out to the world as such, and repute in the vicinity and among neighbors and visitors that they are such, and indeed all such facts as usually accompany the marriage relation and indicate the factum of marriage. *In re Estate of Love*, 274 Ga. App. 316, 618 S.E.2d 97 (2005).

Requirements of common-law marriage. Three requirements of law must be

met, all at one time, in order for there to be a common-law marriage. *Brown v. Brown*, 234 Ga. 300, 215 S.E.2d 671 (1975); *Evans v. Marbut*, 140 Ga. App. 329, 231 S.E.2d 94 (1976), cert. dismissed, 238 Ga. 583, 234 S.E.2d 506 (1977); *Fireman's Fund Ins. Co. v. Smith*, 151 Ga. App. 270, 259 S.E.2d 675 (1979).

O.C.G.A. § 19-3-1 establishes the three essential elements of a marriage in this state, all of which must be met during one period of time in order to prove a common law marriage. *Edwards v. Edwards*, 188 Ga. App. 821, 374 S.E.2d 791 (1988).

Essential elements of a marriage are: (1) parties able to contract; (2) an actual contract; and (3) consummation according to law. These requirements must be satisfied simultaneously in order for a marriage to exist. *Brown v. Carr*, 198 Ga. App. 567, 402 S.E.2d 296 (1991).

No common law marriage. — There was evidence supporting the finding that an administrator and a decedent were not common-law spouses. The couple separated numerous times, and the administrator had a boyfriend during one separation, filed tax returns as a single person, and did not list the decedent as the father on her daughter's birth certificate or give her his last name; furthermore, the administrator was the only person who testified in support of her common-law marriage, while the remaining two witnesses testified that neither the administrator nor the decedent held themselves out as husband and wife. *In re Estate of Smith*, 298 Ga. App. 201, 679 S.E.2d 760 (2009).

Cohabitation

It is not sufficient to agree to present cohabitation and future regular marriage when more convenient, or when a wife dies, or when a ceremony can be performed. *Peacock v. Peacock*, 196 Ga. 441, 26 S.E.2d 608 (1943).

Fact of cohabitation is essential in establishing common-law marriage in this state. *Drewry v. State*, 208 Ga. 239, 65 S.E.2d 916 (1951), adopting dissenting opinion in *Lefkoff v. Sicro*, 189 Ga. 554, 6 S.E.2d 687 (1939); *Fireman's Fund Ins. Co. v. Smith*, 151 Ga. App. 270, 259 S.E.2d 675 (1979).

Cohabitation (Cont'd)

Agreement of marriage may be inferred from cohabitation and reputation unless there is other evidence indicating that such an agreement was not present. In order for a relationship based upon repute and cohabitation to obtain the status of marriage at least one of the parties must have believed in good faith that their marital agreement made them husband and wife. *Kersey v. Gardner*, 264 F. Supp. 887 (M.D. Ga. 1967).

Marriage may be inferred from proof of cohabitation, and that the parties held themselves out to the world as husband and wife. Such proof may be made by general repute among neighbors and others in a position to know the facts. *Simeonides v. Zervis*, 127 Ga. App. 506, 194 S.E.2d 324 (1972).

Informal agreement not consummated by cohabitation is insufficient to establish common-law marriage. *Tabor v. Fowler*, 119 Ga. App. 259, 167 S.E.2d 220 (1969).

Common-law marriage not negated by plans for marriage ceremony. — When the probate court was clearly authorized to determine from the evidence both that decedent and a woman had intended to live together as husband and wife subsequent to decedent's divorce from his first wife and that they actually had done so, the fact that they planned at some point in the future to secure a license and formalize their union with a ceremonial marriage did not negate the existence of a common-law marriage. *Brown v. Carr*, 198 Ga. App. 567, 402 S.E.2d 296 (1991).

Woman's statement that she and decedent had "talked some about getting married but never did it" did not necessarily

negate the existence of a common-law marriage relationship for a couple may enter into such a relationship yet nevertheless discuss and plan a marriage ceremony for the purpose of formalizing the arrangement. *Georgia Osteopathic Hosp. v. O'Neal*, 198 Ga. App. 770, 403 S.E.2d 235 (1991).

Presumption when only proof in case is of continuous cohabitation. — When only proof in case is of continuous cohabitation, presumption is that it was lawful. When to this proof is added some affirmative proof of holding themselves out as man and wife, it adds so much to the force of presumption, and length of time strengthens the probative force of the presumption. This presumption of marriage from connubial habit is one of the strongest known to the law, and is to be repelled only by clear evidence. *Simeonides v. Zervis*, 127 Ga. App. 506, 194 S.E.2d 324 (1972).

Insufficient evidence of common law marriage. — Absence of proof of entry into a present marriage contract resulted in the affirmation of the trial court's finding that the tenant was not the common law spouse of the decedent. *In re Estate of Legrand*, 259 Ga. App. 67, 576 S.E.2d 54 (2002).

Same Sex Marriage

Lesbian marriages. — Attorney General, that is, the State of Georgia's interest, as an employer in promoting the efficiency of the Attorney General's important public service outweighed the plaintiff's personal associational interests in a lesbian marriage. *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997), cert. denied, 522 U.S. 1049, 118 S. Ct. 693, 139 L. Ed. 2d 638 (1998).

OPINIONS OF THE ATTORNEY GENERAL

Common-law marriages are just as valid as any other marriage. 1958-59 Op. Att'y Gen. p. 89.

State recognizes common-law marriages. — While there is no statute relating to common-law marriage in this state, such marriages have long been recognized by the courts; such a marriage must be between persons who are otherwise able

to contract a valid marriage in Georgia and who actually intend to be, or hold themselves out to be, husband and wife. 1967 Op. Att'y Gen. No. 67-35.

Common-law marriages are legal from inception provided essentials of marriage contract are present; namely: (1) the parties are able to contract; (2) it is an actual contract; and (3) it

is consummated according to law; however, should either party be unable to meet any of the prerequisites the marriage would not be legal from the marriage's inception. 1958-59 Op. Att'y Gen. p. 89.

Mutual agreement to be husband and wife by parties able to contract, followed by cohabitation, is recognized as a valid common-law marriage; such a marriage is not defined in terms of length of time of relationship, but rather intent of the relationship. 1967 Op. Att'y Gen. No. 67-35.

Effect of lack of publicizing common-law marriage. — If it were disclosed that the common-law marriage was unknown to relatives, friends, or neighbors, that fact might be taken as one

circumstance bearing upon the credibility as a witness of the party claiming the existence of the common-law marriage, but the lack of publicizing the marriage would not affect its validity if there was an actual contract or marriage. 1957 Op. Att'y Gen. p. 93.

Relationship illicit in inception when intent of marriage is not present is presumed illegal no matter how long the relationship continues; if a cohabitation between a man and a woman is shown to have been illicit in its inception, in the absence of proof to the contrary, the illicit relation will be presumed to have continued throughout the period of cohabitation. 1967 Op. Att'y Gen. No. 67-35.

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Marriage, §§ 13 et seq., 36 et seq.

Am. Jur. Pleading and Practice Forms. — 17A Am. Jur. Pleading and Practice Forms, Marriage, §§ 2, 4.

C.J.S. — 55 C.J.S., Marriage, § 4 et seq.

ALR. — Constitutionality of marriage statutes as affected by discriminations or exceptions, 3 ALR 1568.

Habit and repute as essential to common-law marriage, 33 ALR 27.

Validity of common-law marriage in American jurisdictions, 39 ALR 538; 60 ALR 541; 94 ALR 1000; 133 ALR 758.

Right to attack validity of marriage after death of party thereto, 76 ALR 769; 47 ALR2d 1393.

Continued cohabitation between parties

to ceremonial marriage contracted when one of them was insane as creating presumption of common-law marriage, 85 ALR 1302.

Inference or presumption of marriage from continued cohabitation following removal of impediment, 104 ALR 6.

Proxy marriages, 170 ALR 947.

Validity of marriage as affected by intention of the parties that it should be only a matter of form or jest, 14 ALR2d 624.

Judicial declaration of validity or existence of common-law marriage, 92 ALR2d 1102.

Property rights arising from relationship of couple cohabiting without marriage, 69 ALR5th 219.

19-3-1.1. Common-law marriage; effectiveness.

No common-law marriage shall be entered into in this state on or after January 1, 1997. Otherwise valid common-law marriages entered into prior to January 1, 1997, shall not be affected by this Code section and shall continue to be recognized in this state. (Code 1981, § 19-3-1.1, enacted by Ga. L. 1996, p. 1414, § 1.)

Editor's notes. — Ga. L. 1996, p. 1414, § 2, not codified by the General Assembly, provides: "The Department of Human Resources is authorized and directed to implement a state-wide education program

through the broadcast and print media to inform state residents regarding the Code section enacted by this Act and the elements of a valid common-law marriage."

Law reviews. — For annual survey

article discussing wills, trusts and administration of estates, see 52 Mercer L. Rev. 481 (2000).

JUDICIAL DECISIONS

Application to termination proceedings. — Trial court did not err in denying a father's motion to continue a termination hearing in order for the father to obtain income tax returns that would have shown that the father filed joint tax returns with the mother, thereby showing that they had a common law marriage, because, *inter alia*, correspondence from the IRS noted that records before January 1, 1997 were likely destroyed and tax records dated after January 1, 1997 would not have been probative of a common law marriage as common law marriages could no longer have been created after that date. In the Interest of D.C., 279 Ga. App. 889, 632 S.E.2d 744 (2006).

No common law marriage found. — There was evidence supporting the finding that an administrator and a decedent were not common-law spouses. The couple separated numerous times, and the administrator had a boyfriend during one separation, filed tax returns as a single person, and did not list the decedent as the father on her daughter's birth certificate or give her his last name; furthermore, the administrator was the only person who testified in support of her common-law marriage, while the remaining two witnesses testified that neither the administrator nor the decedent held themselves out as husband and wife. In re Estate of Smith, 298 Ga. App. 201, 679 S.E.2d 760 (2009).

Evidence of common law marriage. — Trial court did not err in admitting evidence regarding the conduct of a common law husband and a common law wife after moving to Georgia because although the parties' cohabitation and public recognition of their marriage in Georgia could not establish a common-law marriage, those facts could corroborate other evidence of a prior agreement to marry entered into in Alabama. Norman v. Ault, 287 Ga. 324, 695 S.E.2d 633 (2010).

Common law marriage found. — Jury was authorized to conclude that a common law marriage existed between a common law husband and a common law wife because the evidence satisfied enough of the criteria generally indicative of public recognition to determine that the husband assented to the marriage in another state; three years after the husband's divorce, the wife began living in Alabama in the same home as him, sharing a bedroom, and doing housework, the parties would tell people that the other was his or her spouse, and the husband would tell the wife all the time that "in God's eyes, you are my wife," the husband had sexual relations only with the wife, and before the parties moved to Georgia, the husband executed a deed filed in Alabama conveying property to himself, his daughter, and his wife. Norman v. Ault, 287 Ga. 324, 695 S.E.2d 633 (2010).

Cited in Field v. Massey, 232 Ga. App. 524, 502 S.E.2d 349 (1998); King v. Lusk, 280 Ga. App. 40, 633 S.E.2d 350 (2006).

19-3-2. Who may contract marriage; parental consent.

(a) To be able to contract marriage, a person must:

(1) Be of sound mind;

(2) Except as provided in subsection (b) of this Code section, be at least 18 years of age;

(3) Have no living spouse of a previous undissolved marriage. The dissolution of a previous marriage in divorce proceedings must be

affirmatively established and will not be presumed. Nothing in this paragraph shall be construed to affect the legitimacy of children; and

(4) Not be related to the prospective spouse by blood or marriage within the prohibited degrees.

(b) If either applicant for marriage is 16 or 17 years of age, parental consent as provided in Code Section 19-3-37 shall be required. (Orig. Code 1863, § 1654; Code 1868, § 1698; Code 1873, § 1699; Code 1882, § 1699; Civil Code 1895, § 2412; Civil Code 1910, § 2931; Code 1933, § 53-102; Ga. L. 1957, p. 83, § 1; Ga. L. 1962, p. 138, § 1; Ga. L. 1963, p. 485, § 1; Ga. L. 1965, p. 335, § 1; Ga. L. 1965, p. 500, § 1; Ga. L. 1976, p. 1719, § 1; Ga. L. 1979, p. 872, § 1; Ga. L. 1999, p. 81, § 19; Ga. L. 2006, p. 141, § 6A/HB 847.)

Cross references. — Bigamy and marrying a bigamist, §§ 16-6-20, 16-6-21.
Law reviews. — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969). For article advocating reamendment of this Code section to recognize the presumption favoring validity of subsequent marriages,

see 21 Mercer L. Rev. 465 (1970). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 79 (2006). For article, “A Holy Secular Institution,” see 58 Emory L.J. 1123 (2009). For article, “Conflict of Laws Structure and Vision: Updating a Venerable Discipline,” see 31 Ga. St. U.L. Rev. 231 (2015).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
SOUND MIND
AGE
PREVIOUS UNDISCLOSED MARRIAGE

General Consideration

Law is more regardful of nuptial contracts, and persons incapable of contracting generally may contract marriage. Unlawful marriages are not void unless so declared. *Park v. Barron*, 20 Ga. 702 (1856).
Presumption of capacity to contract marriage. — There is presumption that parties had capacity to contract marriage and this presumption prevails until overcome by proof. *Fanning v. State*, 46 Ga. App. 716, 169 S.E. 60 (1933).
Requirements of section applicable to common-law marriage. — In order to be able to contract a valid common-law marriage, one must be able to meet the requirements of this statute. *Hiter v. Shelp*, 129 Ga. App. 401, 199 S.E.2d 832 (1973).

When the existence of a common-law marriage was raised as a defense to kidnapping, even though the trial court erred in failing to charge that defendant’s burden to prove the marriage was only to a preponderance of the evidence, the error was harmless since no evidence was cited to prove two of the elements as required by O.C.G.A. § 19-3-2. *Dixon v. State*, 217 Ga. App. 267, 456 S.E.2d 758 (1995).
Cited in *Gibbs v. Brown*, 68 Ga. 803 (1882); *Crapps v. Smith*, 9 Ga. App. 400, 71 S.E. 501 (1911); *Morgan v. Morgan*, 148 Ga. 625, 97 S.E. 675 (1918); *Bentley v. Bentley*, 149 Ga. 707, 102 S.E. 21 (1920); *Finney v. State*, 51 Ga. App. 545, 181 S.E. 144 (1935); *Irby v. State*, 57 Ga. App. 717, 196 S.E. 101 (1938); *Smith v. State*, 66 Ga. App. 669, 19 S.E.2d 168 (1942); *Indian Springs Swimming Pool Corp. v. Maddox*,

General Consideration (Cont'd)

70 Ga. App. 842, 29 S.E.2d 724 (1944); *Christopher v. Christopher*, 198 Ga. 361, 31 S.E.2d 818 (1944); *Hickman v. State*, 199 Ga. 805, 35 S.E.2d 461 (1945); *Gearllach v. Odom*, 200 Ga. 350, 37 S.E.2d 184 (1946); *Pritchett v. Ellis*, 201 Ga. 809, 41 S.E.2d 402 (1947); *Goza v. State*, 91 Ga. App. 842, 87 S.E.2d 232 (1955); *Hayes v. Hay*, 92 Ga. App. 88, 88 S.E.2d 306 (1955); *Liberty Mut. Ins. Co. v. Ellis*, 99 Ga. App. 486, 109 S.E.2d 70 (1959); *Hosley v. Ridley*, 101 Ga. App. 752, 112 S.E.2d 304 (1959); *Ganns v. Worrell*, 216 Ga. 512, 117 S.E.2d 533 (1960); *Bryant v. Bryant*, 216 Ga. 762, 119 S.E.2d 573 (1961); *Toole v. Gallion*, 221 Ga. 494, 144 S.E.2d 360 (1965); *Murry v. Lett*, 222 Ga. 67, 148 S.E.2d 412 (1966); *Wittke v. Horne's Enters., Inc.*, 118 Ga. App. 211, 162 S.E.2d 898 (1968); *Smith v. Smith*, 230 Ga. 616, 198 S.E.2d 307 (1973); *Hiter v. Shelp*, 129 Ga. App. 401, 199 S.E.2d 832 (1973); *Riddle v. Riddle*, 240 Ga. 515, 241 S.E.2d 214 (1978); *Thompson v. Brown*, 254 Ga. 191, 326 S.E.2d 733 (1985); *Dismuke v. C & S Trust Co.*, 261 Ga. 525, 407 S.E.2d 739 (1991); *Cornelius v. State*, 213 Ga. App. 766, 445 S.E.2d 800 (1994); *Singleton v. Wilburn*, 262 Ga. App. 52, 584 S.E.2d 659 (2003); *Singleton v. Wilburn*, 262 Ga. App. 52, 584 S.E.2d 659 (2003).

Sound Mind**Sound mind essential requirement.**

— It is essential to the validity of a marriage in this state that the parties should be of sound mind and marriages of persons unable to contract are void. *Bell v. Bennett*, 73 Ga. 784 (1884). For other cases, see 9 Enc. Dig. 189.

Age

Ratification of marriage contract upon majority. — Although this statute prescribed the consentable age of parties, if a party below the age marries, but after the party reaches the consentable age the party affirms the marriage, and there is cohabitation, the marriage will thereafter be valid and binding. *Americus Gas &*

Elec. Co. v. Coleman, 16 Ga. App. 17, 84 S.E. 493 (1915).

Marriage of a boy under 17 (now 16) years of age, although declared by former Code 1933, § 53-104 (see now O.C.G.A. § 19-3-5) to be void, may nevertheless be ratified and confirmed by continuing, after arriving at the age of 17 (now 16), to cohabit with his wife as such. *Jones v. Jones*, 200 Ga. 571, 37 S.E.2d 711 (1946).

If a girl contracts a marriage which is invalid because she is under the age of consent, but, on arriving at this age, ratifies the marriage by continued cohabitation, the marriage is thereafter valid. Such marriages partake more of the nature of voidable than void marriages. They are imperfect marriages which the party may affirm or disaffirm after reaching the age of consent. The burden of proof is upon the person seeking to prove that the marriage was in fact ratified by continued cohabitation after the removal of the disability. *Mims v. Hardware Mut. Cas. Co.*, 82 Ga. App. 210, 60 S.E.2d 501 (1950).

Underage party who contracts invalid marriage not subject to alimony claim. — When at the time of purported marriage, and at the time of an order granting alimony on the application of the wife for the support of their child, the partner was less than 17 years of age (now 16 years of age) the grant of such judgment against him was contrary to law, since there was no valid marriage to support it, and whether he could in some way be held liable for support of the child, he could not be subject to such liability through a claim of alimony. *Eskew v. Eskew*, 199 Ga. 513, 34 S.E.2d 697 (1945) (decided under former version of section specifying minimum age of 17 for marriage by a male).

Alimony permissible if minor subsequently ratifies marriage. — Marriage of a boy under the age specified in law, though not absolutely void, being voidable only and subject to ratification, must yet be treated as void, so far as alimony is concerned, unless and until it is so ratified by him after reaching such age. *Eskew v. Eskew*, 199 Ga. 513, 34 S.E.2d 697 (1945).

Previous Undisclosed Marriage

Party to previous undissolved marriage is unable to contract marriage. Connor v. Rainwater, 200 Ga. 866, 38 S.E.2d 805 (1946).

Previous undissolved marriage of one of the parties to a marriage ceremony renders such party incapable of making a marriage contract. Pritchett v. Ellis, 201 Ga. 809, 41 S.E.2d 402 (1947).

One who has a prior undissolved marriage does not have legal capacity to contract marriage. Kicklighter v. Kicklighter, 217 Ga. 54, 121 S.E.2d 122 (1961); Murry v. Lett, 222 Ga. 67, 148 S.E.2d 412 (1966).

Previous undissolved marriage renders attempted second marriage void. Graves v. Carter, 207 Ga. 308, 61 S.E.2d 282 (1950); Lovett v. Zeigler, 224 Ga. 144, 160 S.E.2d 360 (1968).

When a woman having a living husband married another man, or a husband having a living wife and married another woman, the second marriage is void. Murchison v. Green, 128 Ga. 339, 57 S.E. 709 (1907); Curlew v. Jones, 146 Ga. 367, 91 S.E. 115 (1917).

Marriage ceremony accompanied by cohabitation between a man and a woman, when one of them has a living wife or husband, is an absolute nullity, and may be so treated by the parties. Atlantic Bitulithic Co. v. Maxwell, 40 Ga. App. 483, 150 S.E. 110 (1929).

Bigamous marriage, being void, is a nullity, and no decree is necessary to avoid the marriage. The marriage may be treated as an absolute nullity by the parties to such a ceremony and by all the world. Smith v. State, 66 Ga. App. 669, 19 S.E.2d 168 (1942).

Attempted bigamous marriage is utterly void, and may be disregarded without ever being decreed void by a judgment of a court. Gearllach v. Odom, 200 Ga. 350, 37 S.E.2d 184 (1946).

Knowledge of former marriage by innocent party to second marriage is not requisite to render void the second marriage. Clark v. Cassidy, 62 Ga. 407 (1879); Belle Isle v. Belle Isle, 47 Ga. App. 168, 170 S.E. 211 (1933).

When marriage has been proved, relation is presumed to exist until evidence of marriage's dissolution by di-

vorce or death, and the party asserting the dissolution must prove the dissolution. Clark v. Cassidy, 62 Ga. 407 (1879); Belle Isle v. Belle Isle, 47 Ga. App. 168, 170 S.E. 211 (1933).

Subsequent marriage does not create presumption of dissolution of first marriage. Uddyback v. Johnson, 149 Ga. App. 769, 256 S.E.2d 29 (1979).

When there is proof that one party has living spouse, there is no presumption that divorce was granted dissolving the former marriage. Liberty Mut. Ins. Co. v. Ellis, 99 Ga. App. 486, 109 S.E.2d 70 (1959).

Presumption of validity of second marriage is strong, and burden is upon one attacking said marriage to overcome the presumption by clear, distinct, positive, and satisfactory proof. Jones v. Transamerica Ins. Co., 154 Ga. App. 408, 268 S.E.2d 444 (1980), overruled on other grounds, Glover v. Glover, 172 Ga. App. 278, 322 S.E.2d 755 (1984).

Presumption arose that second marriage was valid until evidence was adduced that first spouse is living, and only then does the law place the burden on the party contending that the second marriage was valid to go forward with the evidence and show that the first marriage was dissolved by divorce. American Mut. Liab. Ins. Co. v. Copeland, 113 Ga. App. 707, 149 S.E.2d 402 (1966); Patrick v. Simon, 237 Ga. 742, 229 S.E.2d 746 (1976); Kelly v. Kelly, 144 Ga. App. 43, 240 S.E.2d 312 (1977); Glover v. Glover, 172 Ga. App. 278, 322 S.E.2d 755 (1984).

When establishing dissolution of former marriage required. — It is only when there is evidence of a living spouse that rule requiring affirmative establishment of dissolution of previous marriage comes into play. Zurich Ins. Co. v. Craft, 103 Ga. App. 889, 120 S.E.2d 922 (1961).

Burden of proof, once former marriage is shown, is on party asserting dissolution. Good faith or ignorance of the parties to the second marriage as to the true facts does not change the rule. New Amsterdam Cas. Co. v. Thompson, 100 Ga. App. 677, 112 S.E.2d 273 (1959), criticized, Zurich Ins. Co. v. Craft, 103 Ga. App. 889, 120 S.E.2d 922 (1961).

Third party may legally marry party to bigamous marriage not oth-

**Previous Undisclosed
Marriage (Cont'd)**

erwise incapacitated. — When a single man laboring under no disability married a woman who had theretofore knowingly been a party to a bigamous marriage, but was not otherwise incapacitated, his marriage to her was legal and, so long as it was not dissolved, constituted an impediment against another marriage by him. *Atlantic Bitulithic Co. v. Maxwell*, 40 Ga. App. 483, 150 S.E. 110 (1929).

To void bigamous marriage, a party may later marry when no other impediment exists. — The fact that a woman otherwise capable of contracting marriage entered into a marriage ceremony with a man who, to her knowledge, had a living wife from whom he was not divorced, would not render her incapable of later contracting marriage with another man, and this she could do without any judgment or decree annulling the previous marriage. *Atlantic Bitulithic Co. v. Maxwell*, 40 Ga. App. 483, 150 S.E. 110 (1929).

Common-law wife could not invoke marital privilege against testimony when previous existing marriage shown. — When witness testified that prior to the time she lived with the defendant as his common-law wife, she was married to another person who was still living and from whom she had not been divorced, the witness was not entitled to the marital privilege of refusing to testify

as the previous marriage was not presumed to have been dissolved. *Gates v. State*, 120 Ga. App. 518, 171 S.E.2d 375 (1969).

Bigamous marriage may become lawful on death of first spouse. — If a man who had a living wife undivorced entered into a ceremonial marriage with another woman who was not shown to have known of the former marriage, and they cohabited as husband and wife from the time of such marriage and continued to do so after the death of the first wife, they will be considered thereafter as lawfully married. *Hamilton v. Bell*, 161 Ga. 739, 132 S.E. 83 (1926).

Validity of marriage challenged through estoppel. — Georgia does not allow validity of a marriage to be challenged through estoppel. *Hayes v. Schweiker*, 575 F. Supp. 402 (N.D. Ga.), aff'd, 723 F.2d 918 (11th Cir. 1983), cert. denied, 466 U.S. 953, 104 S. Ct. 2160, 80 L. Ed. 2d 545 (1984).

Setting aside divorce decree when marriage void from inception. — Trial court erred by denying an ex-husband's motion to set aside a divorce decree with the ex-wife because the marriage was void from the marriage's inception due to the ex-wife having a living spouse from an undissolved marriage at the time and there was no issue of the protection of a child to prevent the decree from being set aside. *Wright v. Hall*, 292 Ga. 457, 738 S.E.2d 594 (2013).

OPINIONS OF THE ATTORNEY GENERAL

Former Code 1933, § 53-107 (see now O.C.G.A. § 19-3-36) took precedence over former Code 1933, § 53-102 (see now O.C.G.A. § 19-3-2) insofar as a conflict existed between the two statutes; when documentary proof of an applicant's age was required only a birth or baptismal certificate will suffice. 1975 Op. Att'y Gen. No. U75-5.

Marriage performed before final divorce decree issues as to one of parties is void. 1954-56 Op. Att'y Gen. p. 150.

Marriage between first cousins not being prohibited by former Code 1933, § 53-105 (see now O.C.G.A. § 19-3-3), such marriage was legal and proper in

this state. 1965-66 Op. Att'y Gen. No. 65-107.

Person who has been declared incompetent cannot enter into valid marriage, whether the marriage is performed by a minister or arises by declaration through common-law cohabitation; only a court can adjudicate the existence of a marital relationship in a specific case based on a set of particular circumstances. 1965-66 Op. Att'y Gen. No. 66-69.

Physician's certificate is not required to be in affidavit form; the law only contemplates that a physician's certificate be presented, and that the certificate bear the signature of the physician;

thus, any reasonable form of certification by the physician would appear to suffice. 1963-65 Op. Att'y Gen. p. 771.

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Marriage, §§ 16 et seq., 38.

Am. Jur. Pleading and Practice Forms. — 1C Am. Jur. Pleading and Practice Forms, Annulment of Marriage, §§ 2, 18, 26, 34, 57.

C.J.S. — 55 C.J.S., Marriage, §§ 10 et seq., 16, 17, 24.

ALR. — Mental capacity to marry, 28 ALR 635; 82 ALR2d 1040.

Incompetency to marry because of other marital relations as affecting breach of promise, 47 ALR 400.

Right of heir, next of kin, or other person interested in decedent's estate to attack his marriage on ground of his mental incompetency, 57 ALR 131.

Right to attack validity of marriage after death of party thereto, 76 ALR 769; 47 ALR2d 1393.

Validity of marriage celebrated while spouse by former marriage of one of the parties was living and undivorced, in reli-

ance upon presumption from lapse of time of death of such spouse, 93 ALR 345; 144 ALR 747.

Ratification of marriage by one under age, upon attaining marriageable age, 159 ALR 104.

Presumption as to validity of second marriage, 14 ALR2d 7.

Right to attack validity of marriage after death of party thereto, 47 ALR2d 1393.

Acts in connection with marriage of infant below marriageable age as contributing to delinquency, 68 ALR2d 745.

Conflict of laws as to validity of marriage attacked because of nonage, 71 ALR2d 687.

Marriage between persons of the same sex, 81 ALR5th 1.

Validity, construction, and application of state enactment, order, or regulation expressly prohibiting sexual orientation discrimination, 82 ALR5th 1.

19-3-3. Degrees of relationship within which intermarriage prohibited; penalty; effect of prohibited marriage.

(a) Any person who marries a person to whom he knows he is related, either by blood or by marriage, as follows:

- (1) Father and daughter or stepdaughter;
- (2) Mother and son or stepson;
- (3) Brother and sister of the whole blood or the half blood;
- (4) Grandparent and grandchild;
- (5) Aunt and nephew; or
- (6) Uncle and niece

shall be punished by imprisonment for not less than one nor more than three years.

(b) Marriages declared to be unlawful under subsection (a) of this Code section shall be void from their inception. (Cobb's 1851 Digest, p. 814; Code 1863, §§ 1655, 4418; Code 1868, §§ 1699, 4459; Code 1873, §§ 1700, 4533; Code 1882, §§ 1700, 4533; Ga. L. 1886, p. 30, § 1; Civil

Code 1895, § 2413; Penal Code 1895, § 380; Civil Code 1910, § 2932; Penal Code 1910, § 371; Ga. L. 1916, p. 51, § 2; Code 1933, §§ 26-5702, 53-105; Code 1933, § 26-9905, enacted by Ga. L. 1968, p. 1249, § 1.)

Cross references. — Incest, § 16-6-22.

JUDICIAL DECISIONS

Man who marries mother of illegitimate daughter becomes stepfather of such child. *Lipham v. State*, 125 Ga. 52, 53 S.E. 817 (1906); *Nephew v. State*, 5 Ga. App. 841, 63 S.E. 930 (1909).

Marriage to sister of former wife did not violate O.C.G.A. § 19-3-3 since there was no blood relationship between the man and his wife. *Bennett v. Bennett*, 162 Ga. App. 311, 290 S.E.2d 206 (1982), cert. vacated, 250 Ga. 20, 296 S.E.2d 57 (1982).

Power of court to enjoin harassment. — Regardless of whether an order

was denominated a family violence order, it was within the power and authority of the superior court, after hearing the evidence of the mother's conduct, to enjoin her from approaching or harassing the father and his family. *Ganny v. Ganny*, 238 Ga. App. 123, 518 S.E.2d 148 (1999).

Cited in *Hargroves v. State*, 179 Ga. 722, 177 S.E. 561 (1934); *Christopher v. Christopher*, 198 Ga. 361, 31 S.E.2d 818 (1944); *Moss v. Moss*, 135 Ga. App. 401, 218 S.E.2d 93 (1975).

OPINIONS OF THE ATTORNEY GENERAL

Marriage between first cousins not being prohibited, such marriage is legal and proper in this state. 1965-66 Op. Att'y Gen. No. 65-107.

Third cousins may legally marry in Georgia. 1954-56 Op. Att'y Gen. p. 157.

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Marriage, §§ 3, 9.

Am. Jur. Pleading and Practice Forms. — 1C Am. Jur. Pleading and Practice Forms, Annulment of Marriage, § 34.

C.J.S. — 42 C.J.S., Incest, § 8 et seq. 55 C.J.S., Marriage, § 16.

ALR. — Relationship created by adop-

tion as within statute prohibiting marriage between parties in specified relationships, or statute regarding incest, 151 ALR 1146.

Sexual intercourse between persons related by half blood as incest, 34 ALR5th 723.

19-3-3.1. Marriages between persons of same sex prohibited; marriages not recognized.

(a) It is declared to be the public policy of this state to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state.

(b) No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. Any contractual rights granted by virtue of such license shall be

unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage. (Code 1981, § 19-3-3.1, enacted by Ga. L. 1996, p. 1025, § 1.)

Law reviews. — For article, “To Say ‘I Do’: *Shahar v. Bowers*, Same-Sex Marriage, and Public Employee Free Speech Rights,” see 15 Ga. St. U.L. Rev. 381 (1998). For article on proposed constitutional amendment on gay marriage, see 21 Ga. St. U.L. Rev. 14 (2004).
For review of 1996 domestic relations legislation, see 13 Ga. St. U.L. Rev. 137. For note, “Status or Contract? A Comparative Analysis of Inheritance Rights under

Equitable Adoption and Domestic Partnership Doctrines,” see 39 Ga. L. Rev. 675 (2005).
For comment on adoptions by homosexuals, see 55 Mercer L. Rev. 1415 (2004). For article, “A Holy Secular Institution,” see 58 Emory L.J. 1123 (2009). For comment, “By the Power Vested in Me? Licensing Religious Officials to Solemnize Marriage in the Age of Same-Sex Marriage,” see 63 Emory L.J. 979 (2014).

JUDICIAL DECISIONS

Employment denied due to lesbian marriage. — Attorney General, that is, the State of Georgia’s interest, as an employer in promoting the efficiency of the Attorney General’s important public service outweighed the plaintiff’s personal

associational interests in a lesbian marriage. *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997), cert. denied, 522 U.S. 1049, 118 S. Ct. 693, 139 L. Ed. 2d 638 (1998).

RESEARCH REFERENCES

ALR. — Marriage between persons of the same sex, 81 ALR5th 1.
Marriage between persons of same sex

— United States and Canadian cases, 1 ALR Fed. 2d 1.

19-3-4. Nature of consent required.

To constitute an actual contract of marriage, the parties must consent thereto voluntarily without any fraud practiced upon either. Drunkenness at the time of marriage, brought about by art or contrivance to induce consent shall be held as fraud. (Orig. Code 1863, § 1656; Code 1868, § 1700; Code 1873, § 1701; Code 1882, § 1701; Civil Code 1895, § 2414; Civil Code 1910, § 2933; Code 1933, § 53-103.)

JUDICIAL DECISIONS

Granting divorce on ground of duress amounts to finding that no actual contract of marriage ever existed. *York v. York*, 202 Ga. 50, 41 S.E.2d 877 (1947).

Cited in *Baxter v. Rogers*, 195 Ga. 274, 24 S.E.2d 52 (1943).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Marriage, §§ 21, 26 et seq.

Am. Jur. Pleading and Practice Forms. — 1C Am. Jur. Pleading and Practice Forms, Annulment of Marriage, § 39.

C.J.S. — 55 C.J.S., Marriage, §§ 12, 18, 34.

ALR. — Marriage to which consent of one of parties was obtained by duress as void or only voidable, 91 ALR 414.

Concealment or misrepresentation relating to religion as ground for annulment, 44 ALR3d 972.

19-3-5. What marriages void; legitimacy of issue; effect of later ratification.

(a) Marriages of persons unable to contract, unwilling to contract, or fraudulently induced to contract shall be void. However, the issue of such a marriage born before the marriage is annulled and declared void by a competent court shall be legitimate.

(b) In the case of persons unwilling to contract or fraudulently induced to do so, a subsequent consent and ratification of the marriage, freely and voluntarily made, accompanied by cohabitation as husband and wife shall render the marriage valid. In the case of a marriage void on one of the grounds specified in paragraphs (1) through (3) of Code Section 19-3-2, after removal of the impediment to marriage, a subsequent free and voluntary consent and ratification of the marriage accompanied by cohabitation as husband and wife shall likewise render the marriage valid. (Orig. Code 1863, § 1657; Code 1868, § 1701; Code 1873, § 1702; Code 1882, § 1702; Civil Code 1895, § 2416; Civil Code 1910, § 2935; Code 1933, § 53-104.)

Law reviews. — For article, "Annulment of Marriage in Georgia," see 5 Ga. B.J. 22 (1942). For article, "Georgia Inheritance Rights of Children Born Out of

Wedlock," see 23 Ga. St. B.J. 28 (1986). For annual survey of law of domestic relations, see 38 Mercer L. Rev. 179 (1986).

JUDICIAL DECISIONS

Legislative intent as to applicability. — In the use of the word "marriages" in the law, dealing with "marriages of persons unable to contract," it cannot be said that the legislature, in providing that the issue of such marriages before annulled will be legitimate, intended it to apply only to ceremonial marriages. *Campbell v. Allen*, 208 Ga. 274, 66 S.E.2d 226 (1951).

Legislature intended to remove stigma of bastardy from children if their parents go through marriage ceremony, even though the marriage is void

because one of the parties was unable to contract marriage by reason of an existing marriage. *Brazziel v. Spivey*, 219 Ga. 445, 133 S.E.2d 885 (1963).

"Marriage" construed. — Former Code 1933, § 53-101 (see now O.C.G.A. § 19-3-1) defined the essentials of a marriage, and this court repeatedly recognized common-law marriages as complying with these essentials. Former Code 1933, § 53-102 (see now O.C.G.A. § 19-3-2) specified those persons who were able to contract a marriage, and listed as one of the disabilities to contract

a marriage, a previous marriage undissolved. *Campbell v. Allen*, 208 Ga. 274, 66 S.E.2d 226 (1951).

Marriages of persons unable to contract marriage are void. *Christopher v. Christopher*, 198 Ga. 361, 31 S.E.2d 818 (1944).

Contract of marriage entered into by insane person is void. *Johnson v. Johnson*, 172 Ga. 273, 157 S.E. 689 (1931).

Party to previous undissolved marriage cannot contract marriage and marriage by such person is void. *Connor v. Rainwater*, 200 Ga. 866, 38 S.E.2d 805 (1946).

Previous undissolved marriage of one of the parties to a marriage ceremony renders such party incapable of making a marriage contract. A marriage contract involving such a party is void. *Pritchett v. Ellis*, 201 Ga. 809, 41 S.E.2d 402 (1947).

Attempted bigamous marriage is void and may be disregarded without being decreed void by a judgment of court. *Campbell v. Allen*, 208 Ga. 274, 66 S.E.2d 226 (1951).

Previous undissolved marriage renders void an attempted second marriage. *Lovett v. Zeigler*, 224 Ga. 144, 160 S.E.2d 360 (1968).

When a man having a living wife enters into a ceremonial marriage to another woman, such purported second marriage is void. *Rush v. Holtzclaw*, 154 Ga. App. 4, 267 S.E.2d 316 (1980).

Bigamous marriage, being void, is a nullity and no decree is necessary to avoid the marriage. The marriage may be treated as an absolute nullity by the parties to such a ceremony and by all the world. *Smith v. State*, 66 Ga. App. 669, 19 S.E.2d 168 (1942).

This state has abandoned common-law rule that made children of void marriage illegitimate, and adopted the civil law rule that the issue of certain void marriages, before they were annulled, were to be considered legitimate. *Andrews v. Willis*, 133 Ga. App. 697, 212 S.E.2d 24 (1975).

Children born before marriage declared void. — Until marriages are declared void by competent court, children of such marriages are legitimate. *Christopher v. Christopher*, 198 Ga. 361, 31 S.E.2d 818 (1944).

If the parents participated in a marriage ceremony, even though the marriage might ultimately be void, children born before the marriage was annulled or declared void were legitimate. *Hall v. Coleman*, 242 Ga. App. 576, 530 S.E.2d 485 (2000).

Issue of bigamous marriage, born before the marriage is annulled and declared void by a competent court are legitimate. *Connor v. Rainwater*, 200 Ga. 866, 38 S.E.2d 805 (1946).

When party to marriage prosecuted for bigamy. — Although a party to a bigamous marriage is convicted of the offense of bigamy, the issue of such second marriage, born before the commencement of any prosecution for bigamy shall, notwithstanding the invalidity of such marriage, be considered as legitimate. *Perkins v. Levy*, 158 Ga. 896, 124 S.E. 799 (1924); *Connor v. Rainwater*, 200 Ga. 866, 38 S.E.2d 805 (1946).

When there are two ceremonial marriages and the second is void because the man had previously married and was undivorced, the children of the purported second marriage are legitimate if the second marriage has not been declared void and when the children were born before the commencement of a prosecution for bigamy. *Andrews v. Willis*, 133 Ga. App. 697, 212 S.E.2d 24 (1975).

Children of bigamous marriage may be lawful heirs of deceased parent. — Child of a bigamous common-law marriage, born before such marriage was annulled or declared void by a court, is legitimate and is the lawful heir of the child's deceased father. *Campbell v. Allen*, 208 Ga. 274, 66 S.E.2d 226 (1951).

Policy which former Code 1933, § 53-104 codified did not legitimate offspring of illicit relationship. This declared policy was applicable only to those situations, broadly defined in the Code, when a marriage contract had been undertaken, but was void or voidable because of the legal inability of one of the parties to make a valid contract. *Hobby v. Burke*, 227 F.2d 932 (5th Cir. 1955).

Illegitimate offspring. — If no marriage, either ceremonial or common law, ever took place, offspring are illegitimate. *Hobby v. Burke*, 227 F.2d 932 (5th Cir. 1955).

Void marriage may ripen into valid marriage. — While ceremonial marriage may be void at inception, it may under given circumstances ripen into a valid marriage. *Beebe v. Beebe*, 227 Ga. 248, 179 S.E.2d 758 (1971).

No children from marriage void from inception. — Trial court erred by denying an ex-husband's motion to set aside a divorce decree with the ex-wife because the marriage was void from the marriage's inception due to the ex-wife having a living spouse from an undissolved marriage at the time and there was no issue of the protection of a child to prevent the decree from being set aside. *Wright v. Hall*, 292 Ga. 457, 738 S.E.2d 594 (2013).

Continued cohabitation after removal of impediment renders marriage valid. — If the parties cohabited as husband and wife from the time of the ceremonial marriage, and so continued after the husband's disabilities were removed, they will be considered as lawfully married. *Hawkins v. Hawkins*, 166 Ga. 153, 142 S.E. 684 (1928).

When parties enter into a ceremonial marriage which is not valid because of the incapacity of one of them, unknown to the other, but the impediment is later removed, their continued cohabitation thereafter as husband and wife is sufficient to create the presumption of a valid common-law marriage, nothing further appearing. *Rush v. Holtzclaw*, 154 Ga. App. 4, 267 S.E.2d 316 (1980).

Marriage of boy under 17 (now 16), may be ratified and confirmed by continuing, after arriving at the age of 17 (now 16), to cohabit with his wife as such. *Smith v. Smith*, 84 Ga. 440, 11 S.E. 496 (1890); *Morgan v. Morgan*, 148 Ga. 625, 97 S.E. 675 (1918); *Jones v. Jones*, 200 Ga. 571, 37 S.E.2d 711 (1946).

Marriage by female under 14 (now 16) may be ratified by her after she has

reached the age of 17. *Powers v. Powers*, 138 Ga. 65, 74 S.E. 759 (1912); *Dunson v. State*, 25 Ga. App. 172, 102 S.E. 899 (1920).

Party not subject to alimony when marriage void. — When at the time of purported marriage, and at the time of order granting alimony on the application of the wife for the support of their child, the partner was less than 17 years of age (now 16), the grant of such judgment against him was contrary to law, since there was no valid marriage to support it, and whether the father could in some way be held liable for support of the child, he could not be subject to such liability through a claim of alimony. *Eskew v. Eskew*, 199 Ga. 513, 34 S.E.2d 697 (1945).

When husband estopped to deny marriage in alimony actions. — In a suit by reputed wife for alimony, the husband is estopped from denying her competency to contract marriage if he has in fact married her, lived with her many years as his wife, and reared a family of children by her. *Dillon v. Dillon*, 60 Ga. 204 (1878); *Bell v. Bennett*, 73 Ga. 784 (1884).

Cited in *Mims v. State*, 43 Ga. App. 100, 157 S.E. 901 (1931); *Griffin v. Booth*, 176 Ga. 1, 167 S.E. 294 (1932); *Smith v. State*, 66 Ga. App. 669, 19 S.E.2d 168 (1942); *Baxter v. Rogers*, 195 Ga. 274, 24 S.E.2d 52 (1943); *Mackey v. Mackey*, 198 Ga. 707, 32 S.E.2d 764 (1945); *Flynn v. Flynn*, 210 Ga. 280, 79 S.E.2d 534 (1954); *S. v. S.*, 211 Ga. 365, 86 S.E.2d 103 (1955); *Diggs v. Diggs*, 91 Ga. App. 634, 86 S.E.2d 639 (1955); *Goza v. State*, 91 Ga. App. 842, 87 S.E.2d 232 (1955); *Bryant v. Bryant*, 216 Ga. 762, 119 S.E.2d 573 (1961); *King v. King*, 218 Ga. 534, 129 S.E.2d 147 (1962); *Toole v. Gallion*, 221 Ga. 494, 144 S.E.2d 360 (1965); *Wallace v. Wallace*, 221 Ga. 510, 145 S.E.2d 546 (1965); *Aetna Life Ins. Co. v. Harley*, 365 F. Supp. 1210 (N.D. Ga. 1973); *Thompson v. Brown*, 254 Ga. 191, 326 S.E.2d 733 (1985); *Argo v. State*, 188 Ga. App. 102, 371 S.E.2d 922 (1988).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Marriage, §§ 16 et seq., 41 et seq., 54, 83, 84.

Am. Jur. Pleading and Practice Forms. — 1C Am. Jur. Pleading and Prac-

tice Forms, Annulment of Marriage, § 2.

C.J.S. — 55 C.J.S., Marriage, §§ 11 et seq., 21, 30, 36 et seq.

ALR. — Legitimation by subsequent marriage annulled under a statute declaring that certain marriages shall be void from the time their nullity is declared, 27 ALR 1121.

Validity of contract executed under duress exercised by third person, 62 ALR 1477.

Misrepresentation or mistake as to identity or condition in life of one of the parties as affecting validity of marriage, 75 ALR 663.

Right to attack validity of marriage after death of party thereto, 76 ALR 769; 47 ALR2d 1393.

Continued cohabitation between parties to ceremonial marriage contracted when one of them was insane as creating presumption of common-law marriage, 85 ALR 1302.

Marriage to which consent of one of parties was obtained by duress as void or only voidable, 91 ALR 414.

Validity of marriage celebrated while spouse by former marriage of one of the

parties was living and undivorced, in reliance upon presumption from lapse of time of death of such spouse, 93 ALR 345; 144 ALR 747.

Construction and application of statutes which in effect, under prescribed conditions, validate, after removal of impediment, marriage celebrated while a former spouse of one of the parties was living and undivorced, 95 ALR 1292.

Right to alimony, counsel fees, or suit money in case of invalid marriage, 110 ALR 1283.

Rights and remedies in respect of property accumulated by man and woman living together in illicit relations or under void marriage, 31 ALR2d 1255.

Validity of solemnized marriage as affected by absence of license required by statute, 61 ALR2d 847.

Liability of one putative spouse to other for wrongfully inducing entry into or cohabitation under illegal, void, or non-existent marriage, 72 ALR2d 956.

Homosexuality, transvestism, and similar sexual practices as grounds for annulment of marriage, 68 ALR4th 1069.

19-3-6. Effect of restraints on marriage; when valid.

Marriage is encouraged by the law. Every effort to restrain or discourage marriage by contract, condition, limitation, or otherwise shall be invalid and void, provided that prohibitions against marriage to a particular person or persons or before a certain reasonable age or other prudential provisions looking only to the interest of the person to be benefited and not in general restraint of marriage will be allowed and held valid. (Orig. Code 1863, § 1652; Code 1868, § 1696; Code 1873, § 1697; Code 1882, § 1697; Civil Code 1895, § 2410; Civil Code 1910, § 2929; Code 1933, § 53-107.)

JUDICIAL DECISIONS

It is public policy of this state to maintain family relation and to permit the settlement of matrimonial differences for that purpose. *Evans v. Hartley*, 57 Ga. App. 598, 196 S.E. 273 (1938); *McClain v. McClain*, 237 Ga. 80, 227 S.E.2d 5 (1976).

Termination of alimony in event of remarriage. — Provision for permanent alimony which provided that in the event the wife should obtain a divorce and

should marry again, or should marry again in the event of the death of her husband, the alimony should terminate was not violative of law and contrary to public policy in that it was in restraint of marriage. *Watson v. Burnley*, 150 Ga. 460, 104 S.E. 220 (1920).

Agreement incorporated into a divorce decree providing for termination of the former wife's equity in real property upon

her remarriage does not act as a restraint on marriage. *Gordin v. Gordin*, 249 Ga. 371, 290 S.E.2d 921 (1982).

Fact that a termination-upon-remarriage provision in a final judgment and decree originated in the jury's verdict rather than from an agreement of the parties is a distinction without legal significance. A trial court does not err by allowing the jury to return the verdict including the termination provision, or in entering judgment on the verdict. *Gordin v. Gordin*, 249 Ga. 371, 290 S.E.2d 921 (1982).

When agreement to divorce held void. — Any agreement between husband and wife, prior to a separation, that they will live separate and apart, or that either or both will obtain a divorce, and any agreement to otherwise promote a dissolution of the marriage relation, is against public policy and void, and consideration founded thereon is illegal, but a contract between husband and wife, providing for the wife's maintenance, made after a separation has taken place, is valid and enforceable. *Craig v. Craig*, 53 Ga. App. 632, 186 S.E. 755 (1936).

Contract for attorney's fee void when contingent on procuring divorce. — Contract for the payment of a fee to an attorney contingent upon the attorney procuring a divorce for the attorney's client or contingent in amount upon the amount of alimony to be obtained is void as against public policy. *Evans v. Hartley*, 57 Ga. App. 598, 196 S.E. 273 (1938).

Contract for attorney's fee void when fee to be paid from alimony recovered. — Contract by wife to pay her solicitors part of alimony to be recovered by her in a suit for divorce, as compensation for their services in such suit, is void as against public policy. *Evans v. Hartley*, 57 Ga. App. 598, 196 S.E. 273 (1938).

Attorney may recover reasonable value of services where contract void. — When an attorney's contract for compensation for services rendered a married woman was void as against public policy, the attorney could recover what the attorney's services were reasonably worth. *Evans v. Hartley*, 57 Ga. App. 598, 196 S.E. 273 (1938).

Foreign judgment given full faith though based on separation agreement void in this state. — Although a North Carolina judgment which was incorporated into a Georgia divorce decree on the issues of alimony, child support, and custody was based on a separation contract which included a provision not to contest a later divorce which contract was clearly void as against the public policy of this state, the North Carolina alimony judgment was entitled to full faith and credit and the trial court did not err in incorporating it in the divorce decree. *Cannon v. Cannon*, 244 Ga. 299, 260 S.E.2d 19 (1979).

Apprenticeship of female not void when she becomes 18 as being in restraint of marriage. *Dent v. Cock*, 65 Ga. 400 (1880).

Employment contract not void when restraint on marriage reasonable. — Employment contract which provided that a woman employee was to be employed as a teacher only so long as she did not marry was not void because the contract provision was a reasonable one and the restraint on marriage was incidental to the primary lawful purpose of the contract. *Huiet v. Atlanta Gas Light Co.*, 70 Ga. App. 233, 28 S.E.2d 83 (1943).

Limitation of appointment to such time as executrix remains widow is not void as an illegal restraint against marriage. *Bruce v. Fogarty*, 53 Ga. App. 443, 186 S.E. 463 (1936).

Provision in will prohibiting share in estate if daughter married designated individual was not "in terrorem" but was specific valid restraint not tending to discourage marriage. *Taylor v. Rapp*, 217 Ga. 654, 124 S.E.2d 271 (1962).

Statute has nothing to do with adoption standards. — Public policy of the state as enunciated by the General Assembly is to consider the best interest of the child when determining whether he or she should be adopted, O.C.G.A. § 19-8-18(b); in stating that marriage is encouraged, O.C.G.A. § 19-3-6 forbids most efforts to restrain or discourage marriage by contract, condition, limitation, or otherwise, and § 19-3-6 has nothing to do with the standards the courts must apply in determining whether to allow a child to

be adopted. *In re Goudeau*, 305 Ga. App. 718, 700 S.E.2d 688 (2010).

Meretricious relationship defense did not apply to a promise to marry.

— Because the object of a promise to marry was not illegal or against public policy, O.C.G.A. § 19-3-6, the fact that a man and woman were living together before and after a marriage proposal was only collateral to the promise to marry,

and the meretricious relationship defense provided by O.C.G.A. § 13-8-1 was inapplicable to the promise to marry. *Kelley v. Cooper*, 325 Ga. App. 145, 751 S.E.2d 889 (2013).

Cited in *Graham v. McRae*, 147 Ga. 49, 92 S.E. 871 (1917); *Sims v. Sims*, 245 Ga. 680, 266 S.E.2d 493 (1980); *Daniel v. Daniel*, 250 Ga. 849, 301 S.E.2d 643 (1983).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Marriage, § 114 et seq.

C.J.S. — 17A C.J.S., Contracts, §§ 245, 246.

ALR. — Conditions, conditional limita-

tions, or contracts in restraint of marriage, 122 ALR 7.

What constitutes contract between husband or wife and third person promotive of divorce or separation, 93 ALR3d 523.

19-3-7. Contracts attempting to force marriage void.

The policy of the law being opposed equally to restrictions on marriage and to marriages not the result of free choice, all contracts or bonds made to hinder or to force marriage are deemed fraudulent and void. (Orig. Code 1863, § 3113; Code 1868, § 3125; Code 1873, § 3182; Code 1882, § 3182; Civil Code 1895, § 2415; Civil Code 1910, § 2934; Code 1933, § 53-108.)

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Marriage, § 120.

C.J.S. — 17A C.J.S., Contracts, §§ 245, 246.

ALR. — Validity of contract executed under duress exercised by third person, 62 ALR 1477.

Conditions, conditional limitations, or contracts in restraint of marriage, 122 ALR 7.

Recovery for services rendered by persons living in apparent relation of husband and wife without express agreement for compensation, 94 ALR3d 552.

19-3-8. Interspousal tort immunity continued.

Interspousal tort immunity, as it existed immediately prior to July 1, 1983, shall continue to exist on and after July 1, 1983. (Orig. Code 1863, § 1700; Code 1868, § 1743; Code 1873, § 1753; Code 1882, § 1753; Civil Code 1895, § 2473; Civil Code 1910, § 2992; Code 1933, § 53-501; Ga. L. 1983, p. 1309, § 1; Ga. L. 1984, p. 22, § 19.)

Law reviews. — For article, “Defending the Lawsuit: A First-Round Checklist,” see 22 Ga. St. B.J. 24 (1985). For annual survey of law of wills, trusts, and administration of estates, see 38 Mercer

L. Rev. 417 (1986). For article, “Interspousal Tort Immunity in America,” see 23 Ga. L. Rev. 359 (1989). For annual survey article on tort law, see 50 Mercer L. Rev. 335 (1998). For annual survey of

domestic relations law, see 56 Mercer L. Rev. 221 (2004).

For note, "Piercing the Marital Veil:

Interspousal Tort Immunity After *Harris v. Harris*," see 36 Mercer L. Rev. 1013 (1985).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

DECISIONS PRIOR TO 1983 AMENDMENT

General Consideration

Section does not change common-law doctrine of interspousal immunity. — O.C.G.A. § 19-3-8 does not purport to change common law regarding personal torts committed by one spouse against the other, and the law, with respect to those matters, is still the same as it was under common law, that is, that marriage extinguishes antenuptial rights of action between husband and wife, and after marriage the wife cannot maintain an action against her husband based on tortious injury to her person, though committed prior to coverture. *Robeson v. International Indem. Co.*, 248 Ga. 306, 282 S.E.2d 896 (1981).

Common-law interspousal immunity doctrine applies to husbands as well as wives. *Robeson v. International Indem. Co.*, 248 Ga. 306, 282 S.E.2d 896 (1981).

Scope of doctrine. — Doctrine of interspousal tort immunity bars actions between spouses in respect to personal torts committed by one spouse against the other, except when the traditional policy reasons for applying interspousal tort immunity are absent, i.e., when there is no marital harmony to be preserved and when there exists no possibility of collusion between the spouses. *Shoemake v. Shoemake*, 200 Ga. App. 182, 407 S.E.2d 134 (1991).

Application of interspousal immunity doctrine to wrongful death actions violates constitutional guarantee of equal protection because the doctrine arbitrarily distinguishes between classes of wrongful death claimants. *Jones v. Jones*, 259 Ga. 49, 376 S.E.2d 674 (1989).

Doctrine of interspousal immunity is not unconstitutional as a matter of due process or equal protection. *Robeson*

v. International Indem. Co., 248 Ga. 306, 282 S.E.2d 896 (1981).

Common-law interspousal immunity doctrine bears reasonable relationship to promotion of domestic tranquility interest sought to be furthered by it. *Robeson v. International Indem. Co.*, 248 Ga. 306, 282 S.E.2d 896 (1981).

For discussion of reasons for preserving doctrine of interspousal immunity. — See *Robeson v. International Indem. Co.*, 248 Ga. 306, 282 S.E.2d 896 (1981).

Doctrine of interspousal tort immunity is inapplicable when there is, realistically speaking, no marital harmony to be protected by application of the rule nor any hint of collusion between the husband and wife or of intent to defraud an insurance company. *Smith v. Rowell*, 176 Ga. App. 100, 335 S.E.2d 461 (1985).

When husband and wife had been separated for ten years, despite sporadic reconciliation attempts, and during which time the husband lived with another woman, the doctrine of interspousal tort immunity did not apply since there was no "marital harmony" to be protected. *Harris v. Harris*, 252 Ga. 387, 313 S.E.2d 88 (1984).

Suit against husband's estate by wife's parents. — Interspousal immunity doctrine was not a bar to a wrongful death action brought against the estate of a deceased husband by the parents of the wife who died with her husband in the crash of a plane piloted by the husband. *Trust Co. Bank v. Thornton*, 186 Ga. App. 706, 368 S.E.2d 158 (1988), cert. vacated, 258 Ga. 543, 373 S.E.2d 512 (1988).

Requirement to apportion damages did not violate interspousal tort immunity doctrine. — Application of the apportionment of damages pursuant to O.C.G.A. § 51-12-33 did not violate the

interspousal tort immunity doctrine, O.C.G.A. § 19-3-8, because the trial court's holding that the jury should have been instructed to apportion the award of damages to a wife according to the jury's determination of the percentage of fault of her husband and a driver, if any, in no way requires the wife to file suit against her husband, but instead, precluded the wife from recovering from the driver that portion of her damages, if any, that a trier of fact concluded resulted from the negligence of her husband. *Barnett v. Farmer*, 308 Ga. App. 358, 707 S.E.2d 570 (2011).

Application of doctrine. — Trial court erred in denying a husband's motion to dismiss, which was treated as a motion for summary judgment, and in failing to apply the interspousal tort immunity doctrine, as codified in O.C.G.A. § 19-3-8, to a wife's claim for damages for a motorcycle accident, even though the wife's complaint against the husband contained a count for dissolution of the marriage. *Gates v. Gates*, 277 Ga. 175, 587 S.E.2d 32 (2003).

Cited in *Bagley v. Forrester*, 53 F.2d 831 (5th Cir. 1931); *Coleman v. Dublin Coca-Cola Bottling Co.*, 47 Ga. App. 369, 170 S.E. 549 (1933); *Breedlove v. Suttles*, 302 U.S. 277, 58 S. Ct. 205, 82 L. Ed. 252 (1937); *Powell v. Powell*, 196 Ga. 694, 27 S.E. 393 (1943); *Foster v. Withrow*, 201 Ga. 260, 39 S.E.2d 466 (1946); *Bradley v. Tenneco Oil Co.*, 146 Ga. App. 161, 245 S.E.2d 862 (1978); *State Farm Mut. Auto. Ins. Co. v. Gazaway*, 152 Ga. App. 716, 263 S.E.2d 693 (1979); *McTier v. State*, 153 Ga. App. 551, 265 S.E.2d 876 (1980); *Chester v. State*, 162 Ga. App. 10, 290 S.E.2d 117 (1982).

Decisions Prior to 1983 Amendment

Editor's notes. — Prior to the 1983 amendment, Code Section 19-3-8 read as follows: "The husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except insofar as the law recognizes her separately, for her own protection, for her benefit, or for the preservation of public order."

Common law legal fiction. — At common law, husband and wife were in legal fiction one and same person. *Taylor v.*

Vezzani, 109 Ga. App. 167, 135 S.E.2d 522 (1964).

This statute remained unamended and inviolate although there have been many changes regarding the husband-wife relationship. *Cleveland v. State*, 155 Ga. App. 267, 270 S.E.2d 687 (1980).

This statute established presumption that husband's conduct was not ruled by wife's commands. *Brigman v. Brenner*, 206 Ga. 222, 56 S.E.2d 471 (1949).

Husband as head of his family. — In this state, the husband is recognized by law as head of his family. *Dailey v. State*, 47 Ga. App. 57, 169 S.E. 678 (1933); *Jenkins v. State*, 51 Ga. App. 95, 179 S.E. 597 (1935); *Gilder v. State*, 52 Ga. App. 252, 183 S.E. 95 (1935); *Carver v. Carver*, 199 Ga. 352, 34 S.E.2d 509 (1945); *Upchurch v. Upchurch*, 76 Ga. App. 215, 45 S.E.2d 855 (1947); *Cleveland v. State*, 155 Ga. App. 267, 270 S.E.2d 687 (1980).

Conclusiveness of section. — Legal status of the husband as head of the family cannot be affected even by sworn testimony to the effect that in the particular case the wife is in fact the head of the family. *Patterson v. State*, 8 Ga. App. 454, 69 S.E. 591 (1910).

Legal presumption when husband and wife reside together is that house and household effects belong to husband as the head of the family. This presumption, of course, is rebuttable. *Dailey v. State*, 47 Ga. App. 57, 169 S.E. 678 (1933); *Jenkins v. State*, 51 Ga. App. 95, 179 S.E. 597 (1935); *Gilder v. State*, 52 Ga. App. 252, 183 S.E. 95 (1935); *Upchurch v. Upchurch*, 76 Ga. App. 215, 45 S.E.2d 855 (1947); *Hutchens v. State*, 87 Ga. App. 219, 73 S.E.2d 506 (1952); *Cleveland v. State*, 155 Ga. App. 267, 270 S.E.2d 687 (1980).

House occupied by husband and wife together may be denominated husband's house, even though the wife pays the house rent and supports the husband. *Barron v. State*, 46 Ga. App. 829, 169 S.E. 323 (1933); *Hutchens v. State*, 87 Ga. App. 219, 73 S.E.2d 506 (1952).

Coresidence of wife alone does not rebut legal presumption that the house and all the household effects belong to the

Decisions Prior to 1983 Amendment (Cont'd)

husband as the head of the family. *Smith v. Berman*, 8 Ga. App. 262, 68 S.E. 1014 (1910).

Joint residence would not alone be sufficient to give notice of claim of interest in land by wife. *Smith v. Berman*, 8 Ga. App. 262, 68 S.E. 1014 (1910).

Husband is presumed to be in charge and in control of effects in home. *Kelly v. State*, 90 Ga. App. 76, 81 S.E.2d 866 (1954).

Contraband found in marital residence is presumed to be possessed by head of household. *Richardson v. State*, 155 Ga. App. 664, 272 S.E.2d 529 (1980).

When alleged "lottery" book was found in a dresser drawer in the house of the husband, and not on the person of the defendant wife, or in her possession, or in any possession which might be traceable to her, the presumption was that the possession was that of the husband. *Lemon v. State*, 66 Ga. App. 653, 19 S.E.2d 52 (1942).

Rule that the husband is recognized by law as the head of the family and the rebuttable legal presumption that the house and all the household effects belong to him as the head of the house was applicable when recently stolen goods were found in a home occupied by the defendant and his wife. *Wyatt v. State*, 72 Ga. App. 511, 34 S.E.2d 312 (1945).

In the case of a dwelling home, occupied by a single family, the contents therein, including any drugs, may be inferred to have been in the possession of the head of the household. *Cleveland v. State*, 155 Ga. App. 267, 270 S.E.2d 687 (1980).

When wife owned home. — Although defendant wife owned home, jury was authorized to infer that defendant husband, as head of the household, was in constructive possession of the contraband (marijuana). *Cleveland v. State*, 155 Ga. App. 267, 270 S.E.2d 687 (1980).

When presumption not rebutted, conviction of wife for possessing contraband found on premises is contrary to law. *Hutchens v. State*, 87 Ga. App. 219, 73 S.E.2d 506 (1952).

Goods bought by husband and held in his possession not subject to conversion by wife. — Husband being the head of the family, the goods brought by him on his own account, and which are in the house where he and the wife reside, are in the husband's possession, and are not in the possession of the wife, the property not having been in the wife's possession, there has been no conversion by the wife, and the seller cannot maintain a suit in trover against the wife for conversion of the property. *Boss v. Ed. & Al. Matthews, Inc.*, 51 Ga. App. 889, 181 S.E. 688 (1935).

Proof of legal presumption that contraband found in house belongs to husband is sufficient to make prima facie case for the state that it was in the possession of the defendant. *Gilder v. State*, 52 Ga. App. 252, 183 S.E. 95 (1935).

Section does not necessarily render husband possessor of contraband found in household. — Fact that husband has been declared to be head of household does not render it "more likely than not" that he is the possessor of contraband found therein. *Knighton v. State*, 248 Ga. 199, 282 S.E.2d 102 (1981).

Presumption as violation of due process. — Permissive, or rebuttable, presumption that contraband found in a house belongs to the husband by virtue of his statutory status as head of household cannot withstand due process scrutiny. *Knighton v. State*, 248 Ga. 199, 282 S.E.2d 102 (1981).

Husband has right to fix matrimonial residence without wife's consent; and the wife is bound to follow her husband, when he changes his residence, provided the change is made by him in good faith, and not from whim or caprice, or as mere punishment of the wife, or to a place where he did not intend to reside, or to a place where her health or comfort will be endangered. *Carver v. Carver*, 199 Ga. 352, 34 S.E.2d 509 (1945).

Husband is entitled to wife's services. — When husband and wife are living together and any valuable services which she may render to another are rendered by the husband, by and through the instrumentality of the wife as his agent. *Cooper v. Cooper*, 59 Ga. App. 832, 2 S.E.2d 145 (1939).

Husband is liable for all necessities required for family's support and maintenance, although they may be bought and contracted for by the wife, unless they are sold to her on her own account under an express agreement between her and the seller by which she, and not the husband, is liable therefor. *Boss v. Ed. & Al. Matthews, Inc.*, 51 Ga. App. 889, 181 S.E. 688 (1935).

Husband is responsible generally for wife's medical expenses, but this rule is not applicable when such expenses are charged to the wife at her request, and she promises to pay such expenses herself instead of her husband paying them. *Bell v. Proctor*, 92 Ga. App. 759, 90 S.E.2d 84 (1955), rev'd on other grounds, 212 Ga. 325, 92 S.E.2d 514 (1956).

Husband's duty to support wife holds until legally absolved. — Husband is bound to support and maintain his wife. These rights and liabilities of the husband remain in effect during cohabitation of the husband and wife, and until there has been a separation and the husband is relieved in some manner provided by law, such as divorce, contract or deed of separation, or by decree of court. *Powell v. Powell*, 196 Ga. 694, 27 S.E.2d 393 (1943).

Right of one spouse to sue other is purely statutory, and in order to maintain an action, the right must be expressly granted or be granted by necessary implication. *Wallach v. Wallach*, 94 Ga. App. 576, 95 S.E.2d 750 (1956).

Husband and wife are no longer unit, one person in law, but are, so far

as property is concerned, two distinct persons, with distinct and separate rights. *Sessions v. Parker*, 174 Ga. 296, 162 S.E. 790, answer conformed to, 45 Ga. App. 101, 163 S.E. 297 (1932).

Wife as feme sole. — In respect to property rights of the wife, she is as feme sole, and may be sued by her husband in a bail-trover proceeding for recovery of his personal property converted by her. *Eddleman v. Eddleman*, 183 Ga. 766, 189 S.E. 833 (1937).

Wife's unrestricted right to sue for damages to property. — Action for damages to property is right as to which wife suffers from no restrictions from coverture, and she may accordingly maintain an action for damages against her husband thereon. *Hubbard v. Ruff*, 97 Ga. App. 251, 103 S.E.2d 134 (1958).

No personal tort not involving property right. — There is no right of action in one spouse against another for personal tort not involving property right, and this is true regardless of the fact that the tort is wantonly and maliciously inflicted. *Wright v. Wright*, 85 Ga. App. 721, 70 S.E.2d 152 (1952).

Married woman living with her husband is not entitled to have homestead set apart to her as the head of a family, out of her separate estate, notwithstanding the fact that the husband may be physically unable to work and possessed of no property nor means of support. *Simmons v. Anderson*, 56 Ga. 53 (1876); *Johnson v. Little*, 90 Ga. 781, 17 S.E. 294 (1893).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Husband and Wife, § 251 et seq.

C.J.S. — 41 C.J.S., Husband and Wife, §§ 204, 205.

ALR. — Right of wife to exclude husband from possession, use, or enjoyment of family residence or homestead owned by her, 21 ALR 745.

Wife's right to reimbursement by husband for expenditures for support and maintenance of herself or family made while they were living together in the marriage relation, 101 ALR 442.

Presumption of ownership of personal property as between husband and wife, 111 ALR 1374.

Liability of married woman or her estate for fees of real estate broker, 117 ALR 752.

Renewal by one spouse without the other's participation, of lien on homestead, 143 ALR 1369.

Power of either spouse, without consent of other, to make gift of community property or funds to third party, 17 ALR2d 1118.

Woman's right to have abortion without consent of, or against objections of, child's father, 62 ALR3d 1097.

Validity of verdict or verdicts by same jury in personal injury action awarding damages to injured spouse but denying recovery to other spouse seeking collateral damages, or vice versa, 66 ALR3d 472.

Right of married woman to use maiden surname, 67 ALR3d 1266.

Domicile for state tax purposes of wife

living apart from husband, 82 ALR3d 1274.

Right of liability insurer or uninsured motorist insurer to invoke defense based on insured's tort immunity arising out of marital or other close family relationship to injured party, 36 ALR4th 747.

Joinder of tort actions between spouses with proceeding for dissolution of marriage, 4 ALR5th 972.

19-3-9. Each spouse's property separate.

The separate property of each spouse shall remain the separate property of that spouse, except as provided in Chapters 5 and 6 of this title and except as otherwise provided by law. (Laws 1809, Cobb's 1851 Digest, p. 305; Code 1863, § 1701; Ga. L. 1866, p. 146, § 1; Code 1868, § 1744; Code 1873, § 1754; Code 1882, § 1754; Civil Code 1895, § 2474; Civil Code 1910, § 2993; Code 1933, § 53-502; Ga. L. 1979, p. 466, § 33.)

Cross references. — Spouse's separate property, Ga. Const. 1983, Art. I, Sec. I, Para. XXVII.

Law reviews. — For article surveying developments in Georgia domestic relations law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 109 (1981). For survey article on wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982). For article, "Are We

Witnessing the Erosion of Georgia's Separate Property Distinction?," see 13 Ga. St. B.J. 14 (2007).

For note, "Georgia Becomes A Quasi Community Property State," see 17 Ga. St. B.J. 134 (1981).

For comment, "The Georgia Supreme Court's Creation of an Equitable Interest in Marital Property — Yours? Mine? Ours!," 34 Mercer L. Rev. 449 (1982).

JUDICIAL DECISIONS

At common law, earnings of wife belonged to her husband. *Cotter v. Gazaway*, 141 Ga. 534, 81 S.E. 879 (1914).

Real estate of wife prior to married women's statute. — Under the statutes of this state as they were in force prior to the Act approved December 13, 1866 (Acts 1866, p. 146), all the real estate of the wife in her possession and to which she had title at the time of the marriage vested in and belonged to the husband. *Hudgins v. Chupp*, 103 Ga. 484, 30 S.E. 301 (1898).

Law constituted women as feme soles. *Citizens & S. Nat'l Bank v. Mann*, 234 Ga. 884, 218 S.E.2d 593 (1975).

Wife's separate property. — Law gave wife right to keep, acquire, and control her separate property. *Foster v.*

Withrow, 201 Ga. 260, 39 S.E.2d 466 (1946).

Wife's action for conversion of her property. — Trial court erred by finding that a wife could not proceed against her former husband on claims relating to his conversion of stock certificates owned solely in her name. *Fleming v. Fleming*, 246 Ga. App. 69, 539 S.E.2d 563 (2000).

Debts of husband. — Law did not restrict a woman's assumption of debts of her husband. *Citizens & S. Nat'l Bank v. Mann*, 234 Ga. 884, 218 S.E.2d 593 (1975).

Bankruptcy exemptions. — When husband and wife debtors sought to exempt their income tax refunds, pursuant to O.C.G.A. § 44-13-100(a)(6), the procedure set forth in *In re Crowson*, 431 B.R.

484, 489 (10th Cir. B.A.P. 2010) was to be followed. Each debtor was treated separately under 11 U.S.C. § 522(m), and Georgia law had no presumption of equal ownership of property between spouses under O.C.G.A. § 19-3-9. *In re Evans*, 449 B.R. 827 (Bankr. N.D. Ga. 2010).

Retention of tax refund by Chapter 7 debtors. — Chapter 7 debtors could not retain total tax refunds because, pursuant to Georgia law, which—pursuant to O.C.G.A. § 19-3-9—had no presumption of equal ownership of property between spouses, the refund in its entirety was the sole property of the sole income earner at the time of the bankruptcy filing. *In re Hraga*, 467 B.R. 527 (Bankr. N.D. Ga. 2011).

Statute's effect on common law property right of wife. — Statutes of this state do change common law in respect to property rights of wife; with respect to such rights she is as a feme sole. *Eddleman v. Eddleman*, 183 Ga. 766, 189 S.E. 833 (1937).

Husband and wife are no longer unit, one person in law, with all property vested in husband as the head of the family, and subject to his debts, but they are, in law, so far as property is concerned, two distinct persons, with distinct and separate rights. *Sessions v. Parker*, 174 Ga. 296, 162 S.E. 790, answer conformed to, 45 Ga. App. 101, 163 S.E. 297 (1932).

Married woman may deal with her property as freely as man may deal with his; she is not forbidden to utilize her estate for her husband's benefit. *Johnston v. Susman*, 193 Ga. 758, 19 S.E.2d 919 (1942).

Wife may sue and be sued in all matters relating to her sole and separate property. *Martin v. Gurley*, 201 Ga. 493, 39 S.E.2d 878 (1946).

Wife has right of action for damages to her separate estate resulting from her husband's negligence. This right is necessary in order that a wife may have equal protection of the law respecting her separate estate. *Hubbard v. Ruff*, 97 Ga. App. 251, 103 S.E.2d 134 (1958).

Right of action for damages to property resulting from negligence is a property right as to which a wife in this state suffers from no restrictions arising from

coverture, and she may accordingly maintain an action for damages against her husband thereon. *Hubbard v. Ruff*, 97 Ga. App. 251, 103 S.E.2d 134 (1958).

Married woman's action for loss of consortium. — Married woman may maintain action for damages against third person for loss of consortium, even though she may be living at the time with her husband. *Tingle v. Maddox*, 186 Ga. 757, 198 S.E. 722 (1938).

Recovery by wife (and mother) for homicide of child is property right. *Kehely v. Kehely*, 200 Ga. 41, 36 S.E.2d 155 (1945).

Husband can maintain bailtrovers action against his wife, a husband and wife can make contracts with each other, and the husband and wife can become copartners in a business enterprise. *Foster v. Withrow*, 201 Ga. 260, 39 S.E.2d 466 (1946); *Bradley v. Tenneco Oil Co.*, 146 Ga. App. 161, 245 S.E.2d 862 (1978).

Husband cannot use his wife's separate money to buy property for himself; if he invests her funds in real estate in his own name, equity will fix a trust upon the land, and having jurisdiction for one purpose, it will do complete justice and give full relief between the parties. *Sasser v. Sasser*, 73 Ga. 275 (1884).

Failure to allege that wife's separate estate provided portion of purchase price. — Insofar as petition sought to recover one-half, or some other portion of the real estate here involved or to impress such real estate with a trust, upon the theory that it was purchased in part out of the separate estate of the wife, the petition failed to set out a cause of action because it did not allege that any definite portion of the purchase price was paid by her out of her separate estate. *Roach v. Roach*, 212 Ga. 40, 90 S.E.2d 423 (1955).

Property brought into marriage by one party is not subject to equitable division. *Bailey v. Bailey*, 250 Ga. 15, 295 S.E.2d 304 (1982).

Property acquired during marriage by either party by gift, inheritance, bequest, or devise remains separate property of party that acquired it, and is not subject to equitable division. *Bailey v. Bailey*, 250 Ga. 15, 295 S.E.2d 304 (1982).

Interspousal gifts of property acquired during marriage are subject to claims for equitable division of property. *McArthur v. McArthur*, 256 Ga. 762, 353 S.E.2d 486 (1987).

Parties' residence constituted marital property for purposes of equitable division, despite the subsequent interspousal transfer for the purpose of shielding the home from a potential judgment creditor, since the parties initially acquired the property as marital property. *Sparks v. Sparks*, 256 Ga. 788, 353 S.E.2d 508 (1987).

When there is no question that the house initially was acquired as marital property, deeded by husband to wife, the trial court did not err by denying the wife's motion for directed verdict, by charging the jury that gifts, for purposes of determining the parties' separate property, consist of gifts from a nonspouse before or during the marriage, nor by entering judgment on the jury's verdict awarding to the husband a 35 percent interest in the house. *McArthur v. McArthur*, 256 Ga. 762, 353 S.E.2d 486 (1987).

Former husband was barred from seeking resulting trust in parties' residence, because his misconduct of fraudulently transferring the house to the former wife related directly to the transaction from which he sought relief—the transfer of the house placing title in her, but his misconduct in transferring the residence did not relate directly to his claim for an equitable division of the residence. That claim was based not on the circumstances surrounding the transfer, but on the fact that the property was acquired during the parties' marriage, through their labor and investments, thereby giving each party an equitable interest therein. *Sparks v. Sparks*, 256 Ga. 788, 353 S.E.2d 508 (1987).

Effect of conveyance of separate property. — Husband deeding of a home to both his wife and himself, to be held as "tenants in common" with right of survivorship manifested an intent to transform the husband's own separate property into marital property; because both the husband and the wife then owned an undivided one-half interest in the prop-

erty, the entire home should have been treated as marital property. *Lerch v. Lerch*, 278 Ga. 885, 608 S.E.2d 223 (2005).

Once separated by judicial determination in a separate maintenance judgment, property becomes part of the separate estate of the party to whom the property is awarded and the property is not thereafter subject to equitable division in a later divorce action. *Goodman v. Goodman*, 254 Ga. 703, 334 S.E.2d 179 (1985).

Section does not change common-law doctrine of interspousal immunity. — O.C.G.A. § 19-3-9 does not purport to change common law regarding personal torts committed by one spouse against the other, and the law, with respect to those matters, is still the same as it was under common law, that is, that marriage extinguishes antenuptial rights of action between husband and wife, and after marriage the wife cannot maintain an action against her husband based on tortious injury to her person, though committed prior to coverture. *Robeson v. International Indem. Co.*, 248 Ga. 306, 282 S.E.2d 896 (1981).

Common-law interspousal immunity doctrine applies to husbands as well as wives. *Robeson v. International Indem. Co.*, 248 Ga. 306, 282 S.E.2d 896 (1981).

Doctrine of interspousal immunity is not unconstitutional, as a matter of due process or equal protection. *Robeson v. International Indem. Co.*, 248 Ga. 306, 282 S.E.2d 896 (1981).

Common-law interspousal immunity doctrine bears reasonable relationship to promotion of domestic tranquillity interest sought to be furthered by it. *Robeson v. International Indem. Co.*, 248 Ga. 306, 282 S.E.2d 896 (1981).

For discussion of reasons for preserving doctrine of interspousal immunity. — See *Robeson v. International Indem. Co.*, 248 Ga. 306, 282 S.E.2d 896 (1981).

Unvested retirement benefits are marital property subject to equitable division, insofar as the retirement benefits are acquired during the marriage. *Courtney v. Courtney*, 256 Ga. 97, 344 S.E.2d 421 (1986).

Applicable to third-party actions. — Interspousal immunity doctrine does apply in the context of third-party actions. *New v. Hubbard*, 206 Ga. App. 679, 426 S.E.2d 379 (1992).

Cited in *Carlton v. Moultrie Banking Co.*, 170 Ga. 185, 152 S.E. 215 (1930); *Bagley v. Forrester*, 53 F.2d 831 (5th Cir. 1931); *Sheffield v. Sheffield*, 178 Ga. 248, 173 S.E. 121 (1934); *Magid v. Beaver*, 185 Ga. 669, 196 S.E. 422 (1938); *Thompson v. Thompson*, 199 Ga. 692, 35 S.E.2d 262

(1945); *Bryant v. Bryant*, 204 Ga. 747, 51 S.E.2d 797 (1949); *Adams v. Pafford*, 79 Ga. App. 477, 54 S.E.2d 329 (1949); *Taylor v. Vezzani*, 109 Ga. App. 167, 135 S.E.2d 522 (1964); *Reid v. Peoples Bank*, 220 Ga. 368, 138 S.E.2d 876 (1964); *Rankin v. Smith*, 113 Ga. App. 204, 147 S.E.2d 649 (1966); *Stokes v. Stokes*, 246 Ga. 765, 273 S.E.2d 169 (1980); *Walton Elec. Membership Corp. v. Snyder*, 226 Ga. App. 673, 487 S.E.2d 613 (1997); *Head v. Head*, 234 Ga. App. 469, 507 S.E.2d 214 (1998).

OPINIONS OF THE ATTORNEY GENERAL

Proposed Equal Rights Amendment might affect all state laws which discriminate, even innocuously, between

sexes or deny or abridge any equality of rights between sexes for any reason whatsoever. 1970 Op. Att'y Gen. No. 70-165.

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Husband and Wife, § 19 et seq.

C.J.S. — 41 C.J.S., Husband and Wife, § 10 et seq.

ALR. — Should ownership of property be laid in the husband or wife in an indictment for larceny, 2 ALR 352.

Presumption of ownership of personal property as between husband and wife, 111 ALR 1374.

Right of trustee in bankruptcy, or creditors, of marital community in respect of separate property of one spouse, which has been improved wholly or in part by use of community property, 133 ALR 1097.

Mental incompetency of one spouse as affecting transfer or encumbrance of community property, homestead property, or estate by the entirety, 155 ALR 306.

Interest of spouse in estate by entirety as subject to satisfaction of his or her individual debt, 166 ALR 969; 75 ALR2d 1172.

Spouse's cause of action for negligent personal injury as separate or community property, 35 ALR2d 1199.

Use of community funds in improving, or discharging encumbrance on, separate property as grounding right to reimbursement, lien, or charge, 54 ALR2d 429.

Rights in wedding presents as between spouses, 75 ALR2d 1365.

Joint bank account as subject to attachment, garnishment, or execution by cred-

itor of one of the joint depositors, 11 ALR3d 1465.

Change of domicile as affecting character of property previously acquired as separate or community property, 14 ALR3d 404.

Pensions, and reserve or retired pay, as community property, 94 ALR3d 176.

Divorce and separation: appreciation in value of separate property during marriage without contribution by either spouse as separate or communal property, 24 ALR4th 453.

Divorce property distribution: real estate or trust property in which interest vested before marriage and was realized during marriage, 60 ALR4th 217.

Divorce and separation: attorney's contingent fee contracts as marital property subject to distribution, 44 ALR5th 671.

Property rights arising from relationship of couple cohabiting without marriage, 69 ALR5th 219.

Divorce and separation: Determination of whether proceeds from personal injury settlement or recovery constitute marital property, 109 ALR5th 1.

Inherited property as marital or separate property in divorce action, 38 ALR6th 313.

Spouse's professional degree or license as marital property for purposes of alimony, support, or property settlement, 3 ALR6th 447.

Divorce and separation: appreciation in value of separate property during marriage with contribution by either spouse

as separate or community property (doctrine of "active appreciation"), 39 ALR6th 205.

19-3-10. Right of married persons to contract; presumptions.

A married person may make contracts with other persons; but, when a transaction between a husband and wife is attacked for fraud by the creditors of either, the onus shall be on the husband and wife to show that the transaction was fair. If a husband or a wife has a separate estate and purchases property from persons other than his or her spouse, the onus shall be upon a creditor levying on such property as the property of the other spouse to show fraud or to show that the husband or wife did not have the means with which to purchase the property. (Civil Code 1895, § 2492; Civil Code 1910, § 3011; Code 1933, § 53-505; Ga. L. 1979, p. 466, § 35.)

History of Code section. — The language of this Code section is derived in part from the decision in *Richardson & Co. v. Subers*, 82 Ga. 427, 9 S.E. 172 (1889).

Cross references. — Acts void as against creditors, § 18-2-20 et seq.

Law reviews. — For article, "Preparing the Georgia Farmer (or Other Small Entrepreneur) for Bankruptcy," see 22 Ga. State Bar J. 186 (1986).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

TRANSACTIONS

FRAUD

EVIDENCE

General Consideration

Statute applied to transactions between husband and wife only, and does not extend to transactions between other near relatives. *First Nat'l Bank v. Kelly*, 190 Ga. 603, 10 S.E.2d 66 (1940).

Statute was rule of evidence, and does not dispense with necessary elements in setting aside conveyance based on a valuable consideration. *Baker v. Goddard*, 205 Ga. 477, 53 S.E.2d 754 (1949).

Purpose of section. — Recognizing that in transactions between husband and wife fraud might be so completely concealed that creditors could not expose the fraud, and in order that the public might not suffer from such concealment, the law imposes upon the husband and wife the

duty of affirmatively establishing their good faith when creditors attack such transactions for fraud. *Arrington v. Awbrey*, 190 Ga. 193, 8 S.E.2d 648 (1940); *Powell v. Grimes*, 223 Ga. 56, 153 S.E.2d 434 (1967).

Cited in *Strickland v. Jones*, 131 Ga. 409, 62 S.E. 322 (1908); *Brand v. Bagwell*, 133 Ga. 750, 66 S.E. 935 (1910); *Adams v. First Nat'l Bank*, 147 Ga. 470, 94 S.E. 568 (1917); *Mitchell v. Mixon*, 148 Ga. 596, 97 S.E. 528 (1918); *Gill v. Willingham*, 156 Ga. 728, 120 S.E. 108 (1923); *Pope v. Bennett*, 157 Ga. 357, 121 S.E. 333 (1924); *Jenkins v. Flournoy*, 157 Ga. 618, 122 S.E. 309 (1924); *Durden v. Royster Guano Co.*, 158 Ga. 234, 123 S.E. 603 (1924); *Simmons v. Realty Inv. Co.*, 160 Ga. 99, 127 S.E. 279 (1925); *Davis v. Barrett*, 163 Ga.

666, 136 S.E. 904 (1927); *James v. Hudson*, 170 Ga. 321, 152 S.E. 829 (1930); *Cotton States Fertilizer Co. v. Childs*, 179 Ga. 23, 174 S.E. 708 (1934); *Strobel v. Cormley*, 50 Ga. App. 358, 178 S.E. 192 (1935); *Strickland v. Davis*, 184 Ga. 76, 190 S.E. 586 (1937); *Tippins v. Lane*, 184 Ga. 331, 191 S.E. 134 (1937); *Armour Fertilizer Works v. Maxwell*, 186 Ga. 801, 199 S.E. 120 (1938); *Parker v. Harling*, 189 Ga. 224, 5 S.E.2d 755 (1939); *Dwight v. Acme Lumber & Supply Co.*, 189 Ga. 473, 6 S.E.2d 586 (1939); *First Nat'l Bank v. Kelly*, 190 Ga. 603, 10 S.E.2d 66 (1940); *Mattox v. West*, 194 Ga. 310, 21 S.E.2d 428 (1942); *United States v. Phillips*, 59 F. Supp. 1006 (S.D. Ga. 1945); *Beazley v. Allen*, 61 F. Supp. 929 (M.D. Ga. 1945); *Lee v. Calhoun*, 202 Ga. 297, 43 S.E.2d 156 (1947); *Beebe v. Smith*, 76 Ga. App. 391, 46 S.E.2d 212 (1948); *Powers v. Powers*, 213 Ga. 461, 99 S.E.2d 818 (1957); *Clark v. Ryals Ins. Agency*, 99 Ga. App. 689, 109 S.E.2d 643 (1959); *Maloy v. Dixon*, 127 Ga. App. 151, 193 S.E.2d 19 (1972); *Citizens & S. Nat'l Bank v. Parker*, 145 Ga. App. 802, 245 S.E.2d 48 (1978); *Stokes v. McRae*, 247 Ga. 658, 278 S.E.2d 393 (1981); *Johnson v. Sheridan*, 179 Ga. App. 331, 346 S.E.2d 109 (1986); *Hadlock v. Anderson*, 246 Ga. App. 291, 540 S.E.2d 282 (2000); *Broadfoot v. Hunerwadel* (In re Dulock), 282 B.R. 54 (Bankr. N.D. Ga. 2002).

Transactions

Husband not liable for rent if wife specifically contracts to pay. — Husband is not liable for the rent simply because the rent constitutes a necessity of life for his family and because he is legally bound to support his family and provide them with the necessities of life if it appears under the allegations of the petition that the wife expressly contracted with the landlord to pay the rent for the dwelling abode of the family and that the wife entered into a written lease contract with the landlord to that effect. *Butler v. Godley*, 51 Ga. App. 784, 181 S.E. 494 (1935).

Married woman bound as purchaser when entering into unambiguous written contract. — When a married woman enters into an unambiguous

written contract whereby she becomes the owner of personalty, and agrees to pay a stipulated price therefor, she is bound by her obligation as purchaser, if the seller committed no fraud upon her nor knew of any committed by the husband. *Gibson v. GMAC*, 46 Ga. App. 201, 167 S.E. 203 (1932).

When a married woman was sold an automobile under a written contract of purchase and sale, and there was no evidence whatever of any fraud practiced upon her by the vendor, and no evidence going to show that she was unable to read and comprehend the terms of the written agreement, and although the defendant may have purchased the automobile for the benefit of her husband, and may have immediately turned it over to him, she (the married woman) was bound by the unambiguous written contract, by which she became the purchaser of the property, and by which the consideration for the agreement on her part to pay the purchase price passed legally and morally to her. *Gibson v. GMAC*, 46 Ga. App. 201, 167 S.E. 203 (1932).

Transactions between husband and wife involving transfer of property are to be scanned closely. *Futrelle v. Karsman*, 41 Ga. App. 765, 154 S.E. 714 (1930).

Transactions between husband, wife, and near relatives, to the prejudice of creditors, are to be closely scanned and their bona fides clearly established. *State Banking Co. v. Miller*, 185 Ga. 653, 196 S.E. 47 (1938).

Fraud

Conveyances may be fraudulent as to subsequent creditors, as well as existing creditors, if made with intent to defraud. *Jones v. J.S.H. Co.*, 199 Ga. 755, 35 S.E.2d 288 (1945).

Burden on spouses to show fair transaction when creditors allege fraud. — When a transaction between husband and wife is attacked for fraud by the creditors of either, the onus is on the husband and wife to show that the transaction was fair. *Cotton States Fertilizer Co. v. Childs*, 179 Ga. 23, 174 S.E. 708 (1934); *Edwards v. United Food Brokers, Inc.*, 195 Ga. 1, 22 S.E.2d 812 (1942).

Fraud (Cont'd)

When the plaintiff was attacking a conveyance from the husband of claimant to her on the ground that it was voluntarily made to delay or defraud the creditor, since the transaction attacked was one between husband and wife, the onus was on them to show the transaction was fair. *Citizens & S. Nat'l Bank v. Kontz*, 185 Ga. 131, 194 S.E. 536 (1937).

Whenever a transaction is between husband and wife, and the creditors of the husband attack the transaction for fraud, if the wife claims the property purchased or received from her husband, the onus is on her to make a fair showing about the whole transaction. *State Banking Co. v. Miller*, 185 Ga. 653, 196 S.E. 47 (1938); *Jones v. J.S.H. Co.*, 199 Ga. 755, 35 S.E.2d 288 (1945).

In a claim case where the wife sets up title to the property levied upon under a deed from her husband, and his creditor attacks the deed upon the ground that it is a fraudulent conveyance, this puts the burden upon the husband and wife to show that the transaction as a whole is free from fraud. *Cotton States Fertilizer Co. v. Childs*, 179 Ga. 23, 174 S.E. 708 (1934); *Merchants' & Citizens' Bank v. Clark*, 180 Ga. 490, 179 S.E. 103 (1935); *Hodges v. Tattnall Bank*, 185 Ga. 657, 196 S.E. 421 (1938).

Although the onus is on the husband and wife making the transaction to show that the transaction was fair, the plaintiff still retains the burden of putting forth evidence of the fraud. *Bonner v. Smith*, 247 Ga. App. 419, 543 S.E.2d 457 (2000).

Husband and wife must show that transaction as a whole is free from fraud, and the bona fides must be clearly established. *Mattox v. West*, 194 Ga. 310, 21 S.E.2d 428 (1942); *Edwards v. United Food Brokers, Inc.*, 195 Ga. 1, 22 S.E.2d 812 (1942).

When there was no proof to show any transaction between spouses, onus was upon creditor to show fraud or collusion if any. *Rainey v. Eatonton Coop. Creamery*, 69 Ga. App. 547, 26 S.E.2d 297 (1943).

Conveyances for nominal consideration presumed fraudulent. — When

there exist conveyances in exchange for love and affection or nominal consideration, the law forms a presumption that such transfers between husband and wife were fraudulent as against their creditors, because the burden of proving that a legitimate sale occurred must be shouldered by the debtor and his/her spouse. *Loeb v. Dante*, 1 Bankr. 547 (Bankr. N.D. Ga. 1979).

Failure to produce testimony is badge of fraud, when the bona fides of the transaction are in issue, and witnesses who ought to be able to explain the transaction are in reach. *Cotton States Fertilizer Co. v. Childs*, 179 Ga. 23, 174 S.E. 708 (1934).

Transfer of property by alleged killer in unliquidated wrongful death claim. — Summary judgment was error when an issue of fact remained as to whether an unliquidated wrongful death claim at the time of a killer's property transfer without consideration to the killer's spouse rendered the killer insolvent and material issues remained as to fraud. *Bryant v. Browning*, 259 Ga. App. 467, 576 S.E.2d 925 (2003).

Evidence

Mere introduction of conveyance from husband to wife would not shift burden from her to the creditor. *State Banking Co. v. Miller*, 185 Ga. 653, 196 S.E. 47 (1938); *Jones v. J.S.H. Co.*, 199 Ga. 755, 35 S.E.2d 288 (1945).

Slight circumstances must be considered, and may be sufficient to establish existence of fraud. *Arrington v. Awbrey*, 190 Ga. 193, 8 S.E.2d 648 (1940).

Charge to jury on wife's burden to show fairness. — Onus being on the claimant wife to show the fairness of the transaction and deed under which she claimed, as the court correctly charged, and she having assumed this burden and accepted the right to open and conclude the argument, it was not error, in the absence of request, for the court to fail to charge the jury further as to such burden, or as to any shift in the burden of introducing evidence. *Tucker v. Talmadge*, 186 Ga. 798, 198 S.E. 726 (1938).

Wife's proof of good faith is jury question. — It is for jury to say whether

wife has made proof of good faith required of her by law by simply denying knowledge of such business affairs of her hus-

band. *Mercantile Nat'l Bank v. Aldridge*, 233 Ga. 318, 210 S.E.2d 791 (1974).

RESEARCH REFERENCES

Am. Jur. 2d. — 37 Am. Jur. 2d, Fraudulent Conveyances and Transfers, § 206. 41 Am. Jur. 2d, Husband and Wife, § 52 et seq.

C.J.S. — 37 C.J.S., Fraudulent Conveyances, § 155. 41 C.J.S., Husband and Wife, § 60 et seq.

ALR. — Conflict of laws as to capacity of married women to contract, 18 ALR 1516; 71 ALR 744.

Validity of partnership agreement between husband and wife, 20 ALR 1304; 38 ALR 1264; 157 ALR 652.

Conveyance pursuant to antenuptial agreement as fraud on creditors, 41 ALR 1163.

Liability of married woman for articles purchased by her for which husband is not liable, 114 ALR 910.

Liability of married woman or her estate for fees of real estate broker, 117 ALR 752.

Spouse's acceptance or retention of benefits of other spouse's fraudulent act as ratification of transaction, 82 ALR3d 625.

Separation agreements: enforceability of provision affecting property rights upon death of one party prior to final judgment of divorce, 67 ALR4th 237.

19-3-11. Gift from spouse allowed, but not presumed.

Repealed by Ga. L. 1981, p. 704, § 1, effective July 1, 1981.

Editor's notes. — Former Code Section 19-3-11 was based on Civil Code 1895, § 2491; Civil Code 1910, § 3010; Code 1933, § 53-506.

ARTICLE 2

LICENSE AND CEREMONY

19-3-30. Issuance, return, and recording of license.

(a) Marriage licenses shall be issued only by the judge of the probate court or his clerk at the county courthouse between the hours of 8:00 A.M. and 6:00 P.M., Monday through Saturday.

(b)(1) No marriage license shall be issued to persons of the same sex.

(2) If one of the persons to be married is a resident of this state, the license may be issued in any county of this state. If neither the male nor the female to be married is a resident of this state, the license shall be issued in the county in which the ceremony is to be performed.

(c) The license shall be directed to the Governor or any former Governor of this state, any judge, including judges of state and federal courts of record in this state, city recorder, magistrate, minister, or other person of any religious society or sect authorized by the rules of such society to perform the marriage ceremony; such license shall

authorize the marriage of the persons therein named and require the Governor or any former Governor of this state, judge, city recorder, magistrate, minister, or other authorized person to return the license to the judge of the probate court with the certificate thereon as to the fact and date of marriage within 30 days after the date of the marriage. The license with the return thereon shall be recorded by the judge in a book kept by such judge for that purpose.

(d) The fact of issue of any unrecorded marriage license may be established by affidavit of either party to a ceremonial marriage, which affidavit shall set forth the date, the place, and the name and title of the official issuing the license.

(e) In the event that any marriage license is not returned for recording, as provided in subsection (c) of this Code section, either party to a ceremonial marriage may establish the marriage by submitting to the judge of the probate court the affidavits of two witnesses to the marriage ceremony setting forth the date, the place, and the name of the official or minister performing the ceremony. The judge shall thereupon reissue the marriage license and enter thereon the certificate of marriage and all dates and names in accordance with the evidence submitted and shall record and cross-index same in the proper chronological order in the book kept for that purpose.

(f) Any other provisions of this Code section or any other law to the contrary notwithstanding, the judge of the probate court of any county which has within its boundaries a municipality that has a population according to the United States decennial census of 1950 or any future such census greater than that of the county seat of the county is authorized to appoint a clerk for the purpose of granting marriage licenses in the municipality at an office designated by the judge. The licenses shall be issued only between the hours prescribed in subsection (a) of this Code section. (Laws 1805, Cobb's 1851 Digest, p. 282; Laws 1809, Cobb's 1851 Digest, p. 282; Ga. L. 1851-52, p. 49, § 1; Code 1863, §§ 1659, 1663; Code 1868, §§ 1702, 1706; Code 1873, §§ 1703, 1707; Code 1882, §§ 1703, 1707; Civil Code 1895, §§ 2417, 2421; Civil Code 1910, §§ 2936, 2940; Ga. L. 1924, p. 53, § 1; Code 1933, §§ 53-201, 53-211; Ga. L. 1956, p. 43, § 1; Ga. L. 1960, p. 179, § 1; Ga. L. 1965, p. 335, § 2; Ga. L. 1982, p. 3, § 19; Ga. L. 1983, p. 884, § 4-1; Ga. L. 1984, p. 1192, § 1; Ga. L. 1987, p. 409, § 1; Ga. L. 1996, p. 624, § 2; Ga. L. 1997, p. 1592, § 1; Ga. L. 2010, p. 394, § 1/SB 238.)

Cross references. — Authority of retired judge or judge emeritus of a state court to perform marriage ceremonies, § 15-7-25. Maintenance of records of marriage licenses, § 31-10-21.

Law reviews. — For article, "Conflict of Laws Structure and Vision: Updating a Venerable Discipline," see 31 Ga. St. U.L. Rev. 231 (2015).

For comment, "By the Power Vested in

Me? Licensing Religious Officials to Solemnize Marriage in the Age of Same-Sex Marriage,” see 63 Emory L. J. 979 (2014).

JUDICIAL DECISIONS

Public record of ceremonial marriage is conclusive evidence of such marriage, in the absence of a timely direct attack on such record, which attack must be supported by proper proof. *Guess v. Guess*, 202 Ga. 364, 43 S.E.2d 326 (1947).

Marriage certificate produced in alimony action presumed valid unless directly attacked. — In an action for alimony, after plaintiff introduces a certified copy of a marriage certificate, no issue as to the validity of the marriage is made in the absence of a direct attack on the record by the defendant. *Guess v. Guess*, 202 Ga. 364, 43 S.E.2d 326 (1947).

In action for alimony, evidence of defendant denying marriage was without probative value to contradict or disprove the written record of a ceremonial marriage

between the parties in absence of direct attack on record showing ceremonial marriage. *Guess v. Guess*, 202 Ga. 364, 43 S.E.2d 326 (1947).

License valid when ceremony performed, and license issued, in another state. — Failure to issue a marriage license in the county where the female resident resides does not invalidate the license if the ceremony was performed in another state and a valid license was issued in that state. *Perry v. Perry*, 173 Ga. App. 247, 326 S.E.2d 481 (1985).

Cited in *Maryland Cas. Co. v. Teele*, 70 Ga. App. 259, 28 S.E.2d 193 (1943); *Levin v. Blumberg*, 223 Ga. 865, 159 S.E.2d 66 (1968).

OPINIONS OF THE ATTORNEY GENERAL

License must be issued and ceremony performed in same county when female is nonresident. — There is only one occasion where there is a requirement that the license be issued and the ceremony be performed in the same county and that is when the female is not a resident of the State of Georgia. 1965-66 Op. Att’y Gen. No. 66-175.

Justice of the peace is authorized to perform marriage ceremony at any place a judge, city recorder, or minister might perform such ceremony. 1963-65 Op. Att’y Gen. p. 329; 1969 Op. Att’y Gen. No. 69-178.

Out-of-state judge has the authority to perform a marriage ceremony in Georgia. 1998 Op. Att’y Gen. No. U98-5.

Judges emeriti may perform ceremonies. — When a statute separate from the Emeritus Act provides that the ministerial act of performing a marriage ceremony may be carried out by any judge, a judge of the superior courts emeritus may

perform that function. 1975 Op. Att’y Gen. No. U75-3.

City recorder may perform marriages outside municipality. — City recorder, authorized by to perform marriage ceremonies, was not restricted to performing such ceremonies within the territorial limits of the city in which the person serves as recorder. 1975 Op. Att’y Gen. No. U75-96.

Officiant’s failure to return license does not invalidate marriage. — Law was a direction to the officer or minister and the failure to return the license with the certificate within the 30 days would not have any effect upon the validity of the marriage or the validity of the marriage’s record. 1957 Op. Att’y Gen. p. 95.

No witnesses are required to be present at marriage ceremony in order to make the marriage legal; this state recognizes common-law marriage, and no ceremony is actually essential to the validity of the marriage. 1970 Op. Att’y Gen. No. U70-148.

Probate judge may not decline to perform a marriage ceremony for the reason that the parties are not of the same race. 1983 Op. Att'y Gen. No. U83-31.

Person may have several residences, but only one place of domicile. 1981 Op. Att'y Gen. No. U81-5.

"Resides" in O.C.G.A. § 19-3-30 was intended to refer to "legal residence" or "domicile" rather than mere "residence," since a later section, O.C.G.A. § 19-3-45, only provides for liability of probate court judge who issues marriage license to female who, to the judge's knowledge, is domiciled in another county. 1981 Op. Att'y Gen. No. U81-5.

Acquisition of domicile. — Domicile is only acquired through concurrence of actual, physical residence and intention to remain. 1981 Op. Att'y Gen. No. U81-5.

Generally, minor child cannot change domicile of own volition. — Modern case law does not support idea of allowing a minor child to change the child's domicile of the child's own volition when that child has living parents whose rights have not been voluntarily or involuntarily relinquished. 1981 Op. Att'y Gen. No. U81-5.

Domicile of minor is that of the minor's parents, but this can be altered when usual parental authority and control over minor is ended by voluntary or involuntary relinquishment. 1981 Op. Att'y Gen. No. U81-5.

Marriage license may be issued to minor female only in county of her parents' domicile in absence of certain exceptions. 1981 Op. Att'y Gen. No. U81-5.

Previous marriage of minor female allows change in her domicile. — Previous marriage of minor female, with or without parents' consent, not only emancipates her from her parents' control, but also allows change in her domicile. 1981 Op. Att'y Gen. No. U81-5.

Probate judge may lawfully perform marriage ceremony in county other than one in which judge is elected and in which judge serves. 1980 Op. Att'y Gen. No. U80-7.

Prohibition on attorneys or clerks performing ceremony. — Neither attorneys appointed pursuant to O.C.G.A. § 15-9-13(a), nor the clerks of the probate court, may perform marriage ceremonies, in that such power is inherently a personal one of the probate judge pursuant to subsection (c) of O.C.G.A. § 19-3-30. 1988 Op. Att'y Gen. No. U88-22.

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Marriage, §§ 30, 33 et seq.

C.J.S. — 55 C.J.S., Marriage, §§ 26, 29, 33, 46.

ALR. — Validity of solemnized marriage as affected by absence of license required by statute, 61 ALR2d 847.

19-3-30.1. Premarital education.

(a) In applying for a marriage license, a man and woman who certify on the application for a marriage license that they have successfully completed a qualifying premarital education program shall not be charged a fee for a marriage license. The premarital education shall include at least six hours of instruction involving marital issues, which may include but not be limited to conflict management, communication skills, financial responsibilities, child and parenting responsibilities, and extended family roles. The premarital education shall be completed within 12 months prior to the application for a marriage license and the couple shall undergo the premarital education together. The premarital education shall be performed by:

(1) A professional counselor, social worker, or marriage and family therapist who is licensed pursuant to Chapter 10A of Title 43;

(2) A psychiatrist who is licensed as a physician pursuant to Chapter 34 of Title 43;

(3) A psychologist who is licensed pursuant to Chapter 39 of Title 43; or

(4) An active member of the clergy when in the course of his or her service as clergy or his or her designee, including retired clergy, provided that a designee is trained and skilled in premarital education.

(b) Each premarital education provider shall furnish each participant who completes the premarital education required by this Code section a certificate of completion. (Code 1981, § 19-3-30.1, enacted by Ga. L. 2005, p. 1485, § 2/HB 378.)

19-3-31. Issuance of licenses at satellite courthouses in certain counties.

Notwithstanding any other law, in all counties having a population in excess of 400,000 according to the United States decennial census of 1990 or any future such census or in counties where the county site is located in an unincorporated portion of the county, the judge of the probate court or his or her clerk shall be authorized to issue the marriage licenses provided for by Code Section 19-3-30 and to take and perform any and all other actions prescribed in Code Section 19-3-30 either at the courthouse located at the county site or at any permanent satellite courthouse within the county which has been established and constructed by the governing authority of the county and has been designated by the governing authority of the county as a courthouse annex or by similar designation has been established as an additional courthouse to the courthouse located at the county site. (Code 1933, § 53-201a, enacted by Ga. L. 1976, p. 684, § 1; Ga. L. 1981, p. 531, § 1; Ga. L. 1982, p. 3, § 19; Ga. L. 1995, p. 567, § 1; Ga. L. 1998, p. 1159, § 5.)

19-3-32. Penalty for improper issuance of license.

If any judge of the probate court or clerk issues a marriage license in violation of subsection (a) of Code Section 19-3-30, the judge or clerk, as the case may be, shall be guilty of a misdemeanor. (Ga. L. 1956, p. 43, § 2.)

RESEARCH REFERENCES

C.J.S. — 55 C.J.S., Marriage, § 21.

19-3-33. Application for marriage license; contents; supplement marriage report.

(a) A marriage license shall be issued on written application therefor, made by the persons seeking the license, verified by oath of the applicants. The application shall state that there is no legal impediment to the marriage and shall give the full present name of the proposed husband and the full present name of the proposed wife with their dates of birth, their present addresses, and the names of the father and mother of each, if known. If the names of the father or mother of either are unknown, the application shall so state. The application shall state that the persons seeking the license have or have not completed premarital education pursuant to Code Section 19-3-30.1. If the application states that the applicants seeking issuance of the license have completed premarital education, then the applicants shall submit a signed and dated certificate of completion issued by the premarital education provider.

(b) An application supplement-marriage report shall be prepared in connection with each marriage license. Except for the information in paragraph (3) of this subsection, the application supplement-marriage report shall be completed as a part of each application for a marriage license. The application supplement-marriage report shall state, at a minimum, the following:

- (1) The full name, date of birth, and social security number for each applicant;
- (2) The number this marriage would be for each applicant; and
- (3) After the ceremonial marriage has been performed, the date of the marriage ceremony and the county where the marriage ceremony occurred. (Ga. L. 1927, p. 224, § 1A; Code 1933, § 53-202; Ga. L. 1958, p. 214, § 1; Ga. L. 1997, p. 1592, § 2; Ga. L. 2005, p. 1485, § 3/HB 378.)

JUDICIAL DECISIONS

Cited in Maryland Cas. Co. v. Teele, 70 Ga. App. 259, 28 S.E.2d 193 (1943).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Marriage, § 30.
C.J.S. — 55 C.J.S., Marriage, § 26.

ALR. — Power of attorney to apply for or receive marriage license for another, 135 ALR 800.

19-3-33.1. Use of surname in application for marriage license.

(a) The form for application for marriage licenses shall be designed and printed in such a manner that applicants therefor shall designate the surnames which will be used as their legal surnames after the marriage is consummated. The legal surnames shall be designated as provided in subsection (b) of this Code section.

(b) A spouse may use as a legal surname his or her:

(1) Given surname or, in the event the given surname has been changed as provided in Chapter 12 of this title, the surname so changed;

(2) Surname from a previous marriage;

(3) Spouse's surname; or

(4) Surname as provided in paragraph (1) or (2) of this subsection in conjunction with the surname of the other spouse. (Code 1933, § 53-202.1, enacted by Ga. L. 1982, p. 950, § 1; Code 1981, § 19-3-33.1, enacted by Ga. L. 1982, p. 950, § 2; Ga. L. 1996, p. 373, § 1.)

Law reviews. — For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982).

19-3-34. Application to be filed; use as evidence; transmission to the state registrar.

(a) Except as provided in subsection (b) of this Code section, the application for a marriage license shall be filed in the office of the judge of the probate court before a marriage license shall be issued and shall remain in the permanent files in the office of the judge. It may be used as evidence in any court of law under the rules of evidence made and provided in similar cases.

(b) The application supplement-marriage report form provided for in Code Section 19-3-33 shall be transmitted to the state registrar pursuant to Code Section 31-10-21. No original or duplicate application supplement-marriage report form need be retained by any official or employee of the probate court beyond the time required for transmission to the state registrar of vital records and confirmation of such transmission and receipt. While in the temporary custody of the probate court, application supplement-marriage report forms shall not be available for public inspection or copying or admissible in any court of law. (Ga. L. 1927, p. 224, § 1A; Code 1933, § 53-203; Ga. L. 1997, p. 1592, § 3.)

JUDICIAL DECISIONS

Cited in Maryland Cas. Co. v. Teele, 70 Ga. App. 259, 28 S.E.2d 193 (1943); Pritchett v. Ellis, 201 Ga. 809, 41 S.E.2d 402 (1947).

RESEARCH REFERENCES

C.J.S. — 55 C.J.S., Marriage, § 46.

19-3-35. Issuance of license to applicants otherwise eligible.

When both applicants for a marriage license are eligible to receive that license pursuant to the other provisions of this chapter and that license is otherwise authorized to be issued pursuant to the other provisions of this chapter, that license may be issued immediately and without any waiting period. (Ga. L. 1927, p. 224, § 1A; Code 1933, § 53-202; Ga. L. 1958, p. 214, § 1; Ga. L. 1965, p. 335, § 3; Ga. L. 1972, p. 193, § 4; Ga. L. 1976, p. 1719, § 2; Ga. L. 1989, p. 605, § 1.)

Editor's notes. — Ga. L. 1972, p. 193, § 10, not codified by the General Assembly, effective July 1, 1972, provided that the purpose of the Act was to reduce the age of legal majority from 21 years of age to 18 years of age so that all persons, upon reaching the age of 18, would have the rights, privileges, powers, duties, responsibilities, and liabilities previously applicable to persons 21 years of age or over. The section further provided that the Act was not to be construed to have the effect of changing the age from 21 to 18 with respect to any legal instrument or court

decree in existence prior to the effective date of the Act when the instrument referred only to "the age of majority" or words of similar import, except that any guardianship of the person or property of a minor under the provisions of Title 49 of the 1933 Code, whether such guardianship was created by court order or decree entered before or after the effective date of the Act or under the will of a testator which was executed after the effective date of the Act, would terminate when the ward for whom such guardianship was created reached 18 years of age.

19-3-35.1. AIDS brochures; listing of HIV test sites; acknowledgment of receipt.

(a) Any term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for such term in Code Section 31-22-9.1.

(b) The Department of Public Health shall prepare a brochure describing AIDS, HIV, and the dangers, populations at risk, risk behaviors, and prevention measures relating thereto. That department shall also prepare a listing of sites at which confidential and anonymous HIV tests are provided without charge. That department shall further prepare a form for acknowledging that the brochures and listings have been received, as required by subsection (c) of this Code section. The brochures, listings, and forms prepared by the Department of Public Health (formerly known as the Department of Human Resources for

these purposes) under this subsection shall be prepared and furnished to the office of each judge of the probate court no later than October 1, 1988.

(c) On and after October 1, 1988, each person who makes application for a marriage license shall receive from the office of the probate judge at the time of the application the AIDS brochure and listing of HIV test sites prepared and furnished pursuant to subsection (b) of this Code section. On and after October 1, 1988, no marriage license shall be issued unless both the proposed husband and the proposed wife sign a form acknowledging that both have received the brochure and listing. (Code 1981, § 19-3-35.1, enacted by Ga. L. 1988, p. 1799, § 5; Ga. L. 2009, p. 453, § 1-16/HB 228; Ga. L. 2011, p. 705, § 6-3/HB 214.)

Editor's notes. — Ga. L. 1988, p. 1799, § 1, not codified by the General Assembly, provides: “The General Assembly finds that Acquired Immunodeficiency Syndrome (AIDS) and its causative agent, including Human Immunodeficiency Virus (HIV), pose a grave threat to the health, safety, and welfare of the people of this state. In the absence of any effective vaccination or treatment for this disease, it threatens almost certain death to all who contract it. The disease is largely transmitted through sexual contacts and intravenous drug use, not through casual contact, and, while deadly, is therefore preventable. The key component of the fight against AIDS is education. Through public education and counseling our citizens can learn how the disease is trans-

mitted and, thus, how to protect themselves and prevent its spread. The Department of Human Resources is encouraged to continue its efforts to educate all Georgians about the disease, its causative agent, and its means of transmission. In addition, voluntary testing should be encouraged for anyone who feels at risk of infection. While education, counseling, and voluntary testing are vital to the elimination of this epidemic, other measures are needed to protect the health of our citizens, and it is the intention of the General Assembly to enact such measures in the exercise of its police powers in order to deal with AIDS and HIV infection.”

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

19-3-36. Proof of age of applicants.

The judge of the probate court to whom the application for a marriage license is made shall satisfy himself or herself that the provisions set forth in Code Section 19-3-2 regarding age limitations are met. If the judge does not know of his or her own knowledge the age of a party for whom a marriage license is sought, the judge shall require the applicant to furnish the court with documentary evidence of proof of age in the form of a birth certificate, driver's license, baptismal certificate, certificate of birth registration, selective service card, court record, passport, immigration papers, alien papers, citizenship papers, armed forces discharge papers, armed forces identification card, or hospital admission card containing the full name and date of birth. In the event an applicant does not possess any of the above but appears to the judge to be at least 25 years of age, the applicant, in lieu of furnishing the judge with one of the above, may give an affidavit to the judge stating

the applicant's age. Applicants who have satisfactorily proved that they have reached the age of majority may be issued a marriage license immediately. (Orig. Code 1863, § 1661; Code 1868, § 1704; Code 1873, § 1705; Code 1882, § 1705; Civil Code 1895, § 2419; Civil Code 1910, § 2938; Ga. L. 1924, p. 53, § 2; Ga. L. 1927, p. 224, § 1; Code 1933, § 53-206; Ga. L. 1965, p. 335, § 6; Ga. L. 1972, p. 193, § 6; Ga. L. 1975, p. 1298, § 1; Ga. L. 1976, p. 1719, § 4; Ga. L. 1979, p. 872, § 2; Ga. L. 2006, p. 141, § 6B/HB 847.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2006, “or that such limitations are not required by virtue of an order issued pursuant to Code Section 15-11-183” was deleted at the end of the first sentence. There is no Code Section 15-11-183.

Editor's notes. — Ga. L. 1972, p. 193, § 10, not codified by the General Assembly, effective July 1, 1972, provided that the purpose of the Act was to reduce the age of legal majority from 21 years of age to 18 years of age so that all persons, upon reaching the age of 18, would have the rights, privileges, powers, duties, responsibilities, and liabilities previously applicable to persons 21 years of age or over. The section further provided that the Act was not to be construed to have the effect

of changing the age from 21 to 18 with respect to any legal instrument or court decree in existence prior to the effective date of the Act when the instrument referred only to “the age of majority” or words of similar import, except that any guardianship of the person or property of a minor under the provisions of Title 49 of the 1933 Code, whether such guardianship was created by court order or decree entered before or after the effective date of the Act or under the will of a testator which was executed after the effective date of the Act, would terminate when the ward for whom such guardianship was created reached 18 years of age.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 79 (2006).

JUDICIAL DECISIONS

Cited in Maryland Cas. Co. v. Teele, 70 Ga. App. 259, 28 S.E.2d 193 (1943).

OPINIONS OF THE ATTORNEY GENERAL

Former Code 1933, § 53-206 (see now O.C.G.A. § 19-3-36) took precedence over former Code 1933, § 53-102 (see now O.C.G.A. § 19-3-2) insofar as conflict existed between the two statutes; when documentary proof of an applicant's age was required only a birth or baptismal certificate will suffice. 1975 Op. Att'y Gen. No. U75-5.

Judge may dispense with documentary proof of age only if the judge is

certain, within the limits imposed by human observation and experience, that the applicants standing before the judge are of age; accordingly, “of his own knowledge” meant that a judge's observation of or prior personal acquaintance with the parties enabled the judge to conclude as a matter of practical certainty that the parties were of age. 1976 Op. Att'y Gen. No. U76-18.

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Marriage, §§ 17, 18.

C.J.S. — 55 C.J.S., Marriage, §§ 11, 26.

19-3-37. Parental consent to marriage of underage applicants; when necessary; how obtained.

(a) **Definitions.** As used in this Code section, the term:

(1) “Guardian” shall be held to include the same relationships between spouses as the relationships described in paragraph (2) of this subsection between parents and means:

(A) Any person at least five years older than the applicant standing in loco parentis to the applicant for at least two years;

(B) Any person at least five years older than the applicant with whom the applicant has lived for at least two years and who has or would be allowed to claim the applicant as a dependent for the purposes of a federal dependent income tax deduction;

(C) Any relative by blood or marriage at least five years older than the applicant and with whom the applicant has lived at least two years, when the whereabouts of the applicant’s parents are unknown; or

(D) A court appointed guardian.

(2) “Parent” means:

(A) Both parents if the parents are living together;

(B) The parent who has legal custody if the parents are divorced, separated, or widowed; or

(C) Either parent if the parents are living together but one parent is unavailable because of illness or infirmity or because he is not within the boundaries of this state or because physical presence is impossible.

(b) **When parental consent required; how obtained.** In cases where the parties applying for a license are 16 or 17 years of age, their ages to be proved to the judge of the probate court as provided in Code Section 19-3-36, the parents or guardians of each underage applicant shall appear in person before the judge and consent to the proposed marriage, provided that if physical presence because of illness or infirmity is impossible, an affidavit by the incapacitated parent or guardian along with an affidavit signed by a licensed attending physician stating that the parent or guardian is physically incapable of being present shall suffice. The licensed attending physician shall include only those physicians licensed under Chapter 34 of Title 43 or under corresponding requirements pertaining to licensed attending physicians in sister states.

(c) **Alternative methods for obtaining parental consent.**

(1) When the parents or guardians of any underage applicants requiring parental consent reside within the state but in a county other than the county where the marriage license is to be issued, it shall not be necessary for the parents or guardians to appear in person before the judge of the probate court of the latter county and consent to the proposed marriage, if the parents or guardians appear in person and consent to the proposed marriage before the judge of the county in which they reside.

(2) Where the parents or guardians of any underage applicants requiring parental consent reside outside the state, it shall not be necessary for the parents or guardians to appear in person before the judge of the probate court and consent to the proposed marriage, if the parents or guardians appear in person before the judicial authority of their county who is authorized to issue marriage licenses and consent to the proposed marriage before the judicial authority. If the parents or guardians are physically incapable of being present because of illness or infirmity, the illness or infirmity may be attested to by an attending physician licensed in such state, as is provided for in subsection (a) of this Code section.

(3) Where the alternate provisions for parental consent are utilized under paragraph (1) or (2) of this subsection, the parents or guardians shall obtain a certificate from the judge of the probate court or the proper judicial officer before whom they have appeared with the seal and title of the official appearing thereon, the certificate containing information to the effect that the parents or guardians appeared before the judge or judicial officer and consented to the proposed marriage. (Orig. Code 1863, § 1661; Code 1868, § 1704; Code 1873, § 1705; Code 1882, § 1705; Civil Code 1895, § 2419; Civil Code 1910, § 2938; Ga. L. 1924, p. 53, § 2; Ga. L. 1927, p. 224, § 1; Code 1933, § 53-204; Ga. L. 1965, p. 335, § 4; Ga. L. 1967, p. 31, § 1; Ga. L. 1968, p. 382, § 1; Ga. L. 1972, p. 193, § 5; Ga. L. 1976, p. 1719, § 3; Ga. L. 2006, p. 141, § 6C/HB 847.)

Editor's notes. — Ga. L. 1972, p. 193, § 10, not codified by the General Assembly, effective July 1, 1972, provided that the purpose of the Act was to reduce the age of legal majority from 21 years of age to 18 years of age so that all persons, upon reaching the age of 18, would have the rights, privileges, powers, duties, responsibilities, and liabilities previously applicable to persons 21 years of age or over. The section further provided that the Act was not to be construed to have the effect of changing the age from 21 to 18 with

respect to any legal instrument or court decree in existence prior to the effective date of the Act when the instrument referred only to "the age of majority" or words of similar import, except that any guardianship of the person or property of a minor under the provisions of Title 49 of the 1933 Code, whether such guardianship was created by court order or decree entered before or after the effective date of the Act or under the will of a testator which was executed after the effective date of the Act, would terminate when the

ward for whom such guardianship was created reached 18 years of age.

amendment of this Code section, see 23 Ga. St. U.L. Rev. 79 (2006).

Law reviews. — For article on 2006

JUDICIAL DECISIONS

Cited in *Maryland Cas. Co. v. Teele*, 70 Ga. App. 259, 28 S.E.2d 193 (1943); *Speer*

v. Calhoun, 252 Ga. 217, 312 S.E.2d 334 (1984).

OPINIONS OF THE ATTORNEY GENERAL

Use of word “parents” when requiring consent to marriage of minor means both father and mother, if living. 1958-59 Op. Att’y Gen. p. 90.

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Marriage, § 17.

C.J.S. — 55 C.J.S., Marriage, § 24.

19-3-38. Notification of parents of underage applicants; additional fee.

Reserved. Repealed by Ga. L. 2006, p. 141, § 6D/HB 847, effective July 1, 2006.

Editor’s notes. — This Code section was based on Code 1933, § 53-207, enacted by Ga. L. 1980, p. 438, § 1.

19-3-39. Certification and recordation of marriage after publication of banns.

If the Governor or any former Governor of this state, any judge, city recorder, magistrate, minister, or other authorized person joins in marriage persons whose banns have been published, the person shall certify the fact to the judge of the probate court of the county where the banns were published, who shall record the same in the same book in which marriage licenses are recorded. (Orig. Code 1863, § 1660; Code 1868, § 1703; Code 1873, § 1704; Code 1882, § 1704; Civil Code 1895, § 2418; Civil Code 1910, § 2937; Code 1933, § 53-209; Ga. L. 1983, p. 884, § 4-1; Ga. L. 2010, p. 394, § 2/SB 238.)

Cross references. — Further provisions regarding recording of marriage licenses, § 31-10-21.

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Marriage, § 35.

C.J.S. — 55 C.J.S., Marriage, §§ 25, 33.

19-3-40. Blood test for sickle cell disease; information to be provided.

(a) As used in this Code section, the term “blood test for sickle cell disease” means a blood test for sickle cell anemia, sickle cell trait, and other detectable abnormal hemoglobin.

(b) The Department of Public Health shall prepare information for public dissemination on the department’s website describing the importance of obtaining a blood test for sickle cell disease and explaining the causes and effects of such disease. Such information shall recommend that each applicant applying for a marriage license obtain a blood test for sickle cell disease prior to obtaining a marriage license. Such information may also be provided as a brochure or other document. The department shall make such information available in electronic format to the probate courts of this state which shall disseminate such information to all persons applying for marriage licenses. (Code 1981, § 19-3-40, enacted by Ga. L. 2009, p. 314, § 1/HB 184; Ga. L. 2011, p. 705, § 6-3/HB 214.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2009, “Department of Community Health” was substituted for “Department of Human Resources” in subsection (b).

Editor’s notes. — This Code section formerly pertained to blood tests, license refused to person infected with communicable syphilis, and treatment. The former

Code section was based on Ga. L. 1949, p. 1054, §§ 1-6, 9; Ga. L. 1951, p. 674, § 1; Ga. L. 1952, p. 217, § 1; Ga. L. 1958, p. 685, § 1; Ga. L. 1972, p. 782, § 1; Ga. L. 1977, p. 737, §§ 1-3; Ga. L. 1978, p. 936, § 1; Ga. L. 1986, p. 982, § 7.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

19-3-41. Marriage manual; preparation by Department of Public Health; distribution at issuance of license; rules and regulations.

(a) The Department of Public Health shall prepare a marriage manual for distribution by the judge of the probate court or his clerk to all applicants for a marriage license. The manual shall include, but shall not be limited to, material on family planning.

(b) The manual provided for in subsection (a) of this Code section shall be issued by the judge of the probate court or his clerk to applicants for a marriage license at the same time the marriage license is issued.

(c) The Department of Public Health shall promulgate rules and regulations to implement this Code section.

(d) In order to be nonsectarian, the manual will include resource referral information for those who might have questions regarding religious beliefs in the areas covered by the marriage manual. (Code 1933, § 53-201.1, enacted by Ga. L. 1973, p. 879, § 1; Ga. L. 2009, p. 453, § 1-4/HB 228; Ga. L. 2011, p. 705, § 6-3/HB 214.)

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

19-3-42. Effect on marriage of want of authority in person officiating.

A marriage which is valid in other respects and supposed by the parties to be valid shall not be affected by want of authority in the minister, Governor or any former Governor of this state, judge, city recorder, magistrate, or other person to solemnize the same; nor shall such objection be heard from one party who has fraudulently induced the other to believe that the marriage was legal. (Orig. Code 1863, § 1667; Code 1868, § 1708; Code 1873, § 1709; Code 1882, § 1709; Civil Code 1895, § 2423; Civil Code 1910, § 2492; Code 1933, § 53-213; Ga. L. 1983, p. 884, § 4-1; Ga. L. 2010, p. 394, § 3/SB 238.)

Law reviews. — For comment, “By the Power Vested in Me? Licensing Religious Officials to Solemnize Marriage in the Age of Same-Sex Marriage,” see 63 Emory L.J. 979 (2014).

JUDICIAL DECISIONS

Cited in *White v. White*, 41 Ga. App. 394, 153 S.E. 203 (1930).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Marriage, §§ 33, 34. **ALR.** — Validity of marriage as affected by lack of legal authority of person solemnizing it, 13 ALR4th 1323.
C.J.S. — 55 C.J.S., Marriage, §§ 28, 29.

19-3-43. Marriage in another state; effect in this state.

All marriages solemnized in another state by parties intending at the time to reside in this state shall have the same legal consequences and effect as if solemnized in this state. Parties residing in this state may not evade any of the laws of this state as to marriage by going into another state for the solemnization of the marriage ceremony. (Orig. Code 1863, § 1668; Code 1868, § 1709; Code 1873, § 1710; Code 1882,

§ 1710; Civil Code 1895, § 2424; Civil Code 1910, § 2943; Code 1933, § 53-214.)

JUDICIAL DECISIONS

Valid marriage in another state is valid here, although one party labors under disability in this state, provided the parties acted in good faith and did not go to the foreign state for the mere purpose of evading the provisions of Georgia law. *Brown v. Sheridan*, 83 Ga. App. 725, 64 S.E.2d 636 (1951); *Bituminous Cas. Corp. v. Wacht*, 84 Ga. App. 602, 66 S.E.2d 757 (1951).

Effect of marriage contrary to public policy of state. — While the *lex loci*, as a general rule, governs questions of marriage, it is subject, in practice, to the

great controlling idea, that it will not be enforced, by comity, if it involves anything immoral, contrary to general policy, or violative of the conscience of the state called on to give it effect. *Eubanks v. Banks*, 34 Ga. 407 (1866).

Cited in *Smith v. Smith*, 84 Ga. 440, 11 S.E. 496 (1890); *Georgia v. Tutty*, 41 F. 753 (S.D. Ga. 1890); *Rainey v. Moon*, 187 Ga. 712, 2 S.E.2d 405 (1939); *Montgomery v. Gable*, 61 Ga. App. 859, 7 S.E.2d 426 (1940); *Perry v. Perry*, 173 Ga. App. 247, 326 S.E.2d 481 (1985).

OPINIONS OF THE ATTORNEY GENERAL

If alleged marriage is valid when performed, it is valid in this state, regardless of the fact that the license was

invalid where the ceremony was performed or that no license at all was taken out. 1965-66 Op. Att'y Gen. No. 66-240.

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Marriage, § 62 et seq.

C.J.S. — 55 C.J.S., Marriage, § 3.

ALR. — Recognition of foreign marriage as affected by the conditions or manner of dissolving it under the foreign law, or the toleration of polygamous marriages, 74 ALR 1533.

Recognition of foreign marriage as affected by policy in respect of incestuous marriages, 117 ALR 186.

Public policy of forum against recogni-

tion of marriage valid (or voidable only) by the law of the place where it was celebrated, as affected by fact that neither of the parties was domiciled at the forum at the time of the marriage, 127 ALR 437.

Conflict of laws as to validity of marriage attacked because of nonage, 71 ALR2d 687.

Recognition by forum state of marriage which, although invalid where contracted, would have been valid if contracted within forum state, 82 ALR3d 1240.

19-3-44. Return of license to parties.

(a) The judge of the probate court of each county shall return to the parties to a marriage the license and the return thereon after the same have been recorded as provided by law. This subsection shall be applicable to all marriage licenses and the returns thereon recorded after March 25, 1958.

(b) Upon request of either of the parties, the judge of the probate court of each county is authorized, as to marriage licenses with the returns thereon recorded prior to March 25, 1958, to return the license:

(1) To the parties to the marriage if the marriage is not dissolved and the parties are not living in a state of separation;

(2) To the surviving party to the marriage if one of the parties is deceased; or

(3) To the party first requesting the license if the parties are divorced. (Ga. L. 1958, p. 331, §§ 1, 2.)

Cross references. — Maintenance of records of marriage licenses generally, § 31-10-21.

19-3-45. Forfeiture for improper issuance of marriage license; by whom and when action brought; attorney's fee and court costs; disposition of balance of recovery.

Any judge of the probate court who by himself or his clerk knowingly grants a license without the required consent or without proper precaution in inquiring into the question of minority shall forfeit the sum of \$500.00 for every such act, to be recovered at the action of the father or mother, if living, and, if not, at the action of the guardian or legal representative of either of such contracting parties, provided that under no circumstances shall more than one action be maintained by the father or mother, guardian, or legal representative of either of such contracting parties in connection with any one marriage; and provided, further, that no such action shall be brought prior to the expiration of 60 days from the date that the marriage becomes public and that no action under this Code section shall be maintained after the expiration of 12 months from the date the marriage becomes public. A recovery shall be had against the offending judge and his bondsmen. From the recovery a reasonable attorney's fee, to be fixed by the presiding judge trying the case, shall be paid to the attorney representing the person bringing the action and, after the payment of court costs, one-third of the remainder of the recovery shall be paid to the person bringing the action; and the remaining two-thirds shall be paid to the county educational fund of the county of the judge's residence. A judge who in good faith destroys physician's certificates of pregnancy and all records of the certificates under his control in accordance with the provisions of law shall not be prosecuted under this Code section for failure to require such a certificate from the applicants for a marriage license, if a birth certificate is issued for a child born to the applicants within the period of gestation after the marriage license was issued. (Orig. Code 1863, § 1661; Code 1868, § 1704; Code 1873, § 1705; Code 1882, § 1705; Civil Code 1895, § 2419; Civil Code 1910, § 2938; Ga. L. 1924, p. 53, § 2; Ga. L. 1927, p. 224, § 1; Code 1933, § 53-208; Ga. L. 1939, p. 219, § 1; Ga. L. 1939, p. 221, § 1; Ga. L. 1965, p. 335, § 8; Ga. L. 1972, p. 193, § 7; Ga. L. 1976, p. 1719, § 5; Ga. L. 1989, p. 605, § 2.)

Editor's notes. — Ga. L. 1972, p. 193, § 10, not codified by the General Assembly, effective July 1, 1972, provided that the purpose of the Act was to reduce the age of legal majority from 21 years of age to 18 years of age so that all persons, upon reaching the age of 18, would have the rights, privileges, powers, duties, responsibilities, and liabilities previously applicable to persons 21 years of age or over. The section further provided that the Act was not to be construed to have the effect of changing the age from 21 to 18 with respect to any legal instrument or court

decree in existence prior to the effective date of the Act when the instrument referred only to "the age of majority" or words of similar import, except that any guardianship of the person or property of a minor under the provisions of Title 49 of the 1933 Code, whether such guardianship was created by court order or decree entered before or after the effective date of the Act or under the will of a testator which was executed after the effective date of the Act, would terminate when the ward for whom such guardianship was created reached 18 years of age.

JUDICIAL DECISIONS

Applicability of 1939 amendments to this section. — Amendments of 1939 to this statute were intended to apply to bonds previously executed, and as thus construed they are not unconstitutional as impairing the obligation of contracts. If the bond contemplated such possible in-

crease in liability, then the later statutes would not impair its obligation. *National Sur. Corp. v. Gatlin*, 192 Ga. 293, 15 S.E.2d 180 (1941).

Cited in *Maryland Cas. Co. v. Teele*, 70 Ga. App. 259, 28 S.E.2d 193 (1943).

RESEARCH REFERENCES

C.J.S. — 55 C.J.S., Marriage, § 21.

ALR. — Recovery of cumulative statutory penalties, 71 ALR2d 986.

19-3-46. Forfeiture for officiating at marriage without license or banns.

The Governor or any former Governor of this state, any judge, city recorder, magistrate, minister, or other person authorized to perform the marriage ceremony who joins in marriage any couple without a license or the publication of banns shall forfeit the sum of \$500.00, to be recovered and appropriated as set forth in Code Section 19-3-45. (Orig. Code 1863, § 1662; Code 1868, § 1705; Code 1873, § 1706; Code 1882, § 1706; Civil Code 1895, § 2420; Civil Code 1910, § 2939; Code 1933, § 53-210; Ga. L. 1983, p. 884, § 4-1; Ga. L. 2010, p. 394, § 4/SB 238.)

Law reviews. — For comment, "By the Power Vested in Me? Licensing Religious Officials to Solemnize Marriage in the Age

of Same-Sex Marriage," see 63 Emory L. J. 979 (2014).

RESEARCH REFERENCES

C.J.S. — 55 C.J.S., Marriage, § 30.

ALR. — Recovery of cumulative statutory penalties, 71 ALR2d 986.

19-3-47. Penalty for filing false information relative to application for license.

Any person who willfully furnishes false information in connection with the application and issuance of any marriage license, either in the application for the license, in furnishing proof of age, or in the physician’s certificate as to pregnancy, shall be guilty of a misdemeanor. (Code 1933, § 53-9912, enacted by Ga. L. 1965, p. 335, § 9.)

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Marriage, §§ 31, 32.	ALR. — Perjury as predicated upon statements upon application for marriage license, 101 ALR 1263.
C.J.S. — 55 C.J.S., Marriage, § 26.	

19-3-48. Penalty for officiating at illegal marriage ceremony.

If the Governor or any former Governor of this state, any judge, city recorder, magistrate, minister, or other person authorized to perform the marriage ceremony joins together in matrimony any man and woman without a license or the publication of banns or if the person performing the marriage ceremony knows of any disability of either of the parties which would render a contract of marriage improper and illegal, that person shall be guilty of a misdemeanor. (Cobb’s 1851 Digest, pp. 818, 819; Code 1863, § 4441; Code 1868, § 4482; Code 1873, § 4566; Code 1882, § 4566; Penal Code 1895, § 637; Penal Code 1910, § 677; Code 1933, § 53-9901; Ga. L. 1982, p. 3, § 19; Ga. L. 1983, p. 884, § 4-1; Ga. L. 2010, p. 394, § 5/SB 238.)

Law reviews. — For comment, “By the Power Vested in Me? Licensing Religious Officials to Solemnize Marriage in the Age	of Same-Sex Marriage,” see 63 Emory L. J. 979 (2014).
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JUDICIAL DECISIONS

Officiant’s knowledge as to foreign residence did not violate section. — Fact that the license was issued by the ordinary (now probate judge) of a county in which the female did not reside would	not in itself render the marriage illegal, and therefore the knowledge of this fact by the marrying official would not constitute a violation of law. <i>Minshew v. State</i> , 25 Ga. App. 240, 102 S.E. 906 (1920).
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RESEARCH REFERENCES

C.J.S. — 55 C.J.S., Marriage, § 30.

19-3-49. Acceptance by judges of tips, consideration, or gratuities.

In addition to any compensation otherwise provided by law, any judge who performs a marriage ceremony at any time, except normal office hours, may receive and retain as personal income any tip, consideration, or gratuity voluntarily given to such judge for performing such marriage ceremony. (Code 1981, § 19-3-49, enacted by Ga. L. 1992, p. 1488, § 1.)

ARTICLE 3

MARRIAGE ARTICLES, CONTRACTS, AND SETTLEMENTS

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Transfer of Assets in Fraud of Spouse's Antenuptial Contractual Rights, 14 POF2d 755.

ALR. — Necessity, in action against husband for necessities furnished wife, of proving husband's failure to provide necessities, 19 ALR4th 432.

Modern status of views as to validity of premarital agreements contemplating divorce or separation, 53 ALR4th 22.

Enforceability of premarital agreements governing support or property

rights upon divorce or separation as affected by circumstances surrounding execution—modern status, 53 ALR4th 85.

Enforceability of premarital agreements governing support or property rights upon divorce or separation as affected by fairness or adequacy of those terms—modern status, 53 ALR4th 161.

Antenuptial contracts: parties' behavior during marriage as abandonment, estoppel, or waiver regarding contractual rights, 56 ALR4th 998.

19-3-60. Marriage as valuable consideration.

Marriage is a valuable consideration; and a spouse stands, as to property of the other spouse settled upon a spouse by marriage contract, as do other purchasers for value, provided that by the contract a spouse shall not incapacitate himself from paying his existing just debts. (Orig. Code 1863, § 1731; Code 1868, § 1772; Code 1873, § 1782; Code 1882, § 1782; Civil Code 1895, § 2487; Civil Code 1910, § 3006; Code 1933, § 53-403.)

Cross references. — Consideration generally, § 13-3-40 et seq.

JUDICIAL DECISIONS

Marriage is valuable consideration and innocent purchaser on such consideration will be protected even against subsequent bona fide purchaser. *Nally v. Nally*, 74 Ga. 669 (1885).

Marriage is sufficient consideration to support deed, and if the woman is guilty of no fraud, and enters into the settlement without notice of a debt, due from the man to a third party, she will be

protected in the property conveyed by the settlement, against that debt. *Marshall v. Morris*, 16 Ga. 368 (1854); *Sheridan v. Sheridan*, 153 Ga. 262, 111 S.E. 906 (1922).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Husband and Wife, § 106.

C.J.S. — 41 C.J.S., Husband and Wife, §§ 93 et seq., 111.

ALR. — Promise to marry as consideration for note or other executory obligation made some time thereafter, 63 ALR 1184.

What constitutes promise made in or upon consideration of marriage within statute of frauds, 75 ALR2d 633.

Action based upon reconveyance, upon promise of reconciliation, of property realized from divorce award or settlement, 99 ALR3d 1248.

19-3-61. Effect of minority of party.

The minority of either party to marriage articles, as defined in subsection (a) of Code Section 19-3-62, or to a marriage contract shall not invalidate it, so long as the party is of lawful age to contract marriage. (Orig. Code 1863, § 1734; Code 1868, § 1775; Code 1873, § 1784; Code 1882, § 1784; Civil Code 1895, § 2489; Civil Code 1910, § 3008; Code 1933, § 53-402.)

Law reviews. — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969).

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Marriage, § 16.

C.J.S. — 41 C.J.S., Husband and Wife, §§ 120-122.

19-3-62. “Marriage articles” defined; enforceable in equity; executed contracts distinguished.

(a) As used in this article, the term “marriage articles” means any antenuptial agreement between the parties to a marriage contemplating a future settlement upon one spouse. Marriage articles, whether by parol or in writing, may be executed and enforced by a court of equity at the instance of the spouse at any time during the life of the other spouse, so long as the rights of third persons, purchasers, or creditors, in good faith and without notice, are not affected thereby.

(b) An agreement perfect in itself which needs no future conveyance to effect its purposes is an executed contract and does not come under the definition of marriage articles. (Orig. Code 1863, § 1724; Code 1868, § 1765; Code 1873, § 1775; Code 1882, § 1775; Civil Code 1895, § 2480; Civil Code 1910, § 2999; Code 1933, § 53-401.)

Cross references. — Effect of marriage on debt created prior to ceremony, § 13-4-82.

Law reviews. — For article, “Parentage Prenups and Midnups,” see 31 Ga. St. U.L. Rev. 343 (2015).

JUDICIAL DECISIONS

Equity has jurisdiction to set aside marriage settlements. Gefken v. Graef, 77 Ga. 340 (1886).

Husband cannot alter antenuptial agreement by postnuptial deed. Maxwell v. Hoppie, 70 Ga. 152 (1883).

Final and complete settlement. — Prenuptial agreement between decedent husband and wife, wherein the wife agreed not to assert any claim on the husband’s estate, constituted a final and complete settlement which the mother and sister of the decedent had standing to enforce. Sieg v. Sieg, 265 Ga. 384, 455 S.E.2d 830 (1995).

Requirement of attestation by two witnesses. — In a divorce case in which a wife appealed the trial court’s denial of the wife’s motion for partial summary judgment on her claim that the antenuptial agreement was unenforceable, the antenuptial agreement was a marriage contract pursuant to O.C.G.A. § 19-3-62(b), and the agreement was un-

enforceable since the agreement had only been signed by one witness, and O.C.G.A. § 19-3-63 required that every marriage contract in writing, made in contemplation of marriage, must be attested by at least two witnesses. Sullivan v. Sullivan, 286 Ga. 53, 684 S.E.2d 861 (2009).

Trial court did not abuse discretion in setting aside agreement. — Because the evidence supported a finding that one spouse failed to make a full and fair disclosure of assets, income, and liabilities to the other spouse prior to the execution of an antenuptial agreement, hiding specific facts of the spouse’s true financial status, the trial court did not abuse the court’s discretion in setting the agreement aside. Blige v. Blige, 283 Ga. 65, 656 S.E.2d 822 (2008).

Cited in Acree v. Acree, 201 Ga. 359, 40 S.E.2d 54 (1946); Reynolds v. Reynolds, 217 Ga. 234, 123 S.E.2d 115 (1961); Wilcox v. Wilcox, 225 Ga. 472, 169 S.E.2d 819 (1969).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Husband and Wife, §§ 81 et seq., 107, 108, 113, 126.

C.J.S. — 41 C.J.S., Husband and Wife, §§ 58, 59, 93, 94, 111 et seq., 118, 119, 127, 136, 138, 140 et seq.

ALR. — Applicability of succession tax law to antenuptial contract, 44 ALR 1475.

Validity of postnuptial agreement releasing or waiving rights of surviving spouse on death of other spouse, 49 ALR 116.

Agreement not in contemplation of divorce for release of wife’s right to support

as contrary to public policy, 50 ALR 351; 120 ALR 1334.

Rule regarding revocation of will by marriage as affected by antenuptial agreement or settlement, 92 ALR 1010.

Spouse’s right to take under other spouse’s will as affected by antenuptial or postnuptial agreement or property settlement, 53 ALR2d 475.

Declaratory judgment, during lifetime of spouses, as to construction of antenuptial agreement dealing with property rights of survivor, 80 ALR2d 941.

19-3-63. Construction of marriage contract; attestation.

Every marriage contract in writing, made in contemplation of marriage, shall be liberally construed to carry into effect the intention of the parties and no want of form or technical expression shall invalidate the same. The contract must be attested by at least two witnesses. (Orig.

Code 1863, § 1726; Code 1868, § 1767; Code 1873, § 1777; Code 1882, § 1777; Civil Code 1895, § 2482; Civil Code 1910, § 3001; Code 1933, § 53-407.)

History of Code section. — The language of this Code section is derived in part from the decisions in *Blake v. Irwin*, 3 Ga. 367 (1847) and *Lafitte v. Lawton*, 25 Ga. 305 (1858).

Law reviews. — For annual survey of law on domestic relations, see 62 *Mercer L. Rev.* 105 (2010). For article, “Parentage Prenups and Midnups,” see 31 *Ga. St. U.L. Rev.* 343 (2015).

JUDICIAL DECISIONS

Children provided for in settlement, when no words indicate different import are presumed children of marriage which gives occasion to the settlement. *Knorr v. Raymond*, 73 Ga. 749 (1884).

Requirement for two signatures enforced. — In a divorce case in which a wife appealed the trial court’s denial of the wife’s motion for partial summary judgment on her claim that the antenuptial agreement was unenforceable, the antenuptial agreement was a marriage contract pursuant to O.C.G.A. § 19-3-62(b), and the agreement was unenforceable since the agreement had only been signed by one witness, and O.C.G.A. § 19-3-63 required that every marriage contract in writing, made in contemplation of marriage, must be attested by at least two witnesses. *Sullivan v. Sullivan*, 286 Ga. 53, 684 S.E.2d 861 (2009).

Parties’ premarital agreement, viewed as a whole, was a marriage contract made in contemplation of marriage, not a prenuptial agreement made in anticipation of divorce, and the trial court therefore correctly denied enforcement of the agreement due to noncompliance with the attestation requirement of O.C.G.A. § 19-3-63. *Fox v. Fox*, 291 Ga. 492, 731 S.E.2d 676 (2012).

Attendant and surrounding circumstances may always be resorted to, and proof of the local usage or understanding of words is admissible to arrive at the meaning intended by the parties. *Brown v. Ransey*, 74 Ga. 210 (1884).

Misrepresentation or nondisclosure of material fact. — Husband’s argument that an antenuptial agreement contained a severability clause and that, under O.C.G.A. § 13-1-8(a), the failure to

abide by the portion of the agreement concerning attachment of lists showing property owned or held did not void the entire agreement was without merit; the trial court was not bound by the language of the agreement as to severability, but the question was whether there was a misrepresentation or nondisclosure of a material fact. *Alexander v. Alexander*, 279 Ga. 116, 610 S.E.2d 48 (2005).

Intention of parties must be carried out even though court has to disregard rules of grammatical construction to effectuate the intent. *Ardis v. Printup*, 39 Ga. 648 (1869); *Brown v. Ransey*, 74 Ga. 210 (1884).

Use of void antenuptial agreement. — Trial court committed reversible error by permitting testimony as to the contents of the parties antenuptial agreement into the final decree of divorce because that agreement had been previously ruled void and unenforceable, and the existence of the agreement and its contents were not to be considered by the fact-finder; hence, the matter was remanded for a new trial. *Chubbuck v. Lake*, 281 Ga. 218, 635 S.E.2d 764 (2006).

Because a prenuptial agreement addressing alimony issues was not an agreement made in contemplation of marriage, the trial court erred in ruling that O.C.G.A. § 19-3-63 applied; however, the criteria in *Scherer v. Scherer*, 249 Ga. 635 (1982) was satisfied by the disclosure of the husband’s assets. *Dove v. Dove*, 285 Ga. 647, 680 S.E.2d 839 (2009).

Contract made in contemplation of divorce, not marriage. — Trial court did not err in upholding the validity of an antenuptial agreement because the agreement was not subject to the dual

attestation requirement of O.C.G.A. § 19-3-63 when it was a contract made in contemplation of divorce, not a contract made in contemplation of marriage; the antenuptial agreement addressed ali-

mony, and it referred explicitly to the possibility of divorce, explaining that the parties wanted the agreement to govern in that event. *Lawrence v. Lawrence*, 286 Ga. 309, 687 S.E.2d 421 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Husband and Wife, §§ 90, 103 et seq.

C.J.S. — 41 C.J.S., Husband and Wife, §§ 128, 129.

ALR. — Declaratory judgment, during lifetime of spouses, as to construction of antenuptial agreement dealing with property rights of survivor, 80 ALR2d 941.

Modern status of views as to validity of premarital agreements contemplating divorce and separation, 53 ALR4th 22.

Enforceability of premarital agree-

ments governing support or property rights upon divorce or separation as affected by circumstance surrounding execution — modern status, 53 ALR4th 85.

Enforceability of premarital agreements governing support or property rights upon divorce or separation as affected by fairness or adequacy of those terms — modern status, 53 ALR4th 161.

Failure to disclose extent or value of property owned as ground for avoiding premarital contract, 3 ALR5th 394.

19-3-64. Voluntary execution of antenuptial agreement; conveyance of property during marriage.

A spouse may voluntarily execute an agreement described in Code Section 19-3-62 or he may at any time during the marriage, either indirectly through trustees or directly to his spouse, convey any property to which he has title, subject to the rights of prior purchasers or creditors without notice. (Orig. Code 1863, § 1725; Code 1868, § 1766; Code 1873, § 1776; Code 1882, § 1776; Civil Code 1895, § 2481; Civil Code 1910, § 3000; Code 1933, § 53-404.)

History of Code section. — The language of this Code section is derived in part from the decisions in *Blake v. Irwin*, 3

Ga. 345 (1847) and *Lafitte v. Lawton*, 25 Ga. 305 (1858).

RESEARCH REFERENCES

C.J.S. — 41 C.J.S., Husband and Wife, §§ 144, 145.

ALR. — Conveyance of interest in community property by one spouse to other, 37 ALR 282.

Action for tortious interference with bequest as precluded by will contest remedy, 18 ALR5th 211.

JUDICIAL DECISIONS

Trial court did not abuse discretion in setting aside agreement. — Because the evidence supported a finding that one spouse failed to make a full and fair disclosure of assets, income, and liabilities to the other spouse prior to the execution of

an antenuptial agreement, hiding specific facts of the spouse's true financial status, the trial court did not abuse the court's discretion in setting the agreement aside. *Blige v. Blige*, 283 Ga. 65, 656 S.E.2d 822 (2008).

19-3-65. Powers of superior court judge in appointing and removing trustees and protecting trust estate; recordation of proceedings.

The judge of the superior court of the county of a spouse's domicile may at any time, upon petition, exercise equitable powers in appointing, removing, or substituting trustees or in granting any order for the protection of the trust estate, exercising a wise discretion as to the terms on which the appointment shall be made or on which the order shall be granted. The proceeding in each case shall be transmitted to the clerk of the superior court, to be recorded in the book of the minutes of the court. (Orig. Code 1863, § 1729; Code 1868, § 1770; Code 1873, § 1780; Code 1882, § 1780; Civil Code 1895, § 2485; Civil Code 1910, § 3004; Code 1933, § 53-405.)

JUDICIAL DECISIONS

Removal of trustees. — Former Code 1933, § 53-405 (see now O.C.G.A. § 19-3-65) does not authorize filing action to remove trustees in any county other than county of trustees' residence. If that section is capable of being otherwise construed, it is in direct conflict with Ga.

Const. 1976, Art. I, Sec. II, Para. VIII and Art. XI, Sec. I, Para I (see now Ga. Const. 1983, Art. I, Sec. II, Para. V) and must yield to the Constitution which is the paramount law. *First Nat'l Bank v. Rowley*, 224 Ga. 440, 162 S.E.2d 294 (1968).

RESEARCH REFERENCES

ALR. — Resignation or removal of executor, administrator, guardian, or trustee, before final administration or be-

fore termination of trust, as affecting his compensation, 96 ALR3d 1102.

19-3-66. In whose favor marriage contracts, postnuptial settlements, and marriage articles enforced.

Marriage contracts and postnuptial settlements shall be enforced at the instance of all persons in whose favor there are limitations of the estate. Marriage articles, as defined in subsection (a) of Code Section 19-3-62, shall be executed only at the instance of the parties to the contract and the offspring of the marriage and their heirs; but, when executed at their instance, the court may execute also in favor of other persons and volunteers. (Orig. Code 1863, § 1730; Code 1868, § 1771; Code 1873, § 1781; Code 1882, § 1781; Civil Code 1895, § 2486; Civil Code 1910, § 3005; Code 1933, § 53-406.)

Law reviews. — For article, "Parentage Prenups and Midnups," see 31 Ga. St. U.L. Rev. 343 (2015).

JUDICIAL DECISIONS

Interested parties to action construing contract. — When the construction of a doubtful marriage settlement is sought it is proper to make all persons, who may have an interest under any possible construction of the instrument, parties. *Carswell v. Schley*, 56 Ga. 101 (1876).

Parties within scope of marriage settlements. — Those having natural claims upon the parties, such as the wife and offspring, and those claiming under or through them, alone come within the scope of the marriage consideration. The fact that collaterals are first mentioned in the limitations of the articles does not bring them within the reach and influence of the agreement. *Merritt v. Scott*, 6 Ga. 563 (1849).

Prenuptial agreement between decedent husband and wife, wherein the wife agreed not to assert any claim on the husband's estate, constituted a final and complete settlement which the mother and sister of the decedent had standing to

enforce. *Sieg v. Sieg*, 265 Ga. 384, 455 S.E.2d 830 (1995).

Reformation. — Persons, though provided for in a marriage settlement, if they are not parties to it, nor heirs at law of parties thereto, and are not embraced within the scope of the marriage consideration, cannot have it reformed in a court of chancery. *Merritt v. Scott*, 6 Ga. 563 (1849); *Cook v. Walker*, 21 Ga. 370 (1857); *Cartledge v. Cutliff*, 29 Ga. 758 (1859).

Changes to agreement. — Final version of the settlement agreement adopted by the trial court over the objections of the defendant included several provisions either not included in the original or different than those initially agreed upon; those changes and additions to the parties agreement rendered the trial court's adoption of the subsequently drafted final version error. *DeGarmo v. DeGarmo*, 269 Ga. 480, 499 S.E.2d 317 (1998).

Cited in *Ferrill v. Perryman*, 34 Ga. 576 (1866).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Husband and Wife, § 133.

C.J.S. — 41 C.J.S., Husband and Wife, §§ 111 et seq., 136.

ALR. — Divorce or judicial separation as affecting marriage settlement, 95 ALR 1469.

Setting aside antenuptial contract or marriage settlement on ground of failure of spouse to make proper disclosure of property owned, 27 ALR2d 883.

Declaratory judgment, during lifetime of spouses, as to construction of antenuptial agreement dealing with property rights of survivor, 80 ALR2d 941.

Noncompliance with statutory require-

ments concerning form of execution or acknowledgment as affecting validity or enforceability of written antenuptial agreement, 16 ALR3d 370.

Enforcement of antenuptial contract or settlement conditioned upon marriage, where marriage was subsequently declared void, 46 ALR3d 1403.

Separation agreements: enforceability of provision affecting property rights upon death of one party prior to final judgment of divorce, 67 ALR4th 237.

Failure to disclose extent or value of property owned as ground for avoiding premarital contract, 3 ALR5th 394.

19-3-67. Recordation of marriage contracts and voluntary settlements; effect of failure to record.

(a) Every marriage contract and every voluntary settlement made by one spouse with the other, whether or not in execution of marriage articles, shall be recorded in the office of the clerk of the superior court of the county of the residence of the spouse making the settlement

within three months after the execution thereof. If such a contract or settlement is made in another state and the parties subsequently move into this state, the same shall be recorded within three months from the move. If the settled property is in this state and the parties reside in another state, the record shall be made in the county where the property is located within the time specified above.

(b) A contract or settlement which is not recorded as provided in subsection (a) of this Code section shall be of no force or effect against one who, bona fide and without notice, becomes a purchaser, creditor, or surety before the actual recording of the same. (Laws 1847, Cobb's 1851 Digest, p. 180; Code 1863, § 1727; Code 1868, § 1768; Code 1873, § 1778; Code 1882, § 1778; Civil Code 1895, § 2483; Civil Code 1910, § 3002; Code 1933, § 53-408.)

JUDICIAL DECISIONS

Effect of law was to require record of instrument, on pain of forfeiture, as against certain dealers with the parties. It is but fair that a law of this character should be strictly construed, and not extended beyond its terms. *Cummins v. Boston & Gunby*, 25 Ga. 277 (1858); *Cloud & Shackelford v. Dupree*, 28 Ga. 170 (1859); *Cunningham v. Schley*, 41 Ga. 426 (1870).

Section not applicable to actions between parties. — As between the parties, a marriage contract is valid, though it is not recorded. *Reinhart v. Miller*, 22 Ga. 402 (1857); *Logan v. Goodall*, 42 Ga. 95 (1871).

Bona fide creditors. — Bona fide creditor is one who gives credit on the faith of the property contained in the marriage settlement. *Cloud & Shackelford v. Dupree*, 28 Ga. 170 (1859); *Brown v. Spivey*, 53 Ga. 155 (1874).

Person must have become creditor before actual record of settlement. *Brown v. Spivey*, 53 Ga. 155 (1874).

What constitutes voluntary settlement. — Deed from the husband to the wife for love and affection is a voluntary settlement and must be recorded within three months to vest title in the wife against the claim of a surety who endorses for the husband before the date of the record. *Sumner v. Bryan, Dillingham & Co.*, 54 Ga. 613 (1875).

Conveyances after marriage. — Law applied to marriage agreements and marriage settlements only, and the law's

terms will not be extended by construction so as to embrace conveyances of property by a husband to a wife after marriage, upon an independent consideration not connected with the marriage contract. *Coleman, Burden & Warthen Co. v. Walker*, 102 Ga. 576, 28 S.E. 973 (1897).

Application as to nonresident. — Law did not require the record of an antenuptial contract between a woman who was a resident and a man who was a nonresident, by which the latter attempted to release certain supposed rights in her property located within the state. *Bearden v. Benner*, 136 F. 258 (S.D. Ga. 1905).

Marriage contract properly recorded in county where marriage effected. — When a husband, at the time of entering into a marriage contract, lives in one county but after the consummation of the marriage resides in another, the record of the contract in the latter county is proper. *Hayden v. Mitchell*, 103 Ga. 431, 30 S.E. 287 (1898).

Effect upon mortgagee with notice. — When a husband deeded property to himself, as trustee, for the benefit of his wife and children, and such deed was recorded in compliance with law, and the husband later mortgaged the property to a third party, the conveyance was good as against the mortgagee who had notice before the mortgage was executed. *Wilson v. Riddle*, 123 U.S. 608, 8 S. Ct. 255, 31 L. Ed. 280 (1887).

Effect of subsequent removal of husband's residence. — Marriage settlement, duly recorded within the time prescribed by law, in the county of the residence of the husband, need not be again recorded in the county or counties to

which the husband may subsequently move. The first registration, if properly done, is sufficient. *Clark v. Way & Taylor*, 33 Ga. 149 (1864).

Cited in *Fulcher v. Royal*, 55 Ga. 68 (1875); *Adair v. Davis*, 71 Ga. 769 (1883).

RESEARCH REFERENCES

C.J.S. — 41 C.J.S., Husband and Wife, §§ 130, 144, 145.

ALR. — Conveyance pursuant to

antenuptial agreement as fraud on creditors, 41 ALR 1163.

19-3-68. Application for order compelling recordation; effect of application; liability of trustee refusing to record.

(a) If the trustee or the spouse having possession of a marriage contract or settlement fails or refuses to have the same recorded, the other spouse or any person acting on behalf of the spouse may apply to the judge of the superior court at any time for an order compelling its recordation. The application of the spouse or other person, when entered on the minutes of the superior court, shall be a notice equivalent to the record of the marriage contract or trust deed.

(b) A trustee refusing after demand to record a marriage contract or settlement shall be personally liable to his beneficiary for all damages sustained by reason of his failure to record. (Orig. Code 1863, § 1728; Code 1868, § 1769; Code 1873, § 1779; Code 1882, § 1779; Civil Code 1895, § 2484; Civil Code 1910, § 3003; Code 1933, § 53-409.)

RESEARCH REFERENCES

Am. Jur. 2d. — 52 Am. Jur. 2d, Marriage, § 35.

CHAPTER 4

ANNULMENT OF MARRIAGE

Sec.		Sec.	
19-4-1.	When annulments may be granted.	19-4-3.	Petition by next friend.
19-4-2.	Right to file for annulment or divorce.	19-4-4.	Procedure.
		19-4-5.	Effect of annulment.

Cross references. — Recording of marriage annulments in vital records, § 31-10-22.

19-4-1. When annulments may be granted.

Annulments of marriages declared void by law may be granted by the superior court, except that annulments may not be granted in instances where children are born or are to be born as a result of the marriage. (Ga. L. 1952, p. 149, § 1.)

Law reviews. — For article, “Annulment of Marriage in Georgia,” see 5 Ga. B.J. 22 (1942).

For note, “Annulment in Georgia: A Product of Judicial Restraint and Legislative Confusion,” see 14 Ga. L. Rev. 81 (1979).

For comment on *Wallace v. Wallace*, 221 Ga. 510, 145 S.E.2d 546 (1965), see 3 Ga. St. B.J. 219 (1966). For comment which compares this section with § 19-3-2, see 21 Mercer L. Rev. 465 (1970).

JUDICIAL DECISIONS

Purpose of section. — Purpose of statute to uphold the interest and welfare of children is manifested in the provisions insuring their legitimacy, prohibiting annulment, and thus requiring divorce to dissolve such marriages. *Riddle v. Riddle*, 240 Ga. 515, 241 S.E.2d 214 (1978).

O.C.G.A. § 19-4-1 was promulgated for purpose of protecting children of an otherwise void marriage, in other words, this statute, by requiring parties to an otherwise void marriage to seek a divorce rather than an annulment, prevents those parties from bastardizing children which are a product of the marriage. *Burnett v. Schweiker*, 643 F.2d 1168 (5th Cir. 1981).

Section provides exception to common-law rule. — Georgia legislature, in promulgating O.C.G.A. § 19-4-1,

carved out an exception to the common-law rule that if one party to a marriage has a previous unresolved marriage, then that party is unable to contract a subsequent valid marriage, and the later marriage is void from the beginning. *Burnett v. Schweiker*, 643 F.2d 1168 (5th Cir. 1981).

Section does not render legitimate an otherwise void marriage. — In Georgia, a person who enters into a marriage that is void because of a legal impediment must seek a divorce in order to terminate the purported marriage; traditionally, a divorce proceeding seeks to terminate a valid marriage, thus it appears that O.C.G.A. § 19-4-1 confers validity upon an otherwise void marriage; but under closer scrutiny, that section does not

render legitimate an otherwise void marriage. *Burnett v. Schweiker*, 643 F.2d 1168 (5th Cir. 1981).

Annulment statutes protect children of marriages previously considered void by prohibiting annulment and thus guaranteeing their legitimacy. Consistent with this purpose, the legislature provided that such marriage could be dissolved only by divorce. *Wallace v. Wallace*, 221 Ga. 510, 145 S.E.2d 546 (1965). For comment, see 3 Ga. St. B.J. 219 (1966).

Right to alimony lies as necessary concomitant remedy to fulfill the general design of this statute. *Wallace v. Wallace*, 221 Ga. 510, 145 S.E.2d 546 (1965); *Riddle v. Riddle*, 240 Ga. 515, 241 S.E.2d 214 (1978).

Under Social Security Act, 42 U.S.C. § 416(h)(1)(A), state law determines whether a marriage is valid or not in order to determine family status for purposes of social security benefits. *Burnett v. Schweiker*, 643 F.2d 1168 (5th Cir. 1981).

Widows of such marriages not "legal" widows for social security purposes. — In enacting O.C.G.A. § 19-4-1, under which, if a child has been born or will be born of a marriage otherwise void because of legal impediment, the proper procedure for resolution of such marriage is to obtain a divorce rather than an annulment, the Georgia legislature did not intend to confer validity on such otherwise void marriage; therefore, the widow of such void marriage is not the

legal widow for purpose of receiving social security benefits. *Burnett v. Schweiker*, 643 F.2d 1168 (5th Cir. 1981).

Denial of social security benefits to spouses of void marriages. — O.C.G.A. § 19-4-1 does not confer validity on an otherwise void marriage for purpose of permitting a spouse to such marriage to receive benefits that only inure to the husband or wife of the legal marriage; in other words, denying a spouse the ability to receive benefits as a legal widow does not cast doubt on the legitimacy of the child born of a void marriage. Furthermore, to permit such spouse to receive benefits intended to inure only to the benefit of a legal widow would wreak havoc on any scheme set up to protect a surviving spouse. *Burnett v. Schweiker*, 643 F.2d 1168 (5th Cir. 1981).

Setting aside divorce decree when marriage void from inception. — Trial court erred by denying an ex-husband's motion to set aside a divorce decree with the ex-wife because the marriage was void from the marriage's inception due to the ex-wife having a living spouse from an undissolved marriage at the time and there was no issue of the protection of a child to prevent the decree from being set aside. *Wright v. Hall*, 292 Ga. 457, 738 S.E.2d 594 (2013).

Cited in *Andrews v. Andrews*, 91 Ga. App. 659, 86 S.E.2d 669 (1955); *Bryant v. Bryant*, 216 Ga. 762, 119 S.E.2d 573 (1961).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Annulment of Marriage, § 1 et seq.

Am. Jur. Pleading and Practice Forms. — 1C Am. Jur. Pleading and Practice Forms, Annulment of Marriage, § 2.

C.J.S. — 55 C.J.S., Marriage, § 46 et seq.

ALR. — Epilepsy as ground for avoiding marriage, 7 ALR 1503; 31 ALR 148.

Right to annulment of marriage induced by false claim that husband was cause of existing pregnancy, 11 ALR 931; 19 ALR 80.

Meaning of "voluntary cohabitation" within statute relating to annulment of marriage, 26 ALR 1068.

Representation that proposed marriage could and would be dissolved by annulment or divorce as ground for annulment, 93 ALR 705.

Avoidance of procreation of children as ground for divorce or annulment of marriage, 4 ALR2d 227.

Cohabitation of persons ceremonially married after learning of facts negating dissolution of previous marriage of one, as affecting right to annulment, 4 ALR2d 542.

What constitutes duress sufficient to warrant divorce or annulment of marriage, 16 ALR2d 1430.

Refusal of sexual intercourse as ground for annulment, 28 ALR2d 499.

Mental incompetency of defendant at time of action as precluding annulment of marriage, 97 ALR2d 483.

Concealment of or misrepresentation as to prior marital status as ground for annulment of marriage, 15 ALR3d 759.

Concealment or misrepresentation relating to religion as ground for annulment, 44 ALR3d 972.

What constitutes mistake in the identity of one of the parties to warrant annulment of marriage, 50 ALR3d 1295.

Incapacity for sexual intercourse as ground for annulment, 52 ALR3d 589.

Spouse's secret intention not to abide by written antenuptial agreement relating to financial matters as ground for annulment, 66 ALR3d 1282.

Effect, in subsequent proceedings, of paternity findings or implications in divorce or annulment decree or in support or custody order made incidental thereto, 78 ALR3d 846.

Homosexuality, transvestism, and similar sexual practices as grounds for annulment of marriage, 68 ALR4th 1069.

19-4-2. Right to file for annulment or divorce.

Parties who enter into a marriage which is declared void by law shall have the right to file:

- (1) A petition for annulment; or
- (2) A petition for divorce, if grounds for divorce exist. (Ga. L. 1952, p. 149, § 2.)

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Purpose of section. — Purpose of Ga. L. 1952, p. 149, §§ 1 and 2 (see now O.C.G.A. § 19-4-1 and 19-4-2), to uphold the interest and welfare of children, is manifested in the provisions insuring their legitimacy, prohibiting annulment, and thus requiring divorce to dissolve such marriages. *Riddle v. Riddle*, 240 Ga. 515, 241 S.E.2d 214 (1978).

Setting aside divorce decree when marriage void from inception. — Trial court erred by denying an ex-husband's

motion to set aside a divorce decree with the ex-wife because the marriage was void from the marriage's inception due to the ex-wife having a living spouse from an undissolved marriage at the time and there was no issue of the protection of a child to prevent the decree from being set aside. *Wright v. Hall*, 292 Ga. 457, 738 S.E.2d 594 (2013).

Cited in *Wallace v. Wallace*, 221 Ga. 510, 145 S.E.2d 546 (1965); *Burnett v. Schweiker*, 643 F.2d 1168 (5th Cir. 1981).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Annulment of Marriage, § 59.

C.J.S. — 55 C.J.S., Marriage, § 56.

19-4-3. Petition by next friend.

A petition for annulment may be filed by next friend for minors or persons of unsound mind. (Ga. L. 1952, p. 149, § 3.)

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Annulment of Marriage, §§ 61, 63.

C.J.S. — 55 C.J.S., Marriage, § 56.

ALR. — By and in whose name suit to annul infant's marriage must be brought, 150 ALR 609.

19-4-4. Procedure.

All matters of service, jurisdiction, procedure, residence, pleading, and practice for obtaining an annulment of marriage shall be the same as those provided by law for obtaining a divorce, with the exception that a decree of annulment may be ordered at any time, in open court or in chambers, when personal service is had at least 30 days beforehand and no contest or answer is filed. (Ga. L. 1952, p. 149, § 4.)

Law reviews. — For article analyzing jurisdictional problems in annulment actions, and comparing state statutes, see 10 J. of Pub. L. 47 (1961).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Annulment of Marriage, § 47 et seq.

C.J.S. — 55 C.J.S., Marriage, § 57 et seq.

ALR. — Jurisdiction, as between different states, of suit to annul marriage, 128 ALR 61.

Necessity and sufficiency of corroboration of plaintiff's testimony concerning ground for annulment of marriage, 71 ALR2d 620.

19-4-5. Effect of annulment.

A decree of annulment, when rendered, shall have the effect of a total divorce between the parties of a void marriage and shall return the parties thereto to their original status before marriage. However, a decree of annulment shall not operate to relieve the parties to a marriage of criminal charges or responsibilities occasioned by the marriage. (Ga. L. 1952, p. 149, § 5.)

JUDICIAL DECISIONS

Annulled marriage is rendered void ab initio. — Since a subsequent annulment is not merely a dissolution of the marriage but a judicial declaration that no marriage ever existed and, in the absence of a statutory declaration otherwise, its effect is usually said to make the annulled marriage void ab initio, a certificate of marriage to another woman did not establish an irrebuttable presumption that the petitioner was no longer the deceased's widower at the time the widower

filed the year's support petition. *Hamrick v. Bonner*, 182 Ga. App. 76, 354 S.E.2d 687 (1987).

"Responsibilities occasioned by the marriage" are not limited to criminal charges but include civil liabilities, such as necessities furnished the wife by a third person. *McKinney v. McKinney*, 242 Ga. 607, 250 S.E.2d 470 (1978).

Decree of annulment shall return parties to their original status but shall not relieve any party of criminal

charges. *McKinney v. McKinney*, 242 Ga. 607, 250 S.E.2d 470 (1978).

Trial court erred in excluding from evidence a marriage certificate and the proffered testimony concerning the nature of the actual relationship between a petitioner for a year's support and another woman when, given the financial benefits which the petitioner and the woman stood to achieve after the caveat was filed by having their marriage annulled, a manifest injustice could result if the caveators were not permitted to go behind the annulment decree in an at-

tempt to prove that the couple had in fact cohabitated as man and wife both before and after the entry of the annulment decree. *Hamrick v. Bonner*, 182 Ga. App. 76, 354 S.E.2d 687 (1987).

Annulled marriage as res judicata. — While an annulment decree may have been res judicata between the parties thereto, it was not res judicata with respect to others who were neither parties nor in privity with the parties to the annulment proceedings. *Hamrick v. Bonner*, 182 Ga. App. 76, 354 S.E.2d 687 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 4 Am. Jur. 2d, Annulment of Marriage, §§ 1, 77 et seq.

C.J.S. — 55 C.J.S., Marriage, § 75.

ALR. — Division of property upon annulment of marriage, 11 ALR 1394.

Effect of annulment of marriage on rights arising out of acts of or transactions between parties during the marriage, 2 ALR2d 637.

Right to allowance of permanent alimony in connection with decree of annulment, 81 ALR3d 281.

Prior institution of annulment proceedings or other attack on validity of one's marriage as barring or estopping one from entitlement to property rights as surviving spouse, 31 ALR4th 1190.

CHAPTER 5

DIVORCE

Sec.		Sec.	
19-5-1.	Total divorces authorized; how tried; referral for alternative dispute resolution.	19-5-9.	Incompetency to serve as juror.
19-5-2.	Residence requirements; venue.	19-5-10.	Duty of judge in undefended divorce cases; appointment of attorney; evidentiary hearings; evidentiary attacks on prior judgments.
19-5-3.	Grounds for total divorce.	19-5-11.	Use of confession as evidence; corroboration.
19-5-4.	Effect of collusion, consent, guilt of like conduct, or condonation.	19-5-12.	Form of judgment and decree.
19-5-5.	Petition; contents and verification; demand for detailed statement.	19-5-13.	Disposition of property in accordance with verdict.
19-5-6.	Grant of divorce to respondent without necessity of counterclaim.	19-5-14.	New trials.
19-5-7.	Transfer of property after filing of petition; lis pendens notice.	19-5-15.	Effect of divorce.
19-5-8.	Pleading and practice.	19-5-16.	Restoration of maiden or prior name.
		19-5-17.	Determination of parties' rights; disability preventing remarriage forbidden.

Cross references. — Optional retirement allowances; election of such options; revocation of election; effect of divorce, § 47-3-121.

Law reviews. — For annual survey on

law of domestic relations, see 42 Mercer L. Rev. 201 (1990). For article, “The Renewed Significance of Title in Dividing Marital Assets,” see 16 (No. 6) Ga. St. B.J. 24 (2011).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Waiver of Spousal Rights in Estate of Deceased Spouse, 7 POF2d 443.

Transfer of Assets in Fraud of Spouse’s Antenuptial Contractual Rights, 14 POF2d 755.

Forensic Economics — Use of Economists in Cases of Dissolution of Marriage, 17 POF2d 345.

Status of Property as Separate, 20 POF2d 321.

Divorce and Separation — Fraudulent Procurement of Property Settlement, 28 POF2d 663.

Transmutation of Separate Property into Community Property, 37 POF2d 379.

Enforceability of Premarital Agreement Based on Fairness of Terms and Circumstances of Execution, 7 POF3d 581.

Valuation of Goodwill of Professional

Practice for Distribution on Divorce, 8 POF3d 215.

Extent of Community and Separate Interests in Real Property, 19 POF3d 705.

ALR. — Vacating or setting aside divorce decree after remarriage of party, 17 ALR4th 1153.

Divorce and separation: effect of trial court giving consideration to needs of children in making property division — modern status, 19 ALR4th 239.

Spouse’s liability, after divorce, for community debt contracted by other spouse during marriage, 20 ALR4th 211.

Excessiveness or adequacy of amount of money awarded as permanent alimony following divorce, 28 ALR4th 786.

Effect of death of party to divorce proceeding pending appeal or time allowed for appeal, 33 ALR4th 47.

Divorce: excessiveness or adequacy of combined property division and spousal support awards—modern cases, 55 ALR4th 14.

Divorce: order requiring that party not compete with former marital business, 59 ALR4th 1075.

Prejudgment interest awards in divorce cases, 62 ALR4th 156.

Insanity as defense to divorce or separation suit — post-1950 cases, 67 ALR4th 277.

Divorce: spouse's right to order that other spouse pay expert witness fees, 4 ALR5th 403.

Joinder of tort actions between spouses with proceeding for dissolution of marriage, 4 ALR5th 972.

Divorce and separation: consideration of tax consequences in distribution of marital property, 9 ALR5th 568.

19-5-1. Total divorces authorized; how tried; referral for alternative dispute resolution.

(a) Total divorces may be granted in proper cases by the superior court; provided, however, that the parties shall comply with Code Section 19-5-1.1 if it is applicable. Unless an issuable defense is filed as provided by law and a jury trial is demanded in writing by either party on or before the call of the case for trial, in all petitions for divorce and permanent alimony the judge shall hear and determine all issues of law and of fact and any other issues raised in the pleadings.

(b) In any county in which there has been established an alternative dispute resolution program pursuant to Chapter 23 of Title 15, known as the “Georgia Court-annexed Alternative Dispute Resolution Act,” the judge may, prior to trial, refer all contested petitions for divorce or permanent alimony to the appropriate alternative dispute resolution method. In counties in which an alternative dispute resolution program has not been established, a judge may nonetheless refer any disputed divorce case to an appropriate alternative dispute resolution method if a method is reasonably available without additional cost to the parties. (Orig. Code 1863, § 1669; Ga. L. 1866, p. 21, § 1; Code 1868, § 1710; Code 1873, § 1711; Ga. L. 1880-81, p. 65, § 2; Code 1882, § 1711; Civil Code 1895, § 2425; Civil Code 1910, § 2944; Code 1933, § 30-101; Ga. L. 1946, p. 90, § 1; Ga. L. 1956, p. 405, § 1; Ga. L. 1960, p. 1023, § 1; Ga. L. 1995, p. 1292, § 13; Ga. L. 2007, p. 554, § 7/HB 369.)

Editor's notes. — Code Section 19-5-1.1, referred to in subsection (a) of this Code section, does not exist. A new Code Section 19-5-1.1 was included in an early version of 2007 HB 369 but was removed by amendment prior to enactment of Ga. L. 2007, p. 554, § 7/HB 369.

Ga. L. 2007, p. 554, § 1, not codified by the General Assembly, provides that: “The General Assembly of Georgia declares that it is the policy of this state to assure

that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage or relationship.”

Ga. L. 2007, p. 554, § 8, not codified by the General Assembly, provides that the 2007 amendment to subsection (a) shall

apply to all child custody proceedings and modifications of child custody filed on or after January 1, 2008.

Law reviews. — For article, “The Divorce Act of 1946,” see 9 Ga. B.J. 287 (1947). For article advocating the adoption of a Uniform Divorce Bill, see 16 Ga. B.J. 41 (1953). For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004). For article, “Conflict of Laws Structure and Vision: Updating a Venera-

ble Discipline,” see 31 Ga. St. U.L. Rev. 231 (2015).

For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972). For note, “The Economics of Divorce of Georgia: Toward a Partnership Model of Marriage,” see 12 Ga. L. Rev. 640 (1978).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

JURY TRIAL

APPLICATION

General Consideration

Legislative intent. — Laws peculiar to divorce suits clearly indicate an intention upon the part of the lawmaking power to impede the facility for obtaining divorces; and such purpose can only be attributed to a zealous regard for the well-being of society. *Haygood v. Haygood*, 190 Ga. 445, 9 S.E.2d 834 (1940).

Former Code 1933, § 30-101 (see now O.C.G.A. § 19-5-1) was not violative of provisions of former Ga. Const. 1976, Art. VI, Sec. IV, Para. VII (see now Ga. Const. 1983, Art. I, Sec. I, Para XI). *Flournoy v. Flournoy*, 228 Ga. 224, 184 S.E.2d 822 (1971).

“Issuable defense” within meaning of law may be made by pre-trial order or other pleadings filed as provided by law. *Trulove v. Trulove*, 233 Ga. 896, 213 S.E.2d 868 (1975).

Defending divorce action without filing answer cannot preclude “issuable defense.” — Spouse’s right in divorce action to defend without filing answer cannot preclude existence of “issuable defense” and thereby defeat the right to jury trial. *Trulove v. Trulove*, 233 Ga. 896, 213 S.E.2d 868 (1975).

Divorce proceedings are governed by Civil Practice Act. *Ivey v. Ivey*, 233 Ga. 45, 209 S.E.2d 590 (1974).

Divorce proceedings equitable in nature. — Proceedings for divorce and for alimony have always, under the practice

of this state, been regarded as equitable. *Early v. Early*, 243 Ga. 125, 252 S.E.2d 618 (1979).

Superior court judge presiding over a divorce case exercises all of the traditional powers of a chancellor in equity, except as otherwise provided by law. *Allen v. Allen*, 260 Ga. 777, 400 S.E.2d 15 (1991).

Case involving the question of the enforceability of a settlement agreement was remanded to the trial court, pursuant to the rule holding that divorce proceedings are equitable in nature. *Allen v. Allen*, 260 Ga. 777, 400 S.E.2d 15 (1991).

City courts lack jurisdiction to entertain suit for alimony. — Because exclusive jurisdiction of divorce and/or alimony questions is vested in superior courts, city courts are without jurisdiction to entertain a suit for alimony in a case in which a judgment has previously been rendered in the superior court. *Tyson v. Tyson*, 176 Ga. 137, 167 S.E. 172 (1932).

Cited in *Gilbert v. Gilbert*, 202 Ga. 752, 44 S.E.2d 485 (1947); *Huguley v. Huguley*, 204 Ga. 692, 51 S.E.2d 445 (1949); *Allison v. Allison*, 205 Ga. 233, 53 S.E.2d 114 (1949); *Stebbins v. Stebbins*, 206 Ga. 529, 57 S.E.2d 564 (1950); *Gardner v. Gardner*, 206 Ga. 669, 58 S.E.2d 416 (1950); *Champion v. Champion*, 207 Ga. 431, 61 S.E.2d 822 (1950); *Thompson v. Thompson*, 207 Ga. 376, 61 S.E.2d 834 (1950); *Harrison v. Harrison*, 207 Ga. 393, 61 S.E.2d 837 (1950); *Robertson v. Robertson*, 207 Ga. 686, 63 S.E.2d 876 (1951); *Whaley v.*

Whaley, 208 Ga. 323, 66 S.E.2d 722 (1951); Crute v. Crute, 208 Ga. 724, 69 S.E.2d 225 (1952); Lloyd v. Lloyd, 208 Ga. 694, 69 S.E.2d 251 (1952); Neal v. Neal, 209 Ga. 199, 71 S.E.2d 229 (1952); Hilburn v. Hilburn, 210 Ga. 497, 81 S.E.2d 1 (1954); Bedingfield v. Bedingfield, 211 Ga. 310, 85 S.E.2d 756 (1955); Lott v. Lott, 212 Ga. 672, 94 S.E.2d 869 (1956); Bell v. Bell, 213 Ga. 176, 97 S.E.2d 571 (1957); Lott v. Lott, 213 Ga. 559, 100 S.E.2d 170 (1957); Perry v. Perry, 213 Ga. 847, 102 S.E.2d 534 (1958); Moseley v. Moseley, 214 Ga. 137, 103 S.E.2d 540 (1958); Dunn v. Dunn, 221 Ga. 368, 144 S.E.2d 758 (1965); McLarin v. McLarin, 224 Ga. 675, 163 S.E.2d 914 (1968); Smith v. Smith, 228 Ga. 311, 185 S.E.2d 78 (1971); Hatcher v. Hatcher, 229 Ga. 249, 190 S.E.2d 533 (1972); Worrell v. Worrell, 242 Ga. 44, 247 S.E.2d 847 (1978); Gordon v. Gordon, 244 Ga. 21, 257 S.E.2d 528 (1979); Osteen v. Osteen, 244 Ga. 445, 260 S.E.2d 321 (1979); Carmichael v. Carmichael, 248 Ga. 216, 282 S.E.2d 71 (1981); Hudson v. State, 248 Ga. 397, 283 S.E.2d 271 (1981).

Jury Trial

When judge of superior court sits in divorce case without jury, the judge has plenary control of the judge's judgment during the term at which the judgment is rendered. Juneau v. Juneau, 98 Ga. App. 330, 105 S.E.2d 913 (1958).

Ga. L. 1966, p. 609, § 39 (see now O.C.G.A. § 9-11-39) authorized the trial court to permit jury trial even if written demand was not timely filed under former Code 1933, § 30-101 (see now O.C.G.A. § 19-5-1). Bullock v. Bullock, 234 Ga. 253, 215 S.E.2d 255 (1975).

Jury is authorized to find for divorce when evidence establishes ground upon which the action is brought. Brackett v. Brackett, 217 Ga. 84, 121 S.E.2d 146 (1961).

Jury trial required upon proper demand. — When one spouse made a proper demand for a jury trial which was not otherwise waived, it was reversible error for the court to enter a final judgment based upon the findings of an auditor, without a trial by jury. Franklin v. Franklin, 267 Ga. 82, 475 S.E.2d 890 (1996).

Parties waive their right to jury trial in a divorce case if the parties fail to make a written demand for a jury trial on or before the call of the case. Ivey v. Ivey, 264 Ga. 435, 445 S.E.2d 258 (1994).

Waiver of jury trial. — Actions of a party who dismisses a petition for divorce and thereafter files a separation agreement with the court settling all issues as to alimony, property settlement, child custody, and child support must be construed as a waiver of jury trial as to all issues in the case. In these circumstances, the trial court has the power to grant the divorce without the intervention of a jury and adopt the settlement entered into between the parties. Slaughter v. Slaughter, 236 Ga. 353, 223 S.E.2d 714 (1976).

When jury verdict construed as in favor of petitioner. — When both parties to a divorce action introduce evidence in support of their respective prayers for divorce, and the jury returns a verdict finding in favor of a total divorce between the parties, without stating whether the verdict is for the petitioner or the respondent, it will be construed to be for the petitioner. Carawan v. Carawan, 203 Ga. 325, 46 S.E.2d 588 (1948).

Application

Absent fraud, client bound by decree as negotiated by attorney. — When one employs counsel to represent one in a divorce action and such counsel agrees with counsel for the opposite party to a decree which is entered by the court, such decree will, in the absence of a violation of express directions by the client to counsel, known to the adverse party or counsel, or fraud, accident, or mistake, be binding upon the client. Dixon v. Dixon, 204 Ga. 363, 49 S.E.2d 818 (1948).

Adultery as defense. — Alleged act of adultery, committed after date of separation and action, if proven, would be good defense against the grant of either total divorce or permanent alimony. Rowell v. Rowell, 209 Ga. 572, 74 S.E.2d 833 (1953).

Recriminatory charge of adultery committed by the plaintiff after the commencement of a divorce action is a valid defense and upon a proper application at any time before the final decree, if such application is made immediately after the

Application (Cont'd)

discovery of the fact, the court should permit the defendant to put in a supplemental answer or file a plea for continuance for the purpose of setting up such matter as a new defense. *Rowell v. Rowell*, 209 Ga. 572, 74 S.E.2d 833 (1953).

Action for divorce instituted by guardian of person adjudicated insane cannot be maintained in this state; the right to bring and prosecute such an action being strictly personal, and not within the authority conferred by law upon a guardian. *Phillips v. Phillips*, 203 Ga. 106, 45 S.E.2d 621 (1947).

Allegations that an individual, before the individual was adjudged mentally incompetent, and at a time when the individual had mental capacity to show the nature of an action for divorce, expressed the individual's intention and desire to obtain a divorce from the defendant, that at the time of the filing of the action, and during a lucid interval, after such adjudication, the individual again expressed the same intention and desire, and that the suit was instituted pursuant to the individual's direction, desire, and will at the time of filing the suit, would nevertheless not show authority in the guardian to institute and maintain such action. *Phillips v. Phillips*, 203 Ga. 106, 45 S.E.2d 621 (1947).

Intervention by third party in divorce action. — There is no provision of law which allows third party to intervene in divorce action. *Girtman v. Girtman*, 191 Ga. 173, 11 S.E.2d 782 (1940).

Collateral attack of valid divorce judgment. — Judgment in divorce case not shown to be void could not be collaterally attacked in another case and different forum. *Juneau v. Juneau*, 98 Ga. App. 330, 105 S.E.2d 913 (1958).

Action to set aside fraudulent divorce can be maintained following

death of party if it appears that the divorce decree or the subsequent action to set it aside involved some property right in which the surviving spouse is beneficially interested and the status and rights of the parties are retroactively affected. *United States Fid. & Guar. Co. v. Dunbar*, 112 Ga. App. 102, 143 S.E.2d 663 (1965).

Decree properly set aside as fraudulent. — Petition alleging that petitioner had no knowledge of the pendency of the divorce action against the petitioner, the petitioner not having been served with process of the suit, nor had the petitioner acknowledged service thereof, and that the defendant had concealed from petitioner and kept petitioner ignorant of the pending suit, was sufficient as grounds of fraud for setting aside the divorce decree. *Robertson v. Robertson*, 196 Ga. 517, 26 S.E.2d 922 (1943).

Motion to set aside decree properly denied when unsupported. — When a judgment and decree sought to be set aside were rendered in one term, and the motion to set aside came at a subsequent term, was not based on any defect appearing on the face of the record or pleadings, and was not accompanied by any brief of the evidence adduced upon the trial which resulted in the judgment and decree, the trial judge did not err in dismissing the motion to set aside. *Prewett v. Prewett*, 215 Ga. 425, 110 S.E.2d 638 (1959).

Unadjudicated claim for divorce is purely personal and abates upon death. *Segars v. Brooks*, 248 Ga. 427, 284 S.E.2d 13 (1981).

Final judgment was prematurely entered at a temporary hearing in a divorce proceeding since 23 days remained during which defensive pleadings would have been required by law to be filed and both parties had filed timely demands for a jury trial. *Henderson v. Henderson*, 258 Ga. 205, 367 S.E.2d 40 (1988).

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Divorce and Separation, § 1 et seq.

Am. Jur. Pleading and Practice Forms. — 8B Am. Jur. Pleading and Prac-

tice Forms, Dismissal, Discontinuance, and Nonsuit, § 146.

C.J.S. — 27A C.J.S., Divorce, § 2 et seq.

ALR. — Power of court to grant absolute divorce to both spouses upon showing of mutual fault, 13 ALR3d 1364.

Power of court to award absolute divorce in favor of party who desires only limited decree, or vice versa, 14 ALR3d 703.

Enforceability of agreement requiring spouse's cooperation in obtaining religious bill of divorce, 29 ALR4th 746.

Validity, construction, and application of provision in separation agreement af-

fecting distribution or payment of attorneys' fees, 47 ALR5th 207.

Divorce and separation: Determination of whether proceeds from personal injury settlement or recovery constitute marital property, 109 ALR5th 1.

Retirement of husband as change of circumstances warranting modification of divorce decree — Prospective retirement, 110 ALR5th 237.

Division of lottery proceeds in divorce proceedings, 124 ALR5th 537.

19-5-2. Residence requirements; venue.

No court shall grant a divorce to any person who has not been a bona fide resident of this state for six months before the filing of the petition for divorce, provided that any person who has been a resident of any United States army post or military reservation within this state for one year next preceding the filing of the petition may bring an action for divorce in any county adjacent to the United States army post or military reservation; and provided, further, that a nonresident of this state may file a petition for divorce, in the county of residence of the respondent, against any person who has been a resident of this state and of the county in which the action is brought for a period of six months prior to the filing of the petition. (Ga. L. 1890-91, p. 235, § 1; Ga. L. 1893, p. 109, § 1; Civil Code 1895, § 2431; Civil Code 1910, § 2950; Code 1933, § 30-107; Ga. L. 1939, p. 203, § 1; Ga. L. 1950, p. 429, § 1; Ga. L. 1958, p. 385, § 1.)

Cross references. — Venue for divorce cases, Ga. Const. 1983, Art. VI, Sec. II, Para. I.

Law reviews. — For article, "Divorce: Residence and Domicile Requirements in Georgia," see 7 Ga. St. B.J. 455 (1971). For annual survey of domestic relations cases, see 57 Mercer L. Rev. 173 (2005).

For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

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Section's requirements as to domicile. — Law required that plaintiff in divorce action must be domiciled in this state for the statutory period before the institution of the action, but did not require in addition that the plaintiff shall have actually resided in this state during such period. *Williams v. Williams*, 191 Ga. 437, 12 S.E.2d 352 (1940); *Williams v. Williams*, 226 Ga. 734, 177 S.E.2d 481 (1970).

Section does not apply to application for alimony. — There was no provision of law extending the requirements of this statute to the application of the wife for alimony and attorney's fees. *Lee v. Lee*, 154 Ga. 820, 115 S.E. 493 (1923) (see O.C.G.A. § 19-5-2).

Legislature has established a statutory residency requirement of six months before divorce proceedings can be brought, but has not extended this requirement to

alimony proceedings. *Chalfant v. Rains*, 244 Ga. 747, 262 S.E.2d 63 (1979).

“Resident” as used in statute was equivalent to domicile. *Darbie v. Darbie*, 195 Ga. 769, 25 S.E.2d 685 (1943).

Term “resident” meant “domiciliary.” *Worrell v. Worrell*, 242 Ga. 44, 247 S.E.2d 847 (1978).

“Domicile” refers to single fixed place of abode with intention of remaining there indefinitely, or the single fixed place of abode where a person intends to return, even though the person may in fact be residing elsewhere. *Abou-Issa v. Abou-Issa*, 229 Ga. 77, 189 S.E.2d 443 (1972).

Residence in county for six months is all that is required to give the court jurisdiction of a plaintiff’s petition for divorce. *Tate v. Tate*, 220 Ga. 393, 139 S.E.2d 297 (1964).

It requires both act and intent to establish residence, and either without the other is insufficient. *Lorance v. Lorance*, 216 Ga. 754, 119 S.E.2d 342 (1961).

To effect change of domicile there must be avowed intent and actual removal. Temporary absence from the county by a person who has no family does not operate to change the person’s domicile. *Bellamy v. Bellamy*, 187 Ga. 804, 2 S.E.2d 413 (1939).

Party who enters United States on temporary visa does not lack legal capacity to establish domicile in this state for the purposes of a divorce suit. *Abou-Issa v. Abou-Issa*, 229 Ga. 77, 189 S.E.2d 443 (1972).

Question of domicile is ordinarily mixed question of law and fact, and is for jury determination. *Abou-Issa v. Abou-Issa*, 229 Ga. 77, 189 S.E.2d 443 (1972); *Campbell v. Campbell*, 231 Ga. 214, 200 S.E.2d 899 (1973); *Worrell v. Worrell*, 242 Ga. 44, 247 S.E.2d 847 (1978).

Alleging and proving bona fide residence. — One filing petition for divorce must allege and prove that one has been bona fide resident of the state for the length of time required by law. Jurisdiction of the subject matter cannot be conferred by consent. *Dicks v. Dicks*, 177 Ga. 379, 170 S.E. 245 (1933); *Great Am.*

Indem. Co. v. Jeffries, 65 Ga. App. 686, 16 S.E.2d 135 (1941); *Tate v. Tate*, 220 Ga. 393, 139 S.E.2d 297 (1964).

Plaintiff in divorce action carries burden of proving jurisdiction of the court, and this duty is no less incumbent upon the defendant who asks for alimony; in neither instance can jurisdiction be conferred by consent or by waiver. *Jones v. Jones*, 181 Ga. 747, 184 S.E. 271 (1936).

This provision as to venue in divorce cases is mandatory and jurisdictional, and as against demurrer (now motion to dismiss) should be alleged, and must be proved, nor can jurisdiction be conferred on the superior court of a different county by waiver or consent. *Wade v. Wade*, 195 Ga. 748, 25 S.E.2d 683 (1943).

State provisions authorizing waiver of jurisdiction. — Provisions of state law which authorize parties in certain cases to waive jurisdiction do not apply to divorce action. *Haygood v. Haygood*, 190 Ga. 445, 9 S.E.2d 834 (1940).

Parties by plea or otherwise cannot waive jurisdiction so as to dispense with proof in the court that the plaintiff had been a bona fide resident of this state for 12 months (now 6 months) before the suit was filed. *Great Am. Indem. Co. v. Jeffries*, 65 Ga. App. 686, 16 S.E.2d 135 (1941).

Allegation of jurisdictional requirements was essential to applications for divorce. *Owens v. Owens*, 189 Ga. 338, 5 S.E.2d 883 (1939); *Rice v. Rice*, 223 Ga. 363, 155 S.E.2d 393 (1967).

It is necessary to allege the correct venue and to make affirmative proof thereof. *Johnson v. Johnson*, 188 Ga. 800, 4 S.E.2d 807 (1939).

Personal jurisdiction over party. — Personal jurisdiction over the defendant is not a prerequisite to the grant of a divorce by a Georgia court. A party seeking a divorce must show only that the trial court had jurisdiction over the res of the marriage which results from his or her domicile in the state for the six-month period preceding the filing of the action. *Abernathy v. Abernathy*, 267 Ga. 815, 482 S.E.2d 265 (1997).

Failure to make proof of venue will render verdict for divorce subject to be set

aside by proper procedure, and such proof is essential, even though the absence of this jurisdictional averment may be supplied by amendment. *Wade v. Wade*, 195 Ga. 748, 25 S.E.2d 683 (1943).

Dismissal for lack of residency affirmed. — Trial court's finding that a wife was not a resident of DeKalb County, Georgia, and the court's order dismissing her DeKalb County divorce case were affirmed since the parties had sold their home in Georgia six months before the divorce was filed, and the wife's tax forms stated that she did not maintain a home in the United States, but rather that her bona fide residence was in South Africa; although the wife claimed that she intended to return to DeKalb County, the trial court properly applied the principle that the testimony of a party who offered herself as a witness in her own behalf at trial was to be construed most strongly against her when the testimony was self-contradictory, vague, or equivocal. *Conrad v. Conrad*, 278 Ga. 107, 597 S.E.2d 369 (2004).

Action subject to dismissal for failure to allege time of residence. — When there was an absence of a proper allegation of "time of residence," a necessary jurisdictional allegation, an action for divorce was subject to the general demurrer (now motion to dismiss) on the ground that no cause of action was alleged, and the prayers for temporary and permanent alimony being incidental to the suit for divorce on the ground of cruel treatment, cannot be maintained as an independent action, but must fall with the divorce suit. *Mullally v. Mullally*, 199 Ga. 708, 35 S.E.2d 199 (1945).

Husband established that he was Georgia domiciliary. — Trial court's finding that a husband in a divorce case failed to establish that he was a domiciliary of Georgia was error and was reversed since the husband and the wife had maintained a marital residence in Georgia for at least five years before the wife returned to Britain, where the husband continued to maintain his domicile in Georgia and intended to remain in Georgia, and where the husband, an Irish citizen, had obtained permanent resident alien status, had designated himself a year round

Georgia resident on state tax returns, and had declared himself to be a non-resident of Britain for tax purposes. *Cooke v. Cooke*, 277 Ga. 731, 594 S.E.2d 370 (2004).

Even though the wife did not have sufficient minimum contacts with Georgia for the trial court to exercise jurisdiction over issues related to alimony, division of marital property, and attorney fees, the trial court had jurisdiction pursuant to O.C.G.A. § 19-5-2 to grant the divorce sought by the husband since the husband had lived in Georgia for at least six months. *Ennis v. Ennis*, 290 Ga. 890, 725 S.E.2d 311 (2012).

Domicile in Georgia. — Trial court had jurisdiction to grant a divorce, as opposed to the State of New York trial court wherein the wife petitioned for a divorce, because there was some evidence to support the trial court's findings on domicile of the parties, including that the husband was stationed in the military in Georgia, they lived in military housing then purchased a home, and continued to live in that home until their separation. *Black v. Black*, 292 Ga. 691, 740 S.E.2d 613 (2013).

Cited in *Lamont v. Lamont*, 134 Ga. 523, 68 S.E. 96 (1910); *Hansberger v. Hansberger*, 182 Ga. 495, 185 S.E. 810 (1936); *Bellamy v. Bellamy*, 187 Ga. 56, 199 S.E. 745 (1938); *Bellamy v. Bellamy*, 187 Ga. 804, 2 S.E.2d 413 (1939); *Haygood v. Haygood*, 190 Ga. 445, 9 S.E.2d 834 (1940); *Moody v. Moody*, 194 Ga. 843, 22 S.E.2d 837 (1942); *Jones v. State*, 70 Ga. App. 431, 28 S.E.2d 373 (1943); *Tatum v. Tatum*, 203 Ga. 406, 46 S.E.2d 915 (1948); *Lorance v. Lorance*, 216 Ga. 754, 119 S.E.2d 342 (1951); *New Amsterdam Cas. Co. v. Thompson*, 100 Ga. App. 677, 112 S.E.2d 273 (1959); *Bass v. Bass*, 222 Ga. 378, 149 S.E.2d 818 (1966); *Walton v. Walton*, 223 Ga. 85, 153 S.E.2d 554 (1967); *Cates v. Cates*, 225 Ga. 612, 170 S.E.2d 416 (1969); *Goulart v. Goulart*, 237 Ga. 174, 227 S.E.2d 52 (1976); *Charamond v. Charamond*, 240 Ga. 34, 239 S.E.2d 362 (1977); *Tanis v. Tanis*, 240 Ga. 718, 242 S.E.2d 71 (1978); *Bentley v. Bentley*, 247 Ga. 85, 274 S.E.2d 338 (1981); *Midkiff v. Midkiff*, 275 Ga. 136, 562 S.E.2d 177 (2002); *Sastre v. McDaniel*, 293 Ga. App. 671, 667 S.E.2d 896 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Divorce and Separation, § 174 et seq.

C.J.S. — 27A C.J.S., Divorce, §§ 99, 103.

ALR. — Nonresidence of one or both parties as affecting jurisdiction of court of suit or proceeding to annul divorce decree rendered in same state, 33 ALR 469.

Separate domicile of wife for purposes of jurisdiction over subject-matter of suit by her for divorce or separation, 39 ALR 710.

Nonresidence of defendant or cross complainant in a suit for divorce as affecting power to grant divorce in his or her favor, 89 ALR 1203.

What constitutes residence or domicile within state for purpose of jurisdiction in divorce, 106 ALR 6; 159 ALR 496.

Attack on jurisdictional grounds on foreign decree of divorce rendered upon contested hearing on the jurisdictional facts, 118 ALR 1524.

Estoppel to assert invalidity of decree of divorce for lack of domicile at divorce forum or failure to obtain jurisdiction of person of defendant, 140 ALR 914; 153 ALR 941; 175 ALR 538.

Domicile or residence of person in the armed forces, 148 ALR 1413; 149 ALR 1471; 150 ALR 1468; 151 ALR 1468; 152 ALR 1471; 153 ALR 1442; 155 ALR 1466; 156 ALR 1465; 157 ALR 1462; 158 ALR 1474.

Duty to recognize and give effect to decrees of divorce rendered in other states, or in foreign country, as affected by constructive service of process or lack of domicile at divorce forum, 157 ALR 1399; 1 ALR2d 1385; 28 ALR2d 1303.

Recognition as to marital status of foreign divorce decree attacked on ground of lack of domicil, since Williams decision, 1 ALR2d 1385; 28 ALR2d 1303.

Length or duration of domicile, as distinguished from fact of domicile, as a

jurisdictional matter in divorce action, 2 ALR2d 291.

Validity of statute permitting granting of divorces to nonresidents, 3 ALR2d 666.

Denial of divorce in sister state or foreign country as res judicata in another suit for divorce between the same parties, 4 ALR2d 107.

False allegation of plaintiff's domicile or residence in the state as ground for vacation of default decree of divorce, 6 ALR2d 596.

Residence or domicile, for purpose of divorce action, of one in armed forces, 21 ALR2d 1163.

Pendency of prior action for absolute or limited divorce between same spouses in same jurisdiction as precluding subsequent action of like nature, 31 ALR2d 442.

Nature and location of one's business or calling as element in determining domicile in divorce cases, 36 ALR2d 756.

Venue of divorce action in particular county as dependent on residence or domicile for a specified length of time, 54 ALR2d 898.

Lack of insufficiency of allegations of plaintiff's residence or domicile in suit for divorce as ground for vacation of, or collateral attack on, divorce decree, 55 ALR2d 1263.

What constitutes residence or domicile within state by citizen of another country for purpose of jurisdiction in divorce, 51 ALR3d 223.

Validity of statute imposing durational residency requirements for divorce applicants, 57 ALR3d 221.

Validity and construction of statutory provision relating to jurisdiction of court for purpose of divorce for servicemen, 73 ALR3d 431.

Doctrine of forum non conveniens: assumption or denial of jurisdiction of action involving matrimonial dispute, 55 ALR5th 647.

19-5-3. Grounds for total divorce.

The following grounds shall be sufficient to authorize the granting of a total divorce:

(1) Intermarriage by persons within the prohibited degrees of consanguinity or affinity;

(2) Mental incapacity at the time of the marriage;

(3) Impotency at the time of the marriage;

(4) Force, menace, duress, or fraud in obtaining the marriage;

(5) Pregnancy of the wife by a man other than the husband, at the time of the marriage, unknown to the husband;

(6) Adultery in either of the parties after marriage;

(7) Willful and continued desertion by either of the parties for the term of one year;

(8) The conviction of either party for an offense involving moral turpitude, under which he is sentenced to imprisonment in a penal institution for a term of two years or longer;

(9) Habitual intoxication;

(10) Cruel treatment, which shall consist of the willful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justifies apprehension of danger to life, limb, or health;

(11) Incurable mental illness. No divorce shall be granted upon this ground unless the mentally ill party has been adjudged mentally ill by a court of competent jurisdiction or has been certified to be mentally ill by two physicians who have personally examined the party; and he has been confined in an institution for the mentally ill or has been under continuous treatment for mental illness for a period of at least two years immediately preceding the commencement of the action; and the superintendent or other chief executive officer of the institution and one competent physician appointed by the court, after a thorough examination, make a certified statement under oath that it is their opinion that the party evidences such a want of reason, memory, and intelligence as to prevent the party from comprehending the nature, duties, and consequences of the marriage relationship and that, in the light of present day medical knowledge, recovery of the party's mental health cannot be expected at any time during his life. Notice of the action must be served upon the guardian of the person of the mentally ill person and upon the superintendent or other chief executive officer of the institution in which the person is confined. In the event that there is no guardian of the person, then notice of the action shall be served upon a guardian ad litem, who shall be appointed by the court in which the divorce action is filed, and upon the superintendent or chief executive officer of the institution in which the person is confined. The guardian and superintendent shall be entitled to appear and be heard upon the issues. The

status of the parties as to the support and maintenance of the mentally ill person shall not be altered in any way by the granting of the divorce;

(12) Habitual drug addiction, which shall consist of addiction to any controlled substance as defined in Article 2 of Chapter 13 of Title 16;

(13) The marriage is irretrievably broken. Under no circumstances shall the court grant a divorce on this ground until not less than 30 days from the date of service on the respondent. (Laws 1850, Cobb's 1851 Digest, p. 226; Code 1863, § 1670; Code 1868, § 1711; Code 1873, § 1712; Code 1882, § 1712; Civil Code 1895, § 2426; Civil Code 1910, § 2945; Code 1933, § 30-102; Ga. L. 1946, p. 90, § 2; Ga. L. 1951, p. 744, § 1; Ga. L. 1962, p. 600, § 1; Ga. L. 1963, p. 288, § 1; Ga. L. 1971, p. 361, § 1; Ga. L. 1972, p. 633, § 1; Ga. L. 1973, p. 557, § 1; Ga. L. 1977, p. 1253, § 3.)

Cross references. — Criminal penalty for adultery, § 16-6-19. Rights and privileges of persons hospitalized for mental illness generally, § 37-3-140 et seq.

Law reviews. — For article discussing the irretrievably broken marriage as a ground for divorce, see 10 Ga. St. B.J. 9 (1973). For article surveying Georgia

cases dealing with domestic relations from June 1977 through May 1978, see 30 Mercer L. Rev. 59 (1978).

For note, "The Impact of the Revolution in Georgia's Divorce Law on Antenuptial Agreements," see 11 Ga. L. Rev. 406 (1977).

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ADULTERY

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DESERTION

MARRIAGE IRRETRIEVABLY BROKEN

OTHER GROUNDS FOR DIVORCE

General Consideration

Law was capable of definition and application. Dickson v. Dickson, 238 Ga. 672, 235 S.E.2d 479 (1977).

Specified grounds required for dissolution of marriage. — Marriage relationship cannot be dissolved in this state except upon grounds specified in this statute. Christopher v. Christopher, 198 Ga. 361, 31 S.E.2d 818 (1944).

When jury authorized to find for divorce. — Jury is authorized to find for divorce when evidence establishes grounds upon which the action is brought.

Brackett v. Brackett, 217 Ga. 84, 121 S.E.2d 146 (1961).

When action for divorce is not available remedy. — When marriage status never existed and complaint is not grounds for divorce, action for divorce is not available remedy to the petitioner. Gearllach v. Odom, 200 Ga. 350, 37 S.E.2d 184 (1946).

Previous undissolved marriage of one party is not grounds for divorce. Gearllach v. Odom, 200 Ga. 350, 37 S.E.2d 184 (1946); Pritchett v. Ellis, 201 Ga. 809, 41 S.E.2d 402 (1947); Lovett v. Zeigler, 224 Ga. 144, 160 S.E.2d 360 (1968).

Cited in *Smith v. Smith*, 167 Ga. 98, 145 S.E. 63 (1928); *Baker v. Baker*, 168 Ga. 478, 148 S.E. 151 (1929); *Kendrick v. Kendrick*, 173 Ga. 434, 160 S.E. 502 (1931); *Twilley v. Twilley*, 195 Ga. 291, 24 S.E.2d 41 (1943); *Mackey v. Mackey*, 198 Ga. 707, 32 S.E.2d 764 (1945); *Ragans v. Ragans*, 200 Ga. 890, 39 S.E.2d 162 (1946); *Sorrow v. Sorrow*, 203 Ga. 146, 45 S.E.2d 413 (1947); *Brant v. Brant*, 209 Ga. 151, 71 S.E.2d 209 (1952); *Veazy v. Blair*, 86 Ga. App. 721, 72 S.E.2d 481 (1952); *Hinkle v. Hinkle*, 209 Ga. 554, 74 S.E.2d 657 (1953); *Anglin v. Anglin*, 209 Ga. 823, 76 S.E.2d 498 (1953); *Stimpson v. Stimpson*, 213 Ga. 235, 98 S.E.2d 559 (1957); *Morrison v. Morrison*, 215 Ga. 143, 109 S.E.2d 519 (1959); *Shivers v. Shivers*, 215 Ga. 536, 111 S.E.2d 376 (1959); *Phillips v. Phillips*, 215 Ga. 606, 112 S.E.2d 594 (1960); *Walston v. Walston*, 216 Ga. 577, 118 S.E.2d 369 (1961); *Mills v. Mills*, 218 Ga. 686, 130 S.E.2d 221 (1963); *Tolbert v. Tolbert*, 221 Ga. 159, 143 S.E.2d 743 (1965); *Davis v. Davis*, 223 Ga. 657, 157 S.E.2d 444 (1967); *Poulos v. Poulos*, 226 Ga. 375, 174 S.E.2d 925 (1970); *Harkness v. Harkness*, 228 Ga. 184, 184 S.E.2d 566 (1971); *Funderburk v. Funderburk*, 229 Ga. 457, 192 S.E.2d 262 (1972); *Southeastern Fid. Ins. Co. v. Fluellen*, 128 Ga. App. 877, 198 S.E.2d 407 (1973); *Barden v. Barden*, 230 Ga. 663, 198 S.E.2d 869 (1973); *Roberts v. Roberts*, 231 Ga. 196, 200 S.E.2d 731 (1973); *Ivey v. Ivey*, 233 Ga. 45, 209 S.E.2d 590 (1974); *Blois v. Blois*, 234 Ga. 475, 216 S.E.2d 281 (1975); *Anders v. Anders*, 238 Ga. 79, 231 S.E.2d 64 (1976); *Leachmon v. Leachmon*, 239 Ga. 780, 238 S.E.2d 863 (1977); *Ford v. Ford*, 243 Ga. 763, 256 S.E.2d 446 (1979); *Tobitt v. Tobitt*, 249 Ga. 245, 290 S.E.2d 49 (1982).

Adultery

Adultery during marriage is ground for divorce by the other spouse, of whatever gender. *Hargrett v. Hargrett*, 242 Ga. 725, 251 S.E.2d 235 (1978), overruled on other grounds, *Stokes v. Stokes*, 246 Ga. 765, 273 S.E.2d 169 (1980).

Act of illicit sexual intercourse committed prior to marriage is not ground of divorce in this state. *Stanley v. Stanley*, 115 Ga. 990, 42 S.E. 374 (1902).

Adultery may involve homosexual relations. — Person commits adultery when he or she has sexual intercourse with a “person” other than his or her spouse. Therefore, both extramarital homosexual, as well as heterosexual, relations constitute adultery. *Owens v. Owens*, 247 Ga. 139, 274 S.E.2d 484 (1981).

Petitioner not precluded from alleging adultery when discovered after separation. — When the husband sought divorce on ground of adultery, among other grounds, the fact that the petitioner did not know of the adultery until after the separation did not prevent the petitioner from seeking a divorce based on adultery after learning of the adultery. *Hargrett v. Hargrett*, 242 Ga. 725, 251 S.E.2d 235 (1978), overruled on other grounds, *Stokes v. Stokes*, 246 Ga. 765, 273 S.E.2d 169 (1980).

Evidence of adultery. — To be a viable ground for divorce, evidence of adultery must continue to be admissible. *Hargrett v. Hargrett*, 242 Ga. 725, 251 S.E.2d 235 (1978), overruled on other grounds, *Stokes v. Stokes*, 246 Ga. 765, 273 S.E.2d 169 (1980).

Adultery may be proved by circumstantial evidence, but such evidence must infer as a necessary conclusion that adultery was committed. But if such evidence is fairly susceptible of two interpretations, one consistent with innocence and the other with guilt, it is not sufficient to prove adultery. *Johnson v. Johnson*, 218 Ga. 28, 126 S.E.2d 229 (1962).

Requirements for inferring adultery from circumstantial evidence. — There must be both opportunity and adulterous disposition for adultery to be inferred from circumstantial evidence. *Johnson v. Johnson*, 218 Ga. 28, 126 S.E.2d 229 (1962).

Cruel Treatment

“Cruel treatment,” was willful infliction of pain, bodily or mental, upon the complaining party such as reasonably justifies an apprehension of danger to life, limb, or health. *Odom v. Odom*, 36 Ga. 286 (1867), overruled on other grounds, *Wise v. Wise*, 156 Ga. 459, 119 S.E. 410 (1923); *Ring v. Ring*, 118 Ga. 183, 44 S.E. 861 (1903); *Ford v. Ford*, 146 Ga. 164, 91 S.E.

Cruel Treatment (Cont'd)

42 (1916); Phinizy v. Phinizy, 154 Ga. 199, 114 S.E. 185 (1922); Adams v. Adams, 195 Ga. 479, 24 S.E.2d 683 (1943); Hilburn v. Hilburn, 210 Ga. 497, 81 S.E.2d 1 (1954); Ewing v. Ewing, 211 Ga. 803, 89 S.E.2d 180 (1955); Connor v. Connor, 212 Ga. 92, 90 S.E.2d 581 (1955); Moody v. Moody, 224 Ga. 13, 159 S.E.2d 394 (1968).

Cruel treatment, or cruelty in the broad and unrestricted sense in which it is used in the statute, is any act intended to torment, vex, or afflict, or which actually afflicts or torments without necessity; or any act of inhumanity, wrong, oppression, or injustice. Ross v. Ross, 169 Ga. 524, 150 S.E. 822 (1929); Morris v. Morris, 202 Ga. 431, 43 S.E.2d 639 (1947); Bell v. Bell, 213 Ga. 176, 97 S.E.2d 571 (1957).

Acts of cruelty must be such as to render cohabitation unsafe, or are likely to be attended with injury to the person or to the health of the wife. It must be the intention of the offending party to injure — to wound. It must be a willful act the purpose of which is to hurt. Ewing v. Ewing, 211 Ga. 803, 89 S.E.2d 180 (1955).

Cruel treatment justifying separation defined. — Cruel treatment which would justify a wife in leaving her husband and living in a state of separation from him, while he is willing to have her come back to his home and live with him, should have the same definition as the cruel treatment which would afford grounds for divorce. Mell v. Mell, 190 Ga. 508, 9 S.E.2d 756 (1940); Mullikin v. Mullikin, 200 Ga. 638, 38 S.E.2d 281 (1946); Brown v. Brown, 217 Ga. 671, 124 S.E.2d 399 (1962).

Willfulness of cruel treatment is essential element which will authorize the grant of a divorce. Alford v. Alford, 189 Ga. 630, 7 S.E.2d 278 (1940).

Intention to wound is necessary element of cruel treatment for which divorce will be granted. Connor v. Connor, 212 Ga. 92, 90 S.E.2d 581 (1955); Brown v. Brown, 228 Ga. 330, 185 S.E.2d 412 (1971).

Without element of willfulness, there can be no cruel treatment which will authorize the grant of a divorce upon that ground. Hilburn v. Hilburn, 210 Ga.

497, 81 S.E.2d 1 (1954); Vaughan v. Vaughan, 223 Ga. 298, 154 S.E.2d 592 (1967).

If the alleged acts of cruel treatment by the defendant toward the petitioner resulted from the defendant's emotionally unstable personality and not from a willful desire to wound the plaintiff, then the defendant was guilty of no cruel treatment which could authorize the grant of a divorce to the plaintiff on this ground. Connor v. Connor, 212 Ga. 92, 90 S.E.2d 581 (1955).

While husband's allegations as to matters transpiring before the reconciliation of the parties asserted conduct unbecoming a wife, they did not amount to allegations of cruel treatment since there was shown no willful infliction of pain such as would justify an apprehension of danger to life or health. Womble v. Womble, 214 Ga. 438, 105 S.E.2d 324 (1958).

Insane person cannot commit willful acts which amount to cruel treatment within the meaning of paragraph (10) of this statute. Hilburn v. Hilburn, 210 Ga. 497, 81 S.E.2d 1 (1954).

Divorce on grounds of cruel treatment presupposes bona fide separation. Sutton v. Sutton, 224 Ga. 140, 160 S.E.2d 385 (1968).

Separated spouses can commit cruel acts. — Fact that spouses live separated does not make it impossible for either to commit cruel acts which may be the basis for a divorce. Slaughter v. Slaughter, 190 Ga. 229, 9 S.E.2d 70 (1940); Wiley v. Wiley, 231 Ga. 798, 204 S.E.2d 170 (1974).

Separation can occur when one spouse moves into another room with intent and purpose of suspending conjugal rights. Blasingame v. Blasingame, 249 Ga. 791, 294 S.E.2d 519 (1982).

Actual physical violence is not essential ingredient of cruel treatment as used in paragraph (10) of this statute, or as construed by the Supreme Court. Slaughter v. Slaughter, 190 Ga. 229, 9 S.E.2d 70 (1940).

Mental anguish may amount to cruelty. — Mental anguish and wounded feelings, constantly aggravated by repeated insults and neglect, are as bad as actual bruises of the person, and that

which produces the one is not more cruel than that which causes the other. *Ross v. Ross*, 169 Ga. 524, 150 S.E. 822 (1929); *Duncan v. Duncan*, 183 Ga. 570, 189 S.E. 18 (1936).

Commission of acts which outrage the feelings of modesty and decency, such as threatening to commit, or attempting to commit, adultery, or cursing, abusing, or using insulting and opprobrious language, when done between a husband and wife, whether by the husband to the wife, or by the wife to the husband, and in the knowledge or coming to the knowledge of both; these also, if persisted in and unatoned for, constitute cruel treatment. *Ross v. Ross*, 169 Ga. 524, 150 S.E. 822 (1929).

Words must be intended to wound. — In absence of intention to wound, words do not constitute cruel treatment as contemplated by the law as a ground for divorce. *Ewing v. Ewing*, 211 Ga. 803, 89 S.E.2d 180 (1955).

Acts intended to cause anguish. — Acts or conduct of the defendant which would not amount to cruel treatment when considered alone might be found by the jury to enter into an alleged calculated intent by the defendant of causing the petitioner great mental pain and anguish. *Bell v. Bell*, 213 Ga. 176, 97 S.E.2d 571 (1957).

Requirement of reasonable apprehension of injury. — There is no requirement that plaintiff's health be actually injured, but only that there be reasonable apprehension of injury. *Hardy v. Hardy*, 221 Ga. 176, 144 S.E.2d 172 (1965).

Minor acts of temper not cruelty. — Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to the cruelty against which the law can relieve. *Ring v. Ring*, 118 Ga. 183, 44 S.E. 861 (1903); *Hilburn v. Hilburn*, 210 Ga. 497, 81 S.E.2d 1 (1954); *Ewing v. Ewing*, 211 Ga. 803, 89 S.E.2d 180 (1955).

Slight disagreements, and words inspired by transitory temper, were never intended by the statute as cause for setting aside a marriage contract. *Brown v. Brown*, 129 Ga. 246, 58 S.E. 825 (1907).

Single act of personal violence. — As a general rule, single act of personal violence is not considered cruel treatment, but two or more such acts alone may furnish ground for divorce. *Phinizy v. Phinizy*, 154 Ga. 199, 114 S.E. 185 (1922); *Hilburn v. Hilburn*, 210 Ga. 497, 81 S.E.2d 1 (1954).

One act of cruelty, not of a violent or serious character, standing alone, is not a sufficient ground for a divorce. *Brown v. Brown*, 217 Ga. 671, 124 S.E.2d 399 (1962); *Hearn v. Hearn*, 220 Ga. 577, 140 S.E.2d 861 (1965).

When single act of cruelty may justify divorce. — Single act of cruelty may be so severe and atrocious as to justify divorce; and a single act of cruel and inhuman treatment, accompanied by circumstances indicating a probability of a repetition of similar conduct, will warrant a divorce. *Phinizy v. Phinizy*, 154 Ga. 199, 114 S.E. 185 (1922).

"Nagging" may be cruel treatment. *Alford v. Alford*, 189 Ga. 630, 7 S.E.2d 278 (1940).

Allegations of "fussing and nagging" are sufficient to state a cause of action for divorce based on cruel treatment. *Swindle v. Swindle*, 221 Ga. 760, 147 S.E.2d 307 (1966).

Continuous course of ill conduct, such as nagging, injuriously affecting or endangering health of other spouse, might constitute cruel treatment as a ground of divorce, even though one incident in the course of conduct would not; and condoned acts in such a series of misconduct might be revived by the renewal and persistence of the conduct. *Womble v. Womble*, 214 Ga. 438, 105 S.E.2d 324 (1958).

Acts by wife, including continuous nagging and fussing, which were alleged in the husband's petition for divorce are sufficient to state a cause of action for divorce on the ground of cruel treatment. *Cramer v. Cramer*, 217 Ga. 414, 122 S.E.2d 729 (1961).

Allegations of continuous fussing and nagging were sufficient to charge cruel treatment. *Hirsch v. Hirsch*, 217 Ga. 590, 123 S.E.2d 915 (1962).

Constant nagging and false accusations can amount to cruel treatment. *Hardy v. Hardy*, 221 Ga. 176, 144 S.E.2d 172 (1965).

Cruel Treatment (Cont'd)

Affectionate attentions to other persons. — Testimony of an unmarried woman as to attentions shown to her by the defendant, including a proposal of marriage, along with letters written by the defendant to the witness, containing terms of endearment and the like, is admissible to corroborate the testimony of the plaintiff as to cruel treatment. *West v. West*, 199 Ga. 378, 34 S.E.2d 545 (1945).

Circulating slanderous reports of infidelity. — Circulation of reports of infidelity is such cruelty as would not only justify a separation, but would sustain an action for total divorce. *Myrick v. Myrick*, 67 Ga. 771 (1881); *Glass v. Wynn*, 76 Ga. 319 (1886). This holding was said to be obiter in *Ring v. Ring*, 118 Ga. 183, 44 S.E. 861, 62 L.R.A. 878 (1903).

Charge of adultery. — Charging a wife who was undergoing "the change of life," in her presence, with incestuous adultery with her brother, and these charges producing such mental pain as to cause her to become ill and to keep her in bed, at times for as long as two weeks, is sufficient to authorize a verdict for total divorce on the ground of cruel treatment. *Miller v. Miller*, 139 Ga. 282, 77 S.E. 21 (1913).

Charge of unchastity. — It is not cruel treatment to charge a wife with unchastity if she has been guilty thereof. *Fuller v. Fuller*, 108 Ga. 256, 33 S.E. 865 (1899).

Kicking one's wife, wounding and bruising her eye, head, and face, is cruel treatment sufficient to justify a divorce. *Ozmore v. Ozmore*, 41 Ga. 46 (1870).

Refusal to cohabit not cruel treatment. — Mere proof that a wife declined to cohabit with her husband will not authorize the grant of a divorce to him on the ground of cruel treatment. *Pinnebad v. Pinnebad*, 134 Ga. 496, 68 S.E. 73 (1910).

Spouse's dishonesty to third person not cruelty. — Dishonesty on the part of a husband in his dealings with a third party, not connected with his domestic relations or his treatment of his wife or the grounds of cruelty alleged in her petition, should not be brought to the attention of the jury in the charge, as possibly

illustrating the conduct of the parties in respect to each other, on the issue of whether or not the plaintiff cruelly treated his wife. *Anglin v. Anglin*, 145 Ga. 822, 90 S.E. 73 (1916).

Taking legal action against spouse. — That a wife brings action against her husband and recovers judgment against him for a debt due to her, and that after separation she sues him for temporary alimony and obtains a judgment in such action, does not constitute cruel treatment or furnish to the husband any basis for a suit for divorce. *Pinnebad v. Pinnebad*, 134 Ga. 496, 68 S.E. 73 (1910).

Alleging element of willfulness. — Allegations that the acts done or words spoken were done intentionally and for the purpose of injuring or wounding the petitioner were sufficient to allege the element of willfulness in the infliction of mental pain. *Swindle v. Swindle*, 221 Ga. 760, 147 S.E.2d 307 (1966).

Alleged cruelty of a continuous nature. — When cruelty alleged is of a continuous nature, it is not necessary to set forth dates of the cruelties complained of. *Cramer v. Cramer*, 217 Ga. 414, 122 S.E.2d 729 (1961).

Amending charges of cruelty. — Charges of cruelty in petition, as basis for divorce, may be amended by other charges of cruelty, and the plaintiff is not required to set forth with exactitude the dates of cruelty continuous in character. *Duncan v. Duncan*, 183 Ga. 570, 189 S.E. 18 (1936).

Element of willfulness in jury charge. — In charging upon cruel treatment, court should not omit reference to element of willfulness in the offense against the complaining party, nor fail to instruct the jury that it must be such as reasonably justifies the apprehension of the injuries referred to. *Skellie v. Skellie*, 152 Ga. 707, 111 S.E. 22 (1922).

Failure of judge to embrace element of willfulness in instruction requires grant of new trial, unless as a matter of law the court holds that the cruel treatment was willful. *Alford v. Alford*, 189 Ga. 630, 7 S.E.2d 278 (1940).

Charge which embodied substantially definition of cruel treatment was not erroneous merely because not stated in the exact language of the Code.

Bell v. Bell, 213 Ga. 176, 97 S.E.2d 571 (1957).

Cruelty presents question of law. — What constitutes cruel treatment within the meaning of the law is a question of law for the court. *Gholston v. Gholston*, 31 Ga. 625 (1860); *Brown v. Brown*, 129 Ga. 246, 58 S.E. 825 (1907).

Adverse verdict on one claim of cruelty not bar to second action. — Party who has once filed an action for divorce on the ground of cruel treatment, which resulted in a verdict and decree adverse to that party is not barred from thereafter filing a second petition on the same ground, but based on different acts, all of which were committed since the date of the former trial. *Slaughter v. Slaughter*, 190 Ga. 229, 9 S.E.2d 70 (1940).

Desertion

Willful and continued desertion. — Willful and continued desertion by either party for a term of three years (now one) will authorize total divorce. *Wilkinson v. Wilkinson*, 159 Ga. 332, 125 S.E. 856 (1924).

Petitioner's consent to desertion is not grounds for divorce. *Word v. Word*, 29 Ga. 281 (1859); *Phinizy v. Phinizy*, 154 Ga. 199, 114 S.E. 185 (1922).

Affirmative natural elements of desertion are two: the cohabitation ended, and the offending party's intent to desert. The statute creates a third affirmative element, the lapse of a definite period of time. *Reagan v. Reagan*, 221 Ga. 656, 146 S.E.2d 906 (1966).

There are three affirmative elements of desertion under law: the cohabitation ended, the offending party's intent to desert, and the lapse of a definite period of time. *Cagle v. Cagle*, 193 Ga. 34, 17 S.E.2d 75 (1941).

Desertion must be without legal justification, and without a breach of the continuity which the statute renders essential. *Cagle v. Cagle*, 193 Ga. 34, 17 S.E.2d 75 (1941); *Reagan v. Reagan*, 221 Ga. 656, 146 S.E.2d 906 (1966).

Desertion must be "willful." — Desertion must not only have been continued for three years (now one) but must be "willful." *Siniard v. Siniard*, 145 Ga. 541, 89 S.E. 517 (1916).

Law required voluntary separation of one married party from other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or the wrongful conduct of the other. *Cagle v. Cagle*, 193 Ga. 34, 17 S.E.2d 75 (1941); *Reagan v. Reagan*, 221 Ga. 656, 146 S.E.2d 906 (1966).

Separation by mutual consent does not constitute desertion. *Born v. Born*, 213 Ga. 830, 102 S.E.2d 170 (1958).

Voluntary separation is not desertion. — While desertion as a ground for divorce must have been "willful," a separation based merely on a voluntary agreement by both parties that they shall live apart, will not constitute the necessary element of willfulness as to a desertion by either party. *Allen v. Allen*, 194 Ga. 591, 22 S.E.2d 136 (1942).

Denial of conjugal rights may amount to desertion. — Within the meaning of the law, it was desertion by the wife, though she continues to reside in the matrimonial domicile, for her willfully, persistently, and without justification to deny her husband all his conjugal rights with the intention of casting him off as a husband completely and forever. The continuance of this state of affairs for three years (now one) affords cause of divorce on the grounds of desertion. *Whitfield v. Whitfield*, 89 Ga. 471, 15 S.E. 543 (1892); *Pinnebad v. Pinnebad*, 134 Ga. 496, 68 S.E. 73 (1910); *Duncan v. Duncan*, 184 Ga. 602, 192 S.E. 215 (1937).

Continued refusal after request for renewal of relations. — If the husband requests a resumption of the marital relation and a reconciliation in good faith, the refusal of the wife to resume cohabitation without justification or reasonable excuse manifests an intent to stay away and may constitute desertion on her part. *Born v. Born*, 213 Ga. 830, 102 S.E.2d 170 (1958).

One-year requirement for willful desertion. — Evidence must show willful desertion for period of one year prior to filing of divorce action. *Monroe v. Monroe*, 218 Ga. 353, 127 S.E.2d 899 (1962).

Evidence going to show that the desertion was not "willful," or that the petitioner was consenting, is admissible for the respondent. *Word v. Word*, 29 Ga. 281 (1859).

Desertion (Cont'd)

Parties as witnesses on desertion issue. — In an action for divorce by the husband against his wife alleging willful and continued desertion of the wife for a term of three years (now one), the husband is a competent witness; but he could not testify as to any facts derived by him from the confidential relation of husband and wife. *Castello v. Castello*, 41 Ga. 613 (1871).

Jury questions. — Under paragraph (7) of former Code 1933, § 30-102 (see O.C.G.A. § 19-5-3), even if the jury believed that appellant-husband had offered to resume marital relations and that appellee had refused to do so, a verdict for appellee would be proper because questions of good faith on the part of the husband in making the offer and whether the refusal of the wife to resume marital relations was justified or not under the circumstances and the period of time when the desertion began, are all for the determination of the jury. *Reagan v. Reagan*, 221 Ga. 656, 146 S.E.2d 906 (1966).

Marriage Irretrievably Broken

Constitutionality of divorce ground that marriage is irretrievably broken. — Grant of divorce on ground that marriage is irretrievably broken does not violate due process, equal protection, privileges and immunities, right to the courts, and right to trial by jury clauses of the state and federal constitutions. *Dickson v. Dickson*, 238 Ga. 672, 235 S.E.2d 479 (1977).

Legislative intent in adding "no fault" ground of divorce was to manifest public policy of avoiding recriminations between married persons seeking a divorce. *Anderson v. Anderson*, 237 Ga. 886, 230 S.E.2d 272 (1976).

Paragraph (13) amends public policy. — Public policy of the state to hinder facility in the procurement of divorces has been amended to the extent that paragraph (13) of this statute facilitated the procurement of divorces. *Dickson v. Dickson*, 238 Ga. 672, 235 S.E.2d 479 (1977).

When paragraph (13) of this section conflicts with other sections. — To the

extent that paragraph (13) of this statute was in irreconcilable conflict with other statutes, it must be held to amend those statutes by implication. *Dickson v. Dickson*, 238 Ga. 672, 235 S.E.2d 479 (1977).

Irretrievably broken marriage is one where either or both parties are unable or refuse to cohabit and there are no prospects for a reconciliation. *McCoy v. McCoy*, 236 Ga. 633, 225 S.E.2d 682 (1976).

No allocation of fault in irretrievably broken marriage. — Under irretrievably broken ground, divorce is granted to both parties without allocation of fault. *Anderson v. Anderson*, 237 Ga. 886, 230 S.E.2d 272 (1976).

Trial court is required to grant a divorce to both parties without fixing or placing fault on either party when a divorce is granted on the pleadings on irretrievably broken grounds. *Herring v. Herring*, 237 Ga. 771, 229 S.E.2d 756 (1976).

Divorce granted on irretrievably broken grounds should be granted to the parties equally. *Dickson v. Dickson*, 238 Ga. 672, 235 S.E.2d 479 (1977).

When traditional fault grounds alleged in addition to irretrievable break. — Even when traditional fault allegations are put forth by affidavit, or as evidence at a hearing, on a motion for summary judgment on the irretrievably broken ground, the primary finding is merely that the marriage is one where either or both parties are unable or refuse to cohabit and there are no prospects for a reconciliation no matter what the reasons are that have caused that result. *Anderson v. Anderson*, 237 Ga. 886, 230 S.E.2d 272 (1976).

No proof of fault required to show marriage is "irretrievably broken." — When parties do not specifically complain of the other's conduct, but merely state that their marital differences are insoluble and request a change of status, the only question is whether there are prospects for reconciliation. *Anderson v. Anderson*, 237 Ga. 886, 230 S.E.2d 272 (1976).

No evidence requirement as to good faith effort. — There is no requirement that evidence show that parties made

good faith effort to make successful marriage, nor that the marriage became irretrievably broken through no fault of either party. *Whitmire v. Whitmire*, 236 Ga. 153, 223 S.E.2d 135 (1976).

Reconciliation and cohabitation of parties terminates action for divorce. This is a “no-fault” ground, and there can be no reconciliation on condition applicable to it, the breach of which condition would revive the action for divorce. *Lindsay v. Lindsay*, 241 Ga. 166, 244 S.E.2d 8 (1978).

In a case in which a complaint for divorce is brought upon the ground that the marriage was irretrievably broken, subsequent reconciliation and cohabitation of the parties terminates the action for divorce. *Joiner v. Joiner*, 246 Ga. 77, 268 S.E.2d 661 (1980).

Allegation of an irretrievably broken marriage is demonstrably false if the parties have resumed cohabitation or have reconciled for any period. *Joiner v. Joiner*, 246 Ga. 77, 268 S.E.2d 661 (1980).

Reconciliation and cohabitation did not divest court of jurisdiction. — While cohabitation and reconciliation could be asserted as defenses to a pending divorce action, they did not divest a court of jurisdiction to enter a divorce decree; further, the court was authorized under O.C.G.A. § 19-5-3(13) to grant a divorce based on the evidence that the marriage was irretrievably broken. *McCoy v. McCoy*, 281 Ga. 604, 642 S.E.2d 18 (2007).

Whether possibility for reconciliation exists is subjective. When the issue is contested by one of the parties to the divorce action, all relevant evidence is admissible to aid in this determination. *Whitmire v. Whitmire*, 236 Ga. 153, 223 S.E.2d 135 (1976).

Party’s failure to embark upon reconciliation in good faith. — If one party does not embark upon reconciliation in good faith, it cannot amount to evidence of hope for the marriage. *Joiner v. Joiner*, 246 Ga. 77, 268 S.E.2d 661 (1980).

Mere fact that party maintains hope for reconciliation will not support finding that there are prospects for such. *McCoy v. McCoy*, 236 Ga. 633, 225 S.E.2d 682 (1976).

No-fault divorce may be granted by summary judgment when the movant

seeks a divorce on the irretrievably broken grounds and pierces the opposing party’s pleadings, which deny that the marriage is irretrievably broken. *Dickson v. Dickson*, 238 Ga. 672, 235 S.E.2d 479 (1977).

Summary judgment should be denied in a divorce proceeding when one of the parties moves for summary judgment on the issue of no-fault divorce and the other party opposes the motion by filing an affidavit expressing that party’s opinion that the marriage is not irretrievably broken and there are genuine prospects for reconciliation. *Whittington v. Whittington*, 247 Ga. 79, 274 S.E.2d 333 (1981).

Party estopped to complain of divorce judgment granted under paragraph (13). — When the court granted a divorce to the wife on the ground of the marriage being irretrievably broken she cannot later complain because one cannot complain of a judgment, order, or ruling that one’s own procedure or conduct procured or aided in causing. *Friedman v. Friedman*, 233 Ga. 254, 210 S.E.2d 754 (1974).

Other Grounds for Divorce

Insanity at time of marriage is grounds for divorce. *Huguley v. Huguley*, 204 Ga. 692, 51 S.E.2d 445 (1949).

Natural impotence existing at time of marriage will void the marriage. *Head v. Head*, 2 Ga. 191 (1847).

No requirement as to petitioner’s knowledge of impotency. — In naming impotency as a ground for divorce, merely specified “Impotency at the time of the marriage,” without any qualification as to knowledge of the petitioner thereof. *Lovelace v. Lovelace*, 179 Ga. 822, 177 S.E. 685 (1934).

Condonation of impotency is specific affirmative defense which must be alleged and proved by the party insisting upon it. *Lovelace v. Lovelace*, 179 Ga. 822, 177 S.E. 685 (1934).

“Menace.” — Any overt act of threatening character, short of actual assault, was “menace.” *Bryant v. Bryant*, 192 Ga. 114, 14 S.E.2d 725 (1941).

When false representation of paternity not grounds for divorce. — When

Other Grounds for Divorce (Cont'd)

woman prior to her marriage falsely and fraudulently represented to her prospective husband that he was the father of a child with which she was then pregnant, such representation would not be ground for the grant of a divorce based upon fraud, when it was shown that he married her to avoid a prosecution for seduction. *Peacon v. Peacon*, 197 Ga. 748, 30 S.E.2d 640 (1944).

There were three essential ingredients in grounds for divorce based on conviction for a crime of moral turpitude: the commission of the offense involving moral turpitude, the conviction for the offense, and a sentence for a term of two years or longer in the penitentiary. *Holloway v. Holloway*, 126 Ga. 459, 55 S.E. 191 (1906).

Right to divorce for criminal conviction is not affected by executive pardon granted after sentence has been imposed. *Holloway v. Holloway*, 126 Ga. 459, 55 S.E. 191 (1906).

Applicability of condonation. — Condonation has no application between date of conviction and sentence and actual incarceration. *Henderson v. Henderson*, 235 Ga. 236, 219 S.E.2d 160 (1975).

Voluntary manslaughter conviction. — Conviction of a married person of voluntary manslaughter followed by a

sentence of imprisonment in the penitentiary for a term of two years or longer gives to the other party to the marriage a right to a divorce. *Holloway v. Holloway*, 126 Ga. 459, 55 S.E. 191 (1906).

Not necessary to show continual intoxication. — In order to prove "habitual intoxication" on the part of the respondent, it is not essential to show that one was constantly and continuously drunk. *Fuller v. Fuller*, 108 Ga. 256, 33 S.E. 865 (1899).

Proof of drunkenness on one occasion insufficient. — Testimony that the husband was "drunk" or "under the influence of liquor" on one occasion prior to the separation is wholly insufficient to sustain a divorce on the ground of habitual intoxication. *Stimpson v. Stimpson*, 213 Ga. 235, 98 S.E.2d 559 (1957).

Provision on incurable mental illness strictly construed. — Since the settled law in this state is that, unless authorized by statute, insanity or other mental incapacity arising after marriage is not cause for divorce, any change in the settled law by statute making postnuptial insanity a ground for divorce should be strictly construed. *Shelton v. Shelton*, 209 Ga. 454, 74 S.E.2d 5 (1953).

Law did not create any new right to support and maintenance after a divorce granted to the husband on the grounds of incurable insanity. *Morris v. Bruce*, 98 Ga. App. 821, 107 S.E.2d 262 (1959).

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Divorce and Separation, §§ 19 et seq., 324 et seq.

Am. Jur. Pleading and Practice Forms. — 8B Am. Jur. Pleading and Practice Forms, Divorce and Separation, § 33.

C.J.S. — 27A C.J.S., Divorce, §§ 22, 39 et seq., 53 et seq., 67, 68.

ALR. — Sufficiency of allegation of adultery in suit for divorce, 2 ALR 1621.

Desertion as affected by element of remonstrance or resistance, 3 ALR 503.

Forcing spouse to get rid of child by former marriage as cruelty constituting ground for divorce, 3 ALR 803.

Abuse by relatives of other spouse as cruelty constituting ground for divorce, 3 ALR 993.

Conduct amounting to treatment endangering life within statute defining grounds for divorce, 5 ALR 712.

Venereal disease as ground for divorce or annulment of marriage, 5 ALR 1016; 8 ALR 1540.

Desertion as affected by intimations of a possible consent to the renewal of marital relations in the future, 12 ALR 1391.

Misrepresentation or mistake as to identity or condition in life of one of the parties as affecting validity of marriage, 14 ALR 121; 75 ALR 663.

Divorce: offer after lapse of statutory period of desertion to resume marital relations, 18 ALR 630.

Birth of child or miscarriage before or

after lapse of normal period of gestation since access of husband as evidence of adultery, 21 ALR 1457.

Divorce for desertion predicated upon conduct subsequent to a decree of separation, 25 ALR 1047; 61 ALR 1268.

Adultery by deserted spouse after desertion, as ground of divorce in favor of other spouse, 25 ALR 1051.

Refusal of one spouse to live with relatives of other as affecting desertion as ground of divorce or separation, 47 ALR 687.

Charges, in divorce suit, of marital misconduct as cruelty within statute defining grounds of divorce, 51 ALR 1188.

Necessity that drunkenness to constitute ground for divorce shall continue until commencement of suit or later, 54 ALR 331.

Divorce for desertion predicated upon conduct subsequent to a decree of separation, or divorce a mensa et thoro, 61 ALR 1268.

Discretion as to denial of divorce or separation where statutory grounds are established, 74 ALR 271.

Insistence on living with relatives as cruelty for purposes of divorce or separation, 76 ALR 985.

Request or demand for resumption of marital relations as affected by conditions attached or alternatives suggested, 76 ALR 1023.

Divorce a vinculo for desertion predicated upon conduct prior to decree of separation, 95 ALR 234.

Subsequent adultery as recriminatory defense to desertion or cruelty, 101 ALR 646.

Insanity as substantive ground of divorce or separation, 113 ALR 1248; 24 ALR2d 873.

What amounts to habitual intemperance, drunkenness, etc., within statute relating to substantive grounds for divorce, 120 ALR 1176; 29 ALR2d 925.

Cruelty predicated upon acts or conduct during separation as ground for divorce or separation, 129 ALR 160.

Character or nature of crime contemplated by statute as substantive ground for divorce, 135 ALR 851.

Construction and application of statutory provision requiring security for main-

tenance of defendant as condition of divorce or annulment of marriage because of insanity, 141 ALR 946.

Accusation of improper relations as cruelty constituting ground for divorce or separation, 143 ALR 623.

Separation due to husband's refusal or inability to support wife as desertion within divorce statute, 150 ALR 991.

Association or conduct of spouse with persons of opposite sex as cruelty or abusive treatment justifying divorce or separation, 157 ALR 631.

Doctrine of comparative rectitude in divorce cases, 159 ALR 734.

Conduct of plaintiff in divorce suit, not of itself a cause for divorce, as basis of defense of recrimination, 159 ALR 1453.

Divorce on ground of husband's gifts of his property to third persons, 160 ALR 620.

Recrimination as an absolute or qualified defense in divorce cases, 170 ALR 1076.

Validity and construction of statute respecting divorce in favor of spouse whose husband or wife has obtained divorce in another state, 175 ALR 293.

Testimony of children as to grounds of divorce of their parents, 2 ALR2d 1329.

Avoidance of procreation of children as ground for divorce or annulment of marriage, 4 ALR2d 227.

Antenuptial knowledge relating to alleged grounds as barring right to divorce, 15 ALR2d 670.

Requisites of proof of insanity as a ground for divorce, 15 ALR2d 1135.

What constitutes duress sufficient to warrant divorce or annulment of marriage, 16 ALR2d 1430.

Insanity as affecting right to divorce or separation, 19 ALR2d 144.

Conviction in another jurisdiction as within statute making conviction of crime a ground of divorce, 19 ALR2d 1047.

Divorce: acts or omissions of spouse causing other spouse to leave home as desertion by former, 19 ALR2d 1428.

Insanity as substantive ground of divorce or separation, 24 ALR2d 873.

Racial, religious, or political differences as ground for divorce, separation, or annulment, 25 ALR2d 928.

Wife's failure to follow husband to new

domicile as constituting desertion or abandonment as ground for divorce, 29 ALR2d 474.

Condonation of cruel treatment as defense to action for divorce or separation, 32 ALR2d 107.

Charge of insanity or attempt to have spouse committed to mental institution as ground for divorce or judicial separation, 33 ALR2d 1230.

Sufficiency of allegations of desertion, abandonment, or living apart as ground for divorce, separation, or alimony, 57 ALR2d 468.

Concealed premarital unchastity or parenthood as ground of divorce or annulment, 64 ALR2d 742.

What constitutes impotency as ground for divorce, 65 ALR2d 776.

Charging spouse with criminal misconduct as cruelty constituting ground for divorce, 72 ALR2d 1197.

Drunkenness, habitual intemperance, or use of drugs as constituting cruelty as a ground for divorce, 76 ALR2d 419.

Homosexuality as ground for divorce, 78 ALR2d 807.

Divorce: time of pendency of former suit for divorce, annulment, alimony, or maintenance as included in period of desertion, 80 ALR2d 855.

Mistreatment of children as ground for divorce, 82 ALR2d 1361.

Threats or attempts to commit suicide as cruelty or indignity constituting a ground for divorce, 86 ALR2d 422.

Insistence on sex relations as cruelty or indignity constituting ground for divorce, 88 ALR2d 553.

Acts occurring after commencement of suit for divorce as ground for decree under original complaint, 98 ALR2d 1264.

Construction of statute making bigamy or prior lawful subsisting marriage to third person a ground for divorce, 3 ALR3d 1108.

Single act as basis of divorce or separation on ground of cruelty, 7 ALR3d 761.

Power of court to grant absolute divorce to both spouses upon showing of mutual fault, 13 ALR3d 1364.

Fault of spouse as affecting right to divorce under statute making separation a substantive ground of divorce, 14 ALR3d 502.

Concealment of or misrepresentation as to prior marital status as ground for annulment of marriage, 15 ALR3d 759.

Retrospective effect of statute prescribing grounds of divorce, 23 ALR3d 626.

Separation within statute making separation a substantive ground of divorce, 35 ALR3d 1238.

Incapacity for sexual intercourse as ground for annulment, 52 ALR3d 589.

Refusal of sexual intercourse as justifying divorce or separation, 82 ALR3d 660.

Transvestism or transsexualism of spouse as justifying divorce, 82 ALR3d 725.

What constitutes "incompatibility" within statute specifying it as substantive ground for divorce, 97 ALR3d 989.

Insanity as defense to divorce or separation — post 1950 cases, 67 ALR4th 277.

Homosexuality as ground for divorce, 96 ALR5th 83.

19-5-4. Effect of collusion, consent, guilt of like conduct, or condonation.

(a) No divorce shall be granted under the following circumstances:

(1) The adultery, desertion, cruel treatment, or intoxication complained of was occasioned by the collusion of the parties, with the intention of causing a divorce;

(2) The party complaining of the adultery, desertion, cruel treatment, or intoxication of the other party was consenting thereto;

(3) Both parties are guilty of like conduct; or

(4) There has been a voluntary condonation and cohabitation subsequent to the acts complained of, with notice thereof.

(b) In all such cases, the respondent may plead in defense the conduct of the party bringing the action and the jury may, on examination of the whole case, refuse a divorce. (Laws 1850, Cobb’s 1851 Digest, p. 226; Code 1863, § 1673; Code 1868, § 1714; Code 1873, § 1715; Code 1882, § 1715; Civil Code 1895, § 2429; Civil Code 1910, § 2948; Code 1933, § 30-109.)

Law reviews. — For note discussing treatment of condonation in various jurisdictions and advocating its abolition as a strict defense so as to promote reconcilia-

tion, see 20 Mercer L. Rev. 481 (1969). For note advocating abolition of the defense of recrimination, see 20 Mercer L. Rev. 484 (1969).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- LIKE CONDUCT
- CONDONATION
- JURY CHARGE

General Consideration

It is not necessary for wife to counterclaim for divorce to avail herself of this defense under the provisions of this statute. *Minielly v. Minielly*, 234 Ga. 434, 216 S.E.2d 271 (1975).

Reconciliation and cohabitation did not divest court of jurisdiction to grant divorce. — While cohabitation and reconciliation could be asserted as defenses to a pending divorce action, they did not divest a court of jurisdiction to enter a divorce decree; further, the court was authorized under O.C.G.A. § 19-5-3(13) to grant a divorce based on the evidence that the marriage was irretrievably broken. *McCoy v. McCoy*, 281 Ga. 604, 642 S.E.2d 18 (2007).

Like Conduct

“Like conduct” construed. — When the ground of divorce of the husband is cruel treatment occurring prior to the separation, and the wife’s charge in her answer is adultery, this is not such “like conduct” as is contemplated by law. *Schwartz v. Schwartz*, 222 Ga. 460, 150 S.E.2d 809 (1966).

Cruel treatment and desertion are not “like conduct” within the meaning of the law so as to prohibit the grant of a divorce. *Blois v. Blois*, 234 Ga. 475, 216 S.E.2d 281 (1975).

Cruel treatment by the wife prior to separation vis-a-vis adultery of the husband after separation and an invalid Mexican divorce are not “like conduct”. *Blois v. Blois*, 234 Ga. 475, 216 S.E.2d 281 (1975).

Cruel treatment of wife beating is “unlike” the cruel treatment of a wife’s abusive and insulting language to her husband. *Blois v. Blois*, 234 Ga. 475, 216 S.E.2d 281 (1975).

If both parties have been guilty of like misconduct, no divorce shall be granted. *Cohen v. Cohen*, 196 Ga. 562, 27 S.E.2d 28 (1943).

Divorce denied to both parties who participate in quarreling. — When plaintiff’s testimony showed conclusively that any fussing and quarreling was participated in by both, neither party could be granted a divorce under this testimony. *Davis v. Davis*, 223 Ga. 657, 157 S.E.2d 444 (1967).

Condonation

“Condonation” is forgiveness, either expressed or implied, by a husband of his wife, or by a wife of her husband, for a breach of marital duty, with an implied condition that the offense shall not be repeated. *Phinizy v. Phinizy*, 154 Ga. 199, 114 S.E. 185 (1922); *Duncan v. Duncan*, 184 Ga. 602, 192 S.E. 215 (1937); *Day v. Day*, 210 Ga. 454, 81 S.E.2d 6 (1954);

Condonation (Cont'd)

Poulos v. Poulos, 226 Ga. 375, 174 S.E.2d 925 (1970).

Condonation includes conditional forgiveness of all antecedent acts of cruelty, and such acts as may have been condoned will not be revived except by fresh acts of cruelty. Poulos v. Poulos, 226 Ga. 375, 174 S.E.2d 925 (1970).

Sexual intercourse is not essential element of condonation, although it is conclusive evidence thereof. Phinizy v. Phinizy, 154 Ga. 199, 114 S.E. 185 (1922); Duncan v. Duncan, 184 Ga. 602, 192 S.E. 215 (1937); Dixon v. Dixon, 211 Ga. 869, 89 S.E.2d 473 (1955); Poulos v. Poulos, 226 Ga. 375, 174 S.E.2d 925 (1970).

Mere request to resume marital relations not condonation. — Fact that the plaintiff had a friendly interview with his wife, and requested her to return home and live with him, does not amount in law to a condonation. Johns v. Johns, 29 Ga. 718 (1859).

What constitutes condonation of cruel treatment. — If, after an act of cruelty done by the husband to the wife, she lives with him for many years, and has by him numerous children, and would probably still live with him but for the interference of a child, the act is condoned by her. Buckholts v. Buckholts, 24 Ga. 238 (1858).

If a husband is guilty of cruel treatment toward his wife, or of adultery, and with full knowledge thereof she condones the offense and cohabits with him, and he is not guilty of any further misconduct, she can not thereafter, at her mere will, desert him. Davis v. Davis, 134 Ga. 804, 68 S.E. 594 (1910).

If there is no breach of condition after condonation, forgiveness stands complete and absolute. Condonation is not revocable at will. Davis v. Davis, 134 Ga. 804, 68 S.E.2d 594 (1910); Phinizy v. Phinizy, 154 Ga. 199, 114 S.E. 185 (1922).

Condonation will not prevent divorce if based upon condition broken by the husband. Ozmore v. Ozmore, 41 Ga. 46 (1870).

Condonation and cohabitation after filing a suit for divorce, if conditioned upon the promise of the defendant not to again

be guilty of the acts charged in the petition, will not prevent the plaintiff from proceeding with the original petition for divorce in the event of a breach of the condition and agreement on the part of the defendant. Day v. Day, 210 Ga. 454, 81 S.E.2d 6 (1954).

Resumption of cruelty vitiates condonation. — When a husband filed a suit for divorce against his wife on the ground of cruel treatment, and subsequently the marital relations were resumed on the strength of the wife's promise to desist from the acts of cruel treatment as alleged in the petition, and when on resumption of marital relations the wife did not desist from such cruel treatment and another separation took place, the act of the husband in resuming the marital relation did not amount to condonation of the wife's cruel treatment when she failed to fulfill the agreement by virtue of which the marital relations were resumed. Bruce v. Bruce, 195 Ga. 868, 25 S.E.2d 654 (1943).

Revival of right when condition of condonation broken. — If after the condonation the conduct of the husband is such as to revive the condoned acts and give to the wife a right to assert them, she is not debarred from so doing; nor is she prevented from setting up misconduct on his part after the condonation for the consideration of the jury in determining whether a divorce should be granted. Davis v. Davis, 134 Ga. 804, 68 S.E. 594, 30 L.R.A. (n.s.) 73, 20 Ann. Cas. 20 (1910); Harn v. Harn, 155 Ga. 502, 117 S.E. 383 (1923).

Question of condonation is peculiarly matter of defense in the trial of a divorce case on its merits. Lybrand v. Lybrand, 204 Ga. 312, 49 S.E.2d 515 (1948); Johnson v. Johnson, 210 Ga. 795, 82 S.E.2d 831 (1954).

Voluntary condonation and cohabitation subsequent to the acts complained of are matters of affirmative defense in the trial of the case upon its merits. Adams v. Adams, 213 Ga. 875, 102 S.E.2d 566 (1958).

Condonation may be more readily presumed against husband than wife, and condonation may be presumed from cohabitation which means dwelling together. Odom v. Odom, 39 Ga. 286 (1867),

overruled on other grounds, *Wise v. Wise*, 156 Ga. 459, 119 S.E. 410 (1923); *Phinizy v. Phinizy*, 154 Ga. 199, 114 S.E. 185 (1922); *Paris v. Paris*, 197 Ga. 162, 28 S.E.2d 452 (1943).

Condonation is not so readily presumed against the wife, as the husband. Knowledge of the guilt of the husband, and forgiveness by the wife, are not legally to be presumed, but must be clearly and distinctly proved, in order to bar her action. *Duncan v. Duncan*, 184 Ga. 602, 192 S.E. 215 (1937); *Livingston v. Livingston*, 211 Ga. 420, 86 S.E.2d 288 (1955).

When presumption of condonation can be rebutted. — Although presumption of condonation arises if parties occupy same room and bed, such presumption can be rebutted by showing that the party seeking forgiveness has resorted to the same acts of cruel treatment which caused the initial separation. *Thornton v. Thornton*, 232 Ga. 666, 208 S.E.2d 557 (1974).

Presumption rebutted when party clearly denies cohabitation. — When the plaintiff wife testified that “we were not living as man and wife,” and that “there was no condonation on my part of the acts” of the husband, the general presumption of matrimonial cohabitation and condonation by the wife, arising from their occupancy of the same set of apartments, was sufficiently rebutted, so as to fully authorize a finding in her favor on the question of condonation. *Duncan v. Duncan*, 184 Ga. 602, 192 S.E. 215 (1937).

When presumption not overcome. — Strong though rebuttable presumption that a marital act occurs when the parties occupy the same room is not overcome by testimony of the husband that they occupied separate beds and such an act did not occur, when he fails to give the facts and circumstances under which he found himself occupying the same room with his wife in a hotel, when the wife testifies that a marital act did occur. *Duncan v. Duncan*, 184 Ga. 602, 192 S.E. 215 (1937).

Defense to pending divorce action only. — O.C.G.A. § 19-5-4 establishes only that voluntary condonation and cohabitation constitute a defense to a pending divorce action, not a ground for setting aside a previously entered divorce decree;

thus, it did not apply as a defense to a divorce decree and orders for custody and property division when the cohabitation occurred before, rather than after, filing of a divorce action. *Southworth v. Southworth*, 265 Ga. 671, 461 S.E.2d 215 (1995).

Moving party's admission to having committed adultery. — Jury may refuse a divorce in cases when movant committed adultery, but in such circumstances the jury may, on examination of the whole case, grant a divorce. *Williford v. Williford*, 230 Ga. 543, 198 S.E.2d 181 (1973).

Jury Charge

Proper charge of mutual cruel treatment as “like conduct.” — After the judge charged the jury that, “if both were guilty of cruel treatment then you would refuse a divorce to both parties,” this was a sufficient charge of the law that a divorce will not be granted either party when both are guilty of “like conduct”. *Childs v. Childs*, 223 Ga. 435, 156 S.E.2d 21 (1967).

Error to fail to charge that jury should refuse divorce. — When each party charges and proves cruel treatment by accusations alleged by the other to be false, and denial of love for the other, it is error to fail to charge, without request, that, if the jury found both parties guilty of like conduct, the jury should refuse a divorce to either of them. *Moon v. Moon*, 216 Ga. 627, 118 S.E.2d 473 (1961); *McCartney v. McCartney*, 217 Ga. 200, 121 S.E.2d 785 (1961); *Schwartz v. Schwartz*, 222 Ga. 460, 150 S.E.2d 809 (1966); *Childs v. Childs*, 223 Ga. 435, 156 S.E.2d 21 (1967); *McClellan v. McClellan*, 224 Ga. 355, 162 S.E.2d 425 (1968).

When there is evidence that both parties have been guilty of like conduct, it is reversible error to fail to charge, without request, that, if both parties have been guilty of like conduct then no divorce shall be granted. *Brackett v. Brackett*, 217 Ga. 84, 121 S.E.2d 146 (1961).

Error to overrule request for charge on definition of condonation. — When the pleadings and the evidence show repeated separations and reconciliations, after promises not to repeat the misconduct, and then a breach of such

Jury Charge (Cont'd)

promises, and the court charged that all such conduct could be considered unless condoned, the special ground complaining of the failure to charge a definition of condonation is meritorious, and since the question of whether or not there was condonation became a material issue in the case it was error to overrule the decision. *Hall v. Hall*, 220 Ga. 677, 141 S.E.2d 400 (1965).

Charge to jury when equal guilt involved. — When the plaintiff's grounds for divorce are cruel treatment, and the defendant's cross-action (now counter-claim) seeks a divorce for desertion, it is reversible error to charge the jury that they may find a divorce in favor of both parties; to so find is a contradiction, contrary to the evidence and the law. *Moon v. Moon*, 216 Ga. 627, 118 S.E.2d 473 (1961).

While no objection was made by counsel for the wife to the instruction that a divorce could be granted to both parties

when the jury could find that the parties were guilty of like conduct, this charge specifically authorized an invalid verdict, and it was a substantial error which is subject to review. *Childs v. Childs*, 223 Ga. 435, 156 S.E.2d 21 (1967).

Condonation presents jury question. — Whether husband has condoned acts of alleged cruelty about which he complains is a question for determination by the jury. *Paris v. Paris*, 197 Ga. 162, 28 S.E.2d 452 (1943).

Party estopped to challenge validity of property settlement in collusive divorce. — When the main relief sought by the plaintiff is the cancellation of certain conveyances and transfers and the recovery of real and personal property conveyed by him in pursuance of an agreement by which he obtained a divorce by collusion, he must come into a court of equity with clean hands and is estopped from attacking the validity of the decree thus self-induced. *Fender v. Crosby*, 209 Ga. 896, 76 S.E.2d 769 (1953).

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Divorce and Separation, §§ 17, 125, 128, 135 et seq., 243, 366. 24A Am. Jur. 2d, Divorce and Separation, § 1033.

Am. Jur. Pleading and Practice Forms. — 8B Am. Jur. Pleading and Practice Forms, Divorce and Separation, § 82.

C.J.S. — 27A C.J.S., Divorce, § 80 et seq.

ALR. — Condonation of matrimonial offense without cohabitation, 6 ALR 1157; 47 ALR 576.

Adultery by deserted spouse after desertion, as ground of divorce in favor of other spouse, 25 ALR 1051.

Doctrine of comparative rectitude in divorce cases, 63 ALR 1132; 159 ALR 734.

Subsequent adultery as recriminatory defense to desertion or cruelty, 101 ALR 646.

Knowledge of offenses as condition of condonation as defense to suit or counter-claim for divorce, 109 ALR 683.

Collusion as bar to divorce, 109 ALR 832.

Individual acts of cohabitation between husband and wife as breaking continuity of abandonment, desertion, or separation, or as condonation thereof, 155 ALR 132.

Divorce: necessity and sufficiency of corroboration of plaintiff's testimony concerning ground for divorce, 15 ALR2d 170.

Revival of condoned adultery, 16 ALR2d 585.

What amounts to connivance by one spouse at other's adultery, 17 ALR2d 342.

Recrimination as defense to divorce sought on ground of incompatibility, 21 ALR2d 1267.

Condonation of cruel treatment as defense to action for divorce or separation, 32 ALR2d 107.

Fault of spouse as affecting right to divorce under statute making separation a substantive ground of divorce, 14 ALR3d 502.

19-5-5. Petition; contents and verification; demand for detailed statement.

(a) The action for divorce shall be brought by written petition and process, the petition being verified by the petitioner.

(b) The petition shall show:

- (1) The residence or last known address of the respondent;
- (2) That the applicant meets the residence requirements for bringing an action for divorce or that the applicant is bringing a counterclaim and is not required to meet the residence requirements;
- (3) The date of the marriage and the date of the separation;
- (4) Whether or not there are any minor children of the parties and the name and age of each minor child;
- (5) The statutory ground upon which a divorce is sought; and
- (6) Where alimony or support or division of property is involved, the property and earnings of the parties, if such is known.

(c) The respondent, at any time before trial, may file with the court a written demand for a detailed statement of the facts on which the grounds in the petition are predicated. The respondent shall cause a copy of the demand to be served upon the petitioner or upon the petitioner's counsel of record and the facts demanded shall be added to the petition in the form of an amendment thereto. (Laws 1802, Cobb's 1851 Digest, p. 223; Code 1863, § 1675; Code 1868, § 1716; Code 1873, § 1717; Code 1882, § 1717; Civil Code 1895, § 2432; Civil Code 1910, § 2951; Code 1933, § 30-105; Ga. L. 1946, p. 90, § 4; Ga. L. 1967, p. 761, § 1.)

Cross references. — Time of trial in divorce cases involving service by publication, § 9-11-40.

Law reviews. — For article surveying developments in Georgia domestic relations law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 109

(1981). For survey article on wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982).

For note, "The Significance of Stokes v. Stokes: An Examination of Property Rights Upon Divorce in Georgia," see 16 Ga. L. Rev. 695 (1982).

JUDICIAL DECISIONS

Petition must show property. — Law provided that if division of property was involved, petition shall show property. Davis v. Davis, 216 Ga. 305, 116 S.E.2d 219 (1960).

It is not necessary to render schedule of property when alimony or support

is not sought. Davis v. Davis, 216 Ga. 305, 116 S.E.2d 219 (1960).

Law required that petition for divorce be verified, but did not require that the answer be verified. Harrison v. Harrison, 228 Ga. 126, 184 S.E.2d 147 (1971).

Mandatory verification of petition.

— Requirement that all petitions be verified by the petitioner is a mandatory provision and is manifestly a rule of pleading and not of evidence. *Bell v. Bell*, 202 Ga. 615, 44 S.E.2d 118 (1947).

Effect of unverified complaint.

— Fact that original complaint for divorce is not verified does not render suit null and void, but is an amendable defect. *Edwards v. Edwards*, 227 Ga. 307, 180 S.E.2d 358 (1971).

Sworn petition which has not been legally verified. — Petition, having been sworn to by the plaintiff as required by law, was not subject to dismissal as showing on the petition's face that the petition was not legally verified. *Bell v. Bell*, 202 Ga. 615, 44 S.E.2d 118 (1947).

Provision requiring that the plaintiff swear to his or her petition being the only requirement of law that it be sworn to at all, it follows that, even if the plaintiff in such a divorce suit had not been legally empowered and required to verify his or her petition, the rule would simply be that no verification was necessary. *Bell v. Bell*, 202 Ga. 615, 44 S.E.2d 118 (1947).

Sufficiency of allegation concerning separation. — Allegation that the parties live in the same family dwelling, when taken in connection with the further allegation that they "are living separate and apart," is a sufficient allegation of living in a state of separation, and does not render the petition subject to general

demurrer (now motion to dismiss). *Westberry v. Westberry*, 173 Ga. 42, 159 S.E. 671 (1931).

Challenge to residency assertion was challenge to court's jurisdiction.

— In a divorce case, a husband's enumerations of error raising the issue of the wife's residency under O.C.G.A. § 19-5-5(b)(2) were challenges to the trial court's jurisdiction over the subject matter; these related to a motion to set aside under O.C.G.A. § 9-11-60(d)(1). *Kuriatnyk v. Kuriatnyk*, 286 Ga. 589, 690 S.E.2d 397 (2010).

Cited in *Hicks v. Hicks*, 186 Ga. 362, 197 S.E. 878 (1938); *Scott v. Scott*, 192 Ga. 370, 15 S.E.2d 416 (1941); *Ragans v. Ragans*, 200 Ga. 890, 39 S.E.2d 162 (1946); *Tatum v. Tatum*, 203 Ga. 406, 46 S.E.2d 915 (1948); *Huguley v. Huguley*, 204 Ga. 692, 51 S.E.2d 445 (1949); *Hinkle v. Hinkle*, 209 Ga. 554, 74 S.E.2d 657 (1953); *Fuller v. Fuller*, 216 Ga. 131, 114 S.E.2d 881 (1960); *Hughes v. Hughes*, 218 Ga. 684, 130 S.E.2d 226 (1963); *Goodwill v. Goodwill*, 221 Ga. 757, 147 S.E.2d 313 (1966); *Sutton v. Sutton*, 224 Ga. 140, 160 S.E.2d 385 (1968); *Mitchell v. Mitchell*, 226 Ga. 678, 177 S.E.2d 89 (1970); *Sparks v. Sparks*, 127 Ga. App. 657, 194 S.E. 621 (1972); *Auerback v. Maslia*, 142 Ga. App. 184, 235 S.E.2d 594 (1977); *Stokes v. Stokes*, 246 Ga. 765, 273 S.E.2d 169 (1980); *Cavalino v. Cavalino*, 601 F. Supp. 74 (N.D. Ga. 1984); *Holler v. Holler*, 257 Ga. 27, 354 S.E.2d 140 (1987); *Pope v. Pope*, 277 Ga. 333, 588 S.E.2d 736 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Divorce and Separation, § 216.

Am. Jur. Pleading and Practice Forms. — 8B Am. Jur. Pleading and Practice Forms, Divorce and Separation, § 69.

C.J.S. — 27A C.J.S., Divorce, § 143 et seq.

ALR. — Necessity of pleading affirmative defense in divorce suit, 76 ALR 990.

Inclusion in bill for divorce or annulment of allegations and prayer to impress trust upon property or otherwise settle property rights, 93 ALR 327.

Sufficiency of allegations of desertion, abandonment, or living apart as ground for divorce, separation, or alimony, 57 ALR2d 468.

19-5-6. Grant of divorce to respondent without necessity of counterclaim.

When a petition for divorce is filed, the respondent may recriminate in his answer and ask a divorce in his favor. If, at the trial, the court or

jury believes that the respondent rather than the petitioner is entitled to a divorce, they may so find upon legal proof. (Ga. L. 1863-64, p. 45, § 1; Code 1868, § 1717; Code 1873, § 1718; Code 1882, § 1718; Civil Code 1895, § 2433; Civil Code 1910, § 2952; Code 1933, § 30-106; Ga. L. 1946, p. 90, § 5.)

JUDICIAL DECISIONS

Respondent may recriminate and ask for a divorce. — Former Code 1933, § 30-106 did not support the conclusion that both parties may be entitled to a judgment of divorce. It clearly provides that a respondent in a divorce action may recriminate and ask for a divorce and not that both parties may be granted a divorce. *Brackett v. Brackett*, 217 Ga. 84, 121 S.E.2d 146 (1961).

Effect given to wife's counterclaim in divorce action. — Wife, when sued for divorce, may set up in answer any matter which should be subject of counterclaim, and by such counterclaim recriminate her husband and pray for permanent alimony. When the wife so pleads, her counterclaim is the legal equivalent of an independent suit for alimony. *Cohen v. Cohen*, 209 Ga. 459, 74 S.E.2d 95 (1953).

When plaintiff fails to make out case, the defendant may proceed to introduce evidence to support the plaintiff's allegations for a divorce. *Owen v. Owen*, 54 Ga. 526 (1875).

Counterclaim interposed by wife in husband's suit for divorce is legal equivalent of independent action and is treated, in short, as a mere ancillary suit. State rules of procedure, pleading, and practice as applicable to divorce cases do not require that an answer taking the character of a crossclaim (now counterclaim) be filed at the term to which the plaintiff's case is made returnable, or before the regular call of the appearance docket. *Cohen v. Cohen*, 209 Ga. 459, 74 S.E.2d 95 (1953).

Wife's right to proceed with a counterclaim for alimony is unaffected by withdrawal, or by a dismissal, for any reason of the original suit. *Cohen v. Cohen*, 209 Ga. 459, 74 S.E.2d 95 (1953).

Libel for divorce on ground of cruelty. — To be libel for divorce on ground of

cruelty, the defendant may in answer recriminate plaintiff's adultery. *Johns v. Johns*, 29 Ga. 718 (1859); *Rowell v. Rowell*, 209 Ga. 572, 74 S.E.2d 833 (1953).

Recriminatory charge of adultery committed by plaintiff after commencement of divorce action is valid defense and upon a proper application at any time before the final decree, if such application is made immediately after the discovery of the fact, the court should permit the defendant to put in a supplemental answer for the purpose of setting up such matter as a new defense. *Rowell v. Rowell*, 209 Ga. 572, 74 S.E.2d 833 (1953).

Judgment set aside when trial court struck allegation of adultery. — When it appears that trial court in an action for divorce struck an amendment to the defendant's answer and counterclaim in which he recriminated the adultery of his wife, the plaintiff, which allegedly occurred after the parties separated and after the wife filed suit, good and sufficient cause for setting aside a verdict and judgment granting a total divorce and awarding permanent alimony is shown. *Rowell v. Rowell*, 209 Ga. 572, 74 S.E.2d 833 (1953).

Cited in *Lowry v. Lowry*, 170 Ga. 349, 153 S.E. 11 (1930); *Hansberger v. Hansberger*, 182 Ga. 495, 185 S.E. 810 (1936); *Brock v. Brock*, 183 Ga. 860, 190 S.E. 30 (1937); *Twilley v. Twilley*, 195 Ga. 291, 24 S.E.2d 41 (1943); *Taylor v. Taylor*, 195 Ga. 711, 25 S.E.2d 506 (1943); *Ragans v. Ragans*, 200 Ga. 890, 39 S.E.2d 162 (1946); *Huguley v. Huguley*, 204 Ga. 692, 51 S.E.2d 445 (1949); *Veazy v. Blair*, 86 Ga. App. 721, 72 S.E.2d 481 (1952); *Jolley v. Jolley*, 216 Ga. 51, 114 S.E.2d 534 (1960); *Ivey v. Ivey*, 233 Ga. 45, 209 S.E.2d 590 (1974); *Adderholt v. Adderholt*, 240 Ga. 626, 242 S.E.2d 11 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Divorce and Separation, § 238 et seq.

Am. Jur. Pleading and Practice Forms. — 8B Am. Jur. Pleading and Practice Forms, Divorce and Separation, § 82.

C.J.S. — 27A C.J.S., Divorce, § 150.

ALR. — Sufficiency of allegation of adultery in suit for divorce, 2 ALR 1621.

Necessity of pleading affirmative defense in divorce suit, 76 ALR 990.

Subsequent adultery as recriminatory defense to desertion or cruelty, 101 ALR 646.

Power of court to grant absolute divorce to both spouses upon showing of mutual fault, 13 ALR3d 1364.

19-5-7. Transfer of property after filing of petition; lis pendens notice.

After a petition for divorce has been filed, no transfer of property by either party, except a bona fide transfer in payment of preexisting debts, shall pass title so as to avoid the vesting thereof according to the final verdict of the jury in the case; provided, however, that the title to real property shall not be affected by the filing of an action for divorce unless a notice of lis pendens, as provided for by Code Section 44-14-610, is filed in the office of the clerk of the superior court of the county in which the real property is situated and is recorded by the clerk in a book kept by him for that purpose. (Orig. Code 1863, § 1677; Code 1868, § 1720; Code 1873, § 1721; Code 1882, § 1721; Civil Code 1895, § 2436; Civil Code 1910, § 2955; Code 1933, § 30-112; Ga. L. 1950, p. 365, § 1; Ga. L. 1979, p. 466, § 3; Ga. L. 1999, p. 81, § 19.)

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Law should be strictly construed since it is a restraint upon the alienation of property by the owner. *Chatsworth Lumber Co. v. White*, 214 Ga. 798, 107 S.E.2d 827 (1959).

Construction. — Restriction upon the free alienation of property by the owner is contrary to public policy, and will not be extended by construction beyond the plain intent and meaning of the law. *Lamar v. Jennings*, 69 Ga. 392 (1882); *Russell v. Rice*, 103 Ga. 310, 30 S.E. 37 (1898); *Wallace v. Wallace*, 189 Ga. 220, 5 S.E.2d 580 (1939).

When section is operative. — Law was operative only on conveyances made during pendency of divorce action. *Chatsworth Lumber Co. v. White*, 214 Ga. 798, 107 S.E.2d 827 (1959).

Law did not affect conveyance after separation, but before action for divorce was filed. *Wallace v. Wallace*, 189 Ga. 220, 5 S.E. 580 (1939).

Section's effect upon alienation. —

Law operated to render alienation subordinate to any disposition of scheduled property made by jury in the final verdict. *Stephens v. Stephens*, 168 Ga. 630, 148 S.E. 522 (1929).

Law did not apply to suits for alimony alone but applied to cases when a divorce proceeding was pending. *Davis v. Leach*, 228 Ga. 139, 184 S.E.2d 454 (1971).

Law did not operate in favor of third parties. *Lamar v. Jennings*, 69 Ga. 392 (1882).

Equitable proceeding to set aside fraudulent conveyance. — Former Code 1933, § 30-112 (see now O.C.G.A. § 19-5-7) did not prevent equitable proceeding against grantee to set aside fraudulent conveyance, under former Code 1933, §§ 28-101 and 28-201 (see now O.C.G.A. §§ 18-2-1 and former 18-2-22), of real property by the husband with in-

tent to defeat the wife's recovery of alimony since the grantee had knowledge or reason to suspect such intent since the grantee in such case was not an innocent purchaser. *Wood v. McGahee*, 211 Ga. 913, 89 S.E.2d 634 (1955).

Law contemplates rendition of final verdict by jury in the action for divorce, and did not contemplate that the restraint against alienation shall continue after rendition of such verdict was no longer possible. *Chatsworth Lumber Co. v. White*, 214 Ga. 798, 107 S.E.2d 827 (1959); *Butler v. Hicks*, 229 Ga. 72, 189 S.E.2d 416 (1972).

When property sold was included in the schedule, sale did not vest title in purchaser so as to prevent the vesting thereof in the wife, according to the verdict of the jury. The purchaser bought subject to the verdict, and the purchaser's want of actual notice does not protect the purchaser. *Venable v. Craig*, 44 Ga. 437 (1871).

When parties fail to schedule or incompletely schedule property, final decree leaves parties where it finds them, and the separate title of each to party to their property is unaffected by the decree. The same rule is applied to indebtednesses existing between them. *Sparks v. Sparks*, 127 Ga. App. 657, 194 S.E.2d 621 (1972).

Judgment obtained for pre-existing debt. — Valid judgment obtained against the husband during the pendency of a suit for a divorce, founded on a debt contracted before the separation of the husband and wife, is a good lien upon property set apart to the wife on the final hearing. *Carithers v. Venable*, 52 Ga. 389 (1874).

Property disposed before institution of divorce action unaffected. — Law construed in connection with its cognate sections did not restrict a transfer by a husband of his property, made bona fide and for value, prior to the institution of a divorce action, but was operative only on conveyances by the husband made during the pendency of a libel for divorce. *Singleton v. Close*, 130 Ga. 716, 61 S.E. 722 (1908).

Property not disposed of by verdict ultimately unaffected. — Restraint on alienation imposed by law was operative

only insofar as it rendered the alienation subordinate to any disposition of the specific property which might be made by the jury in the final verdict; and this restraint did not affect property not disposed of by the final verdict granting the divorce. *Almand & George v. Seamans*, 89 Ga. 309, 15 S.E. 320 (1892).

Death of party releases restraint on alienation of property. — When action for divorce filed by wife against her husband abated upon her death, there could be no verdict in the divorce suit as contemplated by law and there was no longer any restraint upon the alienation of the husband's property. *Chatsworth Lumber Co. v. White*, 214 Ga. 798, 107 S.E.2d 827 (1959).

Since the death of one of the parties makes a final verdict impossible, the restraint on the husband's transfer of title is removed. *Butler v. Hicks*, 229 Ga. 72, 189 S.E.2d 416 (1972).

Possession of realty by wife and children as inquiry notice. — Actual possession of the realty by the former wife and children was sufficient to put all who might purchase from the husband on notice and on inquiry as to what interest, claim, or rights they might have therein, and this notice by reason of possession was effective as to the property possessed whether or not a lis pendens notice was filed under the requirements of law. *Waddell v. City of Atlanta*, 121 Ga. App. 94, 172 S.E.2d 862, cert. dismissed, 226 Ga. 631, 176 S.E.2d 801 (1970).

Effect of pendency of action on mortgage or conveyance. — Mere pendency of action for alimony will not disable defendant therein from making bona fide mortgage or conveyance of unencumbered property over which the court has not taken nor been asked to take any direct jurisdiction in order to administer or secure it for application to the claim for alimony, and the mortgagee of such property has priority over a judgment for alimony subsequently rendered. *Coulter v. Lumpkin*, 94 Ga. 225, 21 S.E. 461 (1894).

Equity will, by injunction, prevent husband from alienating his property to defeat alimony, it being well established, if others cooperate with him to perpetrate such wrong, the same remedy

is proper as against them. *Gray Bros. v. Gray*, 65 Ga. 193 (1880).

When injunction should not issue. — Injunction should not issue when husband is neither attempting nor threatening to sell or encumber property, and no other grounds for the issuance of the writ is shown. *Melvin v. Melvin*, 129 Ga. 42, 58 S.E. 474 (1907); *Ramsey v. Ramsey*, 175 Ga. 685, 165 S.E. 624 (1932).

Not error to refuse charge of section when action for alimony only. — In a suit by a wife against her husband for alimony when no suit for divorce was pending, and no schedule of the husband's property was filed, it is not error to refuse to give former Civil Code 1910, § 2955 in charge. *Chandler v. Chandler*, 161 Ga. 350, 130 S.E. 685 (1925).

Bona fides question for jury. — It

was a question of fact for the jury to decide whether a deed had been executed bona fides in payment of a pre-existing debt. *Mathews v. Mathews*, 162 Ga. 233, 133 S.E. 254 (1926).

Cited in *Chero-Cola Co. v. May*, 169 Ga. 273, 149 S.E. 895 (1929); *Blevins v. Pittman*, 189 Ga. 789, 7 S.E.2d 662 (1940); *Lawrence v. Lawrence*, 196 Ga. 204, 26 S.E.2d 283 (1943); *McKoy v. Bush*, 200 Ga. 759, 38 S.E.2d 669 (1946); *Roach v. Roach*, 212 Ga. 40, 90 S.E.2d 423 (1955); *Heidelberg v. Smith*, 214 Ga. 785, 107 S.E.2d 844 (1959); *McClinton v. McClinton*, 217 Ga. 283, 122 S.E.2d 112 (1961); *Schofield v. Fearon*, 169 Ga. App. 924, 315 S.E.2d 452 (1984); *Vance v. Lomas Mtg. USA, Inc.*, 263 Ga. 33, 426 S.E.2d 873 (1993).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 8B Am. Jur. Pleading and Practice Forms, Divorce and Separation, § 107.

C.J.S. — 27B C.J.S., Divorce, §§ 508, 513.

ALR. — Statute requiring filing of formal notice of lis pendens in certain classes of cases as affecting common-law doctrine of lis pendens in other cases, 10 ALR 306.

Right of husband or wife to maintain replevin against other, 41 ALR 1054.

Divorce as affecting estate by entireties, 52 ALR 890; 59 ALR 718.

Injunction pendente lite in suit for divorce or separation, 164 ALR 321.

Trust income or assets as subject to claim against beneficiary for alimony, maintenance, or child support, 91 ALR2d 262.

Appointment or discharge of receiver for marital or community property necessitated by suit for divorce or separation, 15 ALR4th 224.

Lis pendens as applicable to suit for separation or dissolution of marriage, 65 ALR4th 522.

Divorce and separation: effect of court prohibiting sale or transfer of property on party's right to change beneficiary of insurance policy, 68 ALR4th 929.

19-5-8. Pleading and practice.

The same rules of pleading and practice applicable to ordinary civil actions shall apply to actions for divorce, alimony, and custody of minor children, except as otherwise specifically provided in this chapter. No verdict or judgment by default shall be taken in any such case but the allegations of the pleadings shall be established to the satisfaction of the court by the verified pleadings, by affidavit, by evidentiary hearing, or otherwise, as provided in Code Section 19-5-10. (Ga. L. 1895, p. 44, § 9; Civil Code 1895, §§ 2440, 5074; Civil Code 1910, §§ 2959, 5658; Code 1933, § 30-113; Ga. L. 1958, p. 315, § 1; Ga. L. 1967, p. 226, § 44; Ga. L. 1987, p. 565, § 1.)

Law reviews. — For article, “The 1967 Amendments to the Georgia Civil Practice Act and the Appellate Procedure Act,” see

3 Ga. St. B.J. 383 (1967). For article, “Georgia Law of Alimony,” see 4 Ga. St. B.J. 54 (1999).

JUDICIAL DECISIONS

Legislative intent. — Laws peculiar to divorce suits clearly indicate an intention upon the part of the lawmaking power to impede the facility for obtaining divorces; and such purpose can only be attributed to a zealous regard for the well-being of society. *Haygood v. Haygood*, 190 Ga. 445, 9 S.E.2d 834 (1940).

Evidence required to establish essential allegations in petition for divorce. — Essential allegations in petition for divorce, including jurisdiction, must be established by evidence and the burden of proving such allegations rests upon the plaintiff. *Moody v. Moody*, 194 Ga. 843, 22 S.E.2d 837 (1942); *Harmon v. Harmon*, 209 Ga. 474, 74 S.E.2d 75 (1953).

Divorce granted by court lacking jurisdiction. — Divorce granted by court having no subject matter or personal jurisdiction is nullity. *Harmon v. Harmon*, 209 Ga. 474, 74 S.E.2d 75 (1953).

In action for divorce it is necessary to allege correct venue, and to make affirmative proof thereof. *Johnson v. Johnson*, 188 Ga. 800, 4 S.E.2d 807 (1939).

Legal status of plaintiff's case, concerning plaintiff's right to verdict, is the same whether or not an answer is filed by the defendant or not. *Lovelace v. Lovelace*, 179 Ga. 822, 177 S.E. 685 (1934).

Construction with other law. — O.C.G.A. § 9-11-55 is authority for the grant of default judgments; however, O.C.G.A. § 19-5-8 specifically exempts from the general ambit of § 9-11-55 issues with regard to the equitable division of marital property. *Brown v. Brown*, 271 Ga. 887, 525 S.E.2d 359 (2000).

Default judgment cannot be taken in divorce or alimony actions. Thus, even though notice of the hearing on the final decree is waived by failure to file responsive pleadings, the allegations of the petition must still be established by evidence. *Youmans v. Youmans*, 247 Ga. 529, 276 S.E.2d 837 (1981).

Although a default judgment was not permissible in a divorce case, O.C.G.A.

§ 19-5-8, a trial court did not err in entering a judgment of divorce on the pleadings pursuant to O.C.G.A. § 19-5-10(a) after a wife failed to file responsive pleadings, thereby waiving notice of the hearing under O.C.G.A. § 9-11-5. The trial court properly relied on the husband's verified complaint and domestic relations affidavit in dividing the parties' property. *Ellis v. Ellis*, 286 Ga. 625, 690 S.E.2d 155 (2010).

No default judgment. — No provision has been made in this state by statute or otherwise for a judgment declaring a divorce suit to be in default as to pleadings. *Jolley v. Jolley*, 216 Ga. 51, 114 S.E.2d 534 (1960); *Johnston v. Still*, 225 Ga. 222, 167 S.E.2d 646 (1969).

Answer is not essential in domestic relations case because a default judgment may not be entered. *Cagle v. Davis*, 236 Ga. App. 657, 513 S.E.2d 16 (1999).

Child custody order in divorce case not a final judgment. — Because neither the original court-ordered parenting plan nor the two subsequent orders amending the plan constituted a final judgment, and the determination of child custody became final only when the final judgment and decree in the divorce case was entered, the wife's motion for new trial, although the motion obviously referenced the bench trial on the child custody issues, was timely filed within 30 days of the date of the final judgment in the divorce case. *Hoover v. Hoover*, 295 Ga. 132, 757 S.E.2d 838 (2014).

Default judgment and child support action. — Default judgment cannot be entered in an original action for child support. Likewise, a default judgment cannot be entered in a subsequent action for modification of a previous award of child support. *Department of Human Resources v. Hedgepath*, 204 Ga. App. 755, 420 S.E.2d 638 (1992).

Default judgment cannot be taken in child custody actions. — Judgment cannot be taken by default in actions involving the custody of minor children.

Wright v. Sanford, 243 Ga. 252, 253 S.E.2d 560 (1979).

Default judgment cannot be taken in habeas corpus custody cases. Wright v. Sanford, 243 Ga. 252, 253 S.E.2d 560 (1979).

Default provisions of Ga. L. 1967, p. 226, § 24 (see now O.C.G.A. § 9-11-55) have no application to divorce cases. Simpson v. Simpson, 240 Ga. 543, 242 S.E.2d 45 (1978).

Spouse's right to defend without filing answer cannot be used to deny existence of "issuable defense" and thereby defeat the right to jury trial provided by former Code 1933, § 30-101 (see now O.C.G.A. § 19-5-1). Trulove v. Trulove, 233 Ga. 896, 213 S.E.2d 868 (1975).

Requirement that evidence make prima facie case. — It is court's duty not to permit verdict for divorce, unless evidence makes prima facie case showing that the defendant in the divorce action was a resident of the county at the time the suit was filed, and it was the duty of the jury to refuse a divorce unless this fact is proved by a preponderance of the testimony. McConnell v. McConnell, 135 Ga. 828, 70 S.E. 647 (1911); Lovelace v. Lovelace, 179 Ga. 822, 177 S.E. 685 (1934).

Preponderance of evidence sufficient to establish terms of lost antenuptial agreement. — In a divorce case, applying the preponderance of the evidence standard, and deferring to the trial court's finding that both a husband and a wife believed their opposing positions regarding the contents of a lost antenuptial agreement, the husband failed to prove the terms of the lost agreement, and the agreement could not be enforced. Coxwell v. Coxwell, 296 Ga. 311, 765 S.E.2d 320 (2014).

Effect of mere failure to answer or contest particular evidence. — Since a divorce cannot be granted by default, a mere failure to answer the complaint or a failure to contest some particular evidence would not be an admission that a divorce should be granted. Benefield v. Benefield, 224 Ga. 208, 160 S.E.2d 895 (1968).

Third parties with claims against marital property properly joined in divorce action. — Trial court erred in entering a default judgment against the appellant because third parties are properly joined in a divorce action so as to facilitate resolution of the spouses' marital claims, and a claim against a non-spouse that involves marital property has always been considered an integral part of the divorce action. Brown v. Brown, 271 Ga. 887, 525 S.E.2d 359 (2000).

Attorney is entitled to the opening and concluding argument before the jury when the verdict for divorce and alimony is not demanded by the evidence and the defendant husband has introduced no evidence. Hogsed v. Hogsed, 230 Ga. 232, 196 S.E.2d 428 (1973).

Motion to set aside divorce decree. — When a judgment and decree sought to be set aside were rendered in one term, and the motion to set aside came at a subsequent term, was not based on any defect appearing on the face of the record or pleadings, and was not accompanied by any brief of the evidence adduced upon the trial which resulted in the judgment and decree, the trial judge did not err in dismissing the motion to set aside. Prewett v. Prewett, 215 Ga. 425, 110 S.E.2d 638 (1959).

Cited in Dicks v. Dicks, 177 Ga. 379, 170 S.E. 245 (1933); Young v. Young, 188 Ga. 29, 2 S.E.2d 622 (1939); Davis v. Freeman, 190 Ga. 833, 10 S.E.2d 847 (1940); Tatum v. Tatum, 203 Ga. 406, 46 S.E.2d 915 (1948); Brackett v. Brackett, 217 Ga. 84, 121 S.E.2d 146 (1961); Patterson v. Patterson, 219 Ga. 186, 132 S.E.2d 201 (1963); Mitchell v. Mitchell, 226 Ga. 678, 177 S.E.2d 89 (1970); Harrison v. Harrison, 228 Ga. 126, 184 S.E.2d 147 (1971); Wallace v. Wallace, 229 Ga. 607, 193 S.E.2d 832 (1972); Barrett v. Barrett, 232 Ga. 840, 209 S.E.2d 181 (1974); Oliveros v. Oliveros, 237 Ga. 615, 229 S.E.2d 415 (1976); Adderholt v. Adderholt, 240 Ga. 626, 242 S.E.2d 11 (1978); Herring v. Herring, 246 Ga. 462, 271 S.E.2d 857 (1980); Gambrell v. Gambrell, 246 Ga. 516, 272 S.E.2d 70 (1980); McElroy v. McElroy, 252 Ga. 553, 314 S.E.2d 893 (1984); Hammack v. Hammack, 281 Ga. 202, 635 S.E.2d 752 (2006).

OPINIONS OF THE ATTORNEY GENERAL

Law required introduction of evidence sufficient to sustain verdict. 1958-59 Op. Att'y Gen. p. 85.

Divorce case was never in default, and since not in default, the case cannot be tried before the trial term, without consent of the parties. 1958-59 Op. Att'y Gen. p. 85.

Legal status of plaintiff's case, concerning plaintiff's right to verdict, is same whether or not answer is filed by the defendant. 1958-59 Op. Att'y Gen. p. 85.

Defendant should not be deprived of right to resist grant of total divorce whether defensive pleadings be filed or not. 1958-59 Op. Att'y Gen. p. 85.

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Divorce and Separation, § 216.

C.J.S. — 27A C.J.S., Divorce, § 143.

ALR. — Extraterritorial recognition and effect on marital status of decree of divorce rendered upon constructive or substituted service, 86 ALR 1329; 143 ALR 1294; 157 ALR 1399; 163 ALR 368; 1 ALR2d 1385; 28 ALR2d 1303.

Nonresidence of defendant or cross complainant in a suit for divorce as affecting power to grant divorce in his or her favor, 89 ALR 1203.

Effect of noncompliance with statutes providing for appearance by prosecuting attorney or other representative of public in suit for divorce, 127 ALR 732.

Jurisdiction upon constructive service in suit for divorce or separation as affected by relief sought in respect of separation agreement, 147 ALR 673.

Power of court, in absence of express authority, to grant relief from judgment by default in divorce action, 157 ALR 6; 22 ALR2d 1312.

Default decree in divorce action as estoppel or res judicata with respect of marital property rights, 22 ALR2d 724.

Decree in suit for separation as res judicata in subsequent suit for divorce or annulment, 90 ALR2d 745.

Jurisdiction on constructive or substituted service, in divorce or alimony action, to reach property within state, 10 ALR3d 212.

Right of one spouse, over objection, voluntarily to dismiss claim for divorce, annulment, or similar marital relief, 16 ALR3d 283.

Right to jury trial in state court divorce proceedings, 56 ALR4th 955.

19-5-9. Incompetency to serve as juror.

A juror who has conscientious scruples as to the granting of divorces shall be incompetent to serve in divorce cases. At the request of either party, the court may question the panel concerning such scruples. (Laws 1840, Cobb's 1851 Digest, p. 225; Code 1863, § 1681; Code 1868, § 1724; Code 1873, § 1725; Code 1882, § 1725; Civil Code 1895, § 2443; Civil Code 1910, § 2962; Code 1933, § 30-114.)

Cross references. — Challenging of jurors in civil cases generally, § 15-12-134.

19-5-10. Duty of judge in undefended divorce cases; appointment of attorney; evidentiary hearings; evidentiary attacks on prior judgments.

(a) In divorce cases which are not defended by the responding party, the judge shall determine that the asserted grounds for divorce are legal and sustained by proof or shall appoint an attorney of the court to discharge that duty for him. An evidentiary hearing for the determination of the existence of the grounds for divorce and for the determination of issues of alimony, child support, and child custody and other issues is authorized but not required. If no evidentiary hearing is held, the determination of such matters may be made upon the verified pleadings of either party, one or more affidavits, or such other basis or procedure as the court may deem proper in its discretion.

(b) The provisions of subsection (a) of this Code section shall apply to proceedings pending on July 1, 1987, as well as to proceedings filed on or after that date.

(c) Any motion to set aside or other proceeding to attack a judgment which attacks a judgment entered in a divorce case prior to July 1, 1987, and which is based upon an alleged failure to properly establish evidence supporting the judgment must be commenced prior to July 1, 1988, or thereafter be totally barred. The bar established by this subsection is in addition to and not in lieu of any other statute or rule of law which would operate as a bar to such a motion or other proceeding; and this subsection shall not operate to revive any otherwise barred right to prosecute any such motion or other proceeding. (Orig. Code 1863, § 1687; Code 1868, § 1730; Code 1873, § 1735; Code 1882, § 1735; Civil Code 1895, § 2455; Civil Code 1910, § 2974; Code 1933, § 30-129; Ga. L. 1987, p. 565, § 2; Ga. L. 1990, p. 1315, § 1.)

Law reviews. — For annual survey article discussing developments in domestic relations law, see 52 Mercer L. Rev. 213 (2000).

JUDICIAL DECISIONS

Legislative intent. — Laws peculiar to divorce suits clearly indicate an intention upon the part of the lawmaking power to impede the facility for obtaining divorces; and such purpose can only be attributed to a zealous regard for the well-being of society. *Haygood v. Haygood*, 190 Ga. 445, 9 S.E.2d 834 (1940).

Duty imposed by law was clearly placed on trial judge, and not the solicitor general (now district attorney), although the judge may appoint the solicitor general or some other attorney to dis-

charge that duty for the judge. *Boykin v. Martocello*, 194 Ga. 867, 22 S.E.2d 790 (1942).

Judge must hear evidence and determine legality of grounds alleged.

— While there was no judgment by default in a divorce case, law meant no more than that in any divorce case when no defensive pleadings were filed it was incumbent upon the trial court to hear evidence in support of the plaintiff's grounds of divorce and make an affirmative finding therefrom that the grounds are legal and

were sustained by proof. *Harris v. Harris*, 228 Ga. 562, 187 S.E.2d 139 (1972).

Duties of attorney appointed by judge. — Since the solicitor general (now district attorney) was appointed to see that the grounds of a divorce were legal, and sustained by proof, the solicitor general might introduce evidence, and enter fully into the defense of the case. *Creamer v. Creamer*, 36 Ga. 618 (1867); *Cohen v. Cohen*, 209 Ga. 459, 74 S.E.2d 95 (1953).

No authority to grant relief beyond pleadings. — Although O.C.G.A. § 19-5-10 allows a court presiding over an undefended divorce case to conduct a hearing and make a determination on child support, it does not authorize a court to grant relief beyond that requested in the pleadings. *Hackbart v. Hackbart*, 272 Ga. 26, 526 S.E.2d 840 (2000).

Verified complaint and affidavit supported judgment of divorce and division of property. — Although a default judgment was not permissible in a divorce case, O.C.G.A. § 19-5-8, a trial court did not err in entering a judgment of

divorce on the pleadings pursuant to O.C.G.A. § 19-5-10(a) after a wife failed to file responsive pleadings, thereby waiving notice of the hearing under O.C.G.A. § 9-11-5. The trial court properly relied on the husband's verified complaint and domestic relations affidavit in dividing the parties' property. *Ellis v. Ellis*, 286 Ga. 625, 690 S.E.2d 155 (2010).

Award of child support. — Since the husband was a Georgia resident and was personally served, the trial court erred to the extent that the court based the refusal to award child support upon the fact that his whereabouts were unknown; because he was served in Georgia and his current location was irrelevant to the jurisdiction of the trial court to determine his obligation for the support of his child. *Russ v. Russ*, 272 Ga. 438, 530 S.E.2d 469 (2000).

Cited in *Tatum v. Tatum*, 203 Ga. 406, 46 S.E.2d 915 (1948); *Miller v. Miller*, 214 Ga. 606, 106 S.E.2d 284 (1958); *Jolley v. Jolley*, 216 Ga. 51, 114 S.E.2d 534 (1960); *Reynolds v. Reynolds*, 217 Ga. 234, 123 S.E.2d 115 (1961).

19-5-11. Use of confession as evidence; corroboration.

The confessions of a party to acts of adultery or cruel treatment shall be received with great caution; if unsupported by corroborating circumstances and if made with a view to be evidence in the case, such confessions shall not be deemed sufficient to grant a divorce. (Orig. Code 1863, § 1674; Code 1868, § 1715; Code 1873, § 1716; Code 1882, § 1716; Civil Code 1895, § 2430; Civil Code 1910, § 2949; Code 1933, § 30-110.)

Cross references. — Criminal penalty for adultery, § 16-6-19.

JUDICIAL DECISIONS

Confessions of parties against themselves are admissible when there is no suspicion of collusion. *Johns v. Johns*, 29 Ga. 718 (1859).

Uncorroborated confessions. — Confession of the respondent as to acts of adultery since the respondent's marriage, uncorroborated by other circumstances, will not authorize the granting of a divorce. *Head v. Head*, 2 Ga. 191 (1847); *Woolfolk v. Woolfolk*, 53 Ga. 661 (1875).

Total divorce will not be granted on evidence consisting exclusively in confessions of the defendant. *Buckholts v. Buckholts*, 24 Ga. 238 (1858).

Incriminating admission made by spouse in third person's presence. — In a suit for divorce on the ground of adultery, an incriminating admission made by one spouse to the other in the known presence of a third person is not confidential or privileged, and the third

person in whose presence the admission was made may testify to such admission on the trial of a divorce case between the parties. *Cocroft v. Cocroft*, 158 Ga. 714, 124 S.E. 346 (1924).

Cited in *Collins v. Collins*, 229 Ga. 222, 190 S.E.2d 539 (1972); *McCoy v. McCoy*, 236 Ga. 633, 225 S.E.2d 682 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Divorce and Separation, §§ 311, 321, 341 et seq.

C.J.S. — 27A C.J.S., Divorce, §§ 171, 172, 209.

ALR. — Birth of child or miscarriage before or after lapse of normal period of gestation since access of husband as evidence of adultery, 21 ALR 1457.

Necessity of corroboration of admission or confession of ground of divorce or nullity, 40 ALR 630.

Discretion as to denial of divorce or

separation where statutory grounds are established, 74 ALR 271.

Association or conduct of spouse with persons of opposite sex as cruelty or abusive treatment justifying divorce or separation, 157 ALR 631.

Admissibility in divorce action for adultery of wife's statement that husband was not father of her child, 4 ALR2d 567.

Divorce: necessity and sufficiency of corroboration of plaintiff's testimony concerning ground for divorce, 15 ALR2d 170.

19-5-12. Form of judgment and decree.

(a) A final judgment of divorce shall be prepared so as to conform to the pleadings and the evidence and may restore a maiden or prior name, if requested. It shall be prepared in form substantially as follows:

FINAL JUDGMENT AND DECREE

Upon consideration of this case, upon evidence submitted as provided by law, it is the judgment of the court that a total divorce be granted, that is to say, a divorce a vinculo matrimonii, between the parties to the above stated case upon legal principles.

It is considered, ordered, and decreed by the court that the marriage contract heretofore entered into between the parties to this case, from and after this date, be and is set aside and dissolved as fully and effectually as if no such contract had ever been made or entered into.

Petitioner and Respondent in the future shall be held and considered as separate and distinct persons altogether unconnected by any nuptial union or civil contract whatsoever and both shall have the right to remarry.

Decree and order entered this _____ day of _____,
_____.

Judge, Superior Court

(b) Where applicable, any one or more of the following clauses shall be included in the form of the judgment:

The court restores to (Petitioner/Respondent) his/her prior or maiden name, to wit: _____.

The court awards custody of the children of the parties as follows:

_____.

The court fixes alimony as follows: _____.

(c) In any case which involves the determination of child support, the form of the judgment shall also include provisions indicating both parents' income, the number of children for which support is being provided, the presumptive amount of child support award calculation, and, if the presumptive amount of child support is rebutted, the award amount and the basis for the rebuttal award. The final judgment shall have attached to it the child support worksheet containing the calculation of the final award of child support and Schedule E pertaining to deviations. The final judgment shall specify a sum certain amount of child support to be paid.

(d) Where applicable, the court shall also include in the order the provisions of Code Section 19-6-30 concerning continuing garnishment for support and language in compliance with Code Section 19-6-32 concerning income deduction orders. (Laws 1802, Cobb's 1851 Digest, p. 224; Code 1863, § 3484; Code 1868, § 3507; Code 1873, § 3565; Code 1882, § 3565; Civil Code 1895, § 2438; Civil Code 1910, § 2957; Code 1933, § 30-116; Ga. L. 1946, p. 90, § 9; Ga. L. 1979, p. 466, § 4; Ga. L. 1995, p. 603, § 1; Ga. L. 1996, p. 453, § 5; Ga. L. 1999, p. 81, § 19; Ga. L. 2005, p. 224, § 4/HB 221; Ga. L. 2006, p. 583, § 3/SB 382.)

Cross references. — Recording of divorces in vital records, § 31-10-21. Provision for collection of child support by continuing garnishment for support, § 19-6-30.

Editor's notes. — Ga. L. 1995, p. 603, § 4, not codified by the General Assembly, provides that it is the intention of Sections 1 and 2 of that Act to encourage judges in divorce cases to require all couples involved in contested divorces to go to mediation to attempt a mutually agreeable settlement.

Ga. L. 2005, p. 224, § 1/HB 221, not codified by the General Assembly, provides that: "The General Assembly finds and declares that it is important to assess periodically child support guidelines and determine whether existing guidelines continue to be viable and effective or whether they have failed or ceased to accomplish their original policy objectives. The General Assembly further finds that

supporting Georgia's children is vitally important to the citizens of Georgia. Therefore, the General Assembly has determined that it is in the best interests of the state and its citizenry to undertake an evaluation of the child support guidelines on a continuing basis. The General Assembly declares that it is important that all of Georgia's children are provided with adequate financial support whether the children's parents are living together or not living together. The General Assembly finds that both parents have a continuing obligation with respect to providing financial and emotional stability for their child or children. It is the hope of the members of the General Assembly that all parents work together to advance the best interest of their children."

Ga. L. 2006, p. 583, § 10(b)/SB 382, not codified by the General Assembly, provides: "Sections 1 through 7 of this Act shall become effective on January 1, 2007,

and shall apply to all pending civil actions on or after January 1, 2007.”

Law reviews. — For article on 2005 amendment of this Code section, see 22 Ga. St. U.L. Rev. 73 (2005). For article on

2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 103 (2006).

For note on the 1995 amendment of this Code section, see 12 Ga. St. U.L. Rev. 169 (1995).

JUDICIAL DECISIONS

Decree fixing status of parties treated as judgment quasi in rem. So far as the adjudication fixes the status of the parties, the judgment concludes both parties and strangers; but, beyond the adjudication of the status, the decree does not conclude strangers. *McDonald v. McDonald*, 232 Ga. 190, 205 S.E.2d 850 (1974).

Verdict construed as for plaintiff when form fails to specify. — When both parties to a divorce suit introduced evidence in support of their respective prayers for divorce, and the jury returned a verdict in the form prescribed by law, without stating whether the verdict was for the plaintiff or the defendant, the verdict would be construed to be for the plaintiff. *Gardner v. Gardner*, 206 Ga. 669, 58 S.E.2d 416 (1950); *Fried v. Fried*, 208 Ga. 861, 69 S.E.2d 862 (1952); *Newman v. Newman*, 223 Ga. 278, 154 S.E.2d 581 (1967).

Verdict for plaintiff is not concurrent with one for defendant and decree based upon nonconcurrent verdicts is void, and should be set aside on proper motion. *Hyde v. Hyde*, 200 Ga. 635, 38 S.E.2d 287 (1946).

Judgment not set aside when language used substantially conforms to section. — Verdict and judgment which was not couched in the exact language contained in the statute but the language used was substantially the same, the verdict was not subject to being set aside. *De Gouras v. De Gouras*, 205 Ga. 362, 53 S.E.2d 759 (1949).

Incorporation of custody judgment in divorce decree. — When custody is decided by juvenile court, it is unnecessary to incorporate custody judgment in divorce decree. *Saade v. Saade*, 238 Ga. 620, 234 S.E.2d 530 (1977).

Decree should accurately reflect a settlement reached by the parties; therefore, the trial court cannot be allowed to make substantive additions in voluntary agreements made before the court. *Robinson v. Robinson*, 261 Ga. 330, 404 S.E.2d 435 (1991).

Substantially conforming to agreement. — Although a spouse alleged on appeal that a motion to set aside that portion of the divorce decree which dealt with the issue of child support, which incorporated the parties’ settlement agreement, was properly granted because the decree failed to set forth a specific baseline dollar amount for child support, as required by O.C.G.A. § 19-5-12, the decree contained stated dollar amounts which could be considered baseline payments; hence, pursuant to O.C.G.A. § 19-6-15 as applicable at the time, the trial court properly found that the spouse was liable for paying child support for two children in the range of 23 to 28 percent of the spouse’s gross income. *Scott v. Scott*, 282 Ga. 36, 644 S.E.2d 842 (2007).

Cited in *Taylor v. Taylor*, 195 Ga. 711, 25 S.E.2d 506 (1943); *Ragans v. Ragans*, 200 Ga. 890, 39 S.E.2d 162 (1946); *Pate v. Citizens & S. Nat’l Bank*, 203 Ga. 442, 47 S.E.2d 277 (1948); *Huguley v. Huguley*, 204 Ga. 692, 51 S.E.2d 445 (1949); *Carnegie v. Carnegie*, 206 Ga. 77, 55 S.E.2d 583 (1949); *McDonald v. Hester*, 115 Ga. App. 740, 155 S.E.2d 720 (1967); *Shaw v. Shaw*, 224 Ga. 747, 164 S.E.2d 723 (1968); *Moore v. Moore*, 229 Ga. 600, 193 S.E.2d 608 (1972); *Loftis v. Loftis*, 236 Ga. 637, 225 S.E.2d 685 (1976); *Dickson v. Dickson*, 238 Ga. 672, 235 S.E.2d 479 (1977); *Shell v. Shell*, 239 Ga. 566, 238 S.E.2d 99 (1977); *Harwell v. Harwell*, 248 Ga. 578, 285 S.E.2d 12 (1981); *Urquhart v. Urquhart*, 272 Ga. 548, 533 S.E.2d 80 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Divorce and Separation, §§ 357, 358, 361, 362.

C.J.S. — 27A C.J.S., Divorce, § 230 et seq.

ALR. — Divorce decree as res judicata in respect of community property, 85 ALR 339.

Decree of divorce or annulment by court having jurisdiction as binding upon one not a party, as to facts adjudicated, 87 ALR 203.

Effect of failure of divorce decree to show whether divorce was granted to the husband or to the wife, 133 ALR 556.

Remedy of party against whom prelim-

inary decree for divorce is rendered in event of failure or refusal of prevailing party to request entry of final decree, 151 ALR 849.

Divorce decree as res judicata in independent action involving property settlement agreement, 32 ALR2d 1145.

Power of court to award absolute divorce in favor of party who desires only limited decree, or vice versa, 14 ALR3d 703.

Support provisions of judicial decree or order as limit of parent's liability for expenses of child, 35 ALR5th 757.

19-5-13. Disposition of property in accordance with verdict.

The verdict of the jury disposing of the property in a divorce case shall be carried into effect by the court by entering such judgment or decree or taking such other steps as are usual in the exercise of the court's equitable powers to execute effectually and fully the jury's verdict. (Orig. Code 1863, § 1680; Code 1868, § 1723; Code 1873, § 1724; Code 1882, § 1724; Civil Code 1895, § 2442; Civil Code 1910, § 2961; Code 1933, § 30-118.)

Cross references. — Identification of spouses' separate property, Ga. Const. 1983, Art. I, Sec. I, Para. XXVII and § 19-3-9.

Law reviews. — For article surveying developments in Georgia domestic relations law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 109 (1981). For survey article on wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982). For annual survey of domestic relations law, see 35 Mercer L. Rev. 127 (1983). For article, "Tax Aspects of Divorce and Separation and the Inno-

cent Spouse Rules," see 3 Ga. St. U.L. Rev. 201 (1987). For article, "The Civil Jurisdiction of State and Magistrate Courts," see 24 Ga. St. B.J. 29 (1987).

For note, "Georgia Becomes A Quasi Community Property State," see 17 Ga. St. B.J. 134 (1981). For note, "The Significance of Stokes v. Stokes: An Examination of Property Rights Upon Divorce in Georgia," see 16 Ga. L. Rev. 695 (1982).

For comment, "The Georgia Supreme Court's Creation of an Equitable Interest in Marital Property — Yours? Mine? Ours!," 34 Mercer L. Rev. 449 (1982).

JUDICIAL DECISIONS

Settlement of property rights can be made in divorce action. Hendrix v. Hendrix, 224 Ga. 662, 163 S.E.2d 917 (1968); Stokes v. Stokes, 246 Ga. 765, 273 S.E.2d 169 (1980).

Court has ancillary jurisdiction to determine equitable interest of either spouse in real or personal property owned,

either in whole or in part, by the other spouse. Stokes v. Stokes, 246 Ga. 765, 273 S.E.2d 169 (1980).

When the husband is a nonresident, served by publication, the court, having jurisdiction of the res of the marriage relation, may render a valid decree of divorce; and under the court's additional

powers given by the statutes, having incidental equity jurisdiction over the res of the property within its territory, it may render a valid judgment or decree in rem with respect to such property when necessary to enforce the wife's claim to permanent alimony. *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937).

Court or jury has authority to award property of one spouse to the other spouse based solely on an equitable division of property. *Bedford v. Bedford*, 246 Ga. 780, 273 S.E.2d 167 (1980).

Trier hearing an alimony case has the authority to award to one spouse real property titled in the name of the other spouse since the basis of such award is neither alimony, partitioning, trust, nor fraud, but is equitable division of property. *Stokes v. Stokes*, 246 Ga. 765, 273 S.E.2d 169 (1980).

Improper in personam judgment award. — When wife's failure to have received \$25,000 was not the result of the husband's willful disobedience, but of the fiduciary's apparent misappropriation of the fund, the trial court erred in subsequently ordering that the husband was required to pay this sum, as this had the erroneous effect of amending the judgment to make it an in personam judgment against the husband, in the nature of an award of lump sum alimony, which was totally inconsistent with the jury's in rem award to wife of the \$25,000, as a component of the equitable property division. *Wagan v. Wagan*, 263 Ga. 376, 434 S.E.2d 475 (1993).

Because a jury expressly declined to make an equitable division of property between the parties, and the husband did not pray for alimony, the parties' ownership interests in any marital property not addressed by the jury in its specific award of alimony to the wife remained as they were before the decree was entered. *Mitchell v. Mitchell*, 263 Ga. 182, 430 S.E.2d 350 (1993).

Medical license is not property. — Husband's medical school education and license may not be considered "marital property," subject to equitable division. The value of these assets is too speculative to calculate, being simply the possibility of enhanced earnings they provide. That po-

tential may never be realized for any number of reasons. *Lowery v. Lowery*, 262 Ga. 20, 413 S.E.2d 731 (1992).

Value of stock in closely-held corporation. — In dividing the marital property of the parties to a divorce action, the court was not bound by the value set forth in a buy-sell provision of a stockholder agreement in placing a value on the stock of a closely-held corporation for purposes of marital division, as the buy-sell price did not reflect the true market value. *Barton v. Barton*, 281 Ga. 565, 639 S.E.2d 481 (2007).

Decree should carry verdict into effect, and not destroy the verdict. *Gilbert v. Gilbert*, 151 Ga. 520, 107 S.E. 490 (1921); *Wise v. Wise*, 156 Ga. 459, 119 S.E. 410 (1923).

Changes to agreement. — Final version of the settlement agreement adopted by the trial court over the objections of the defendant included several provisions either not included in the original or different than those initially agreed upon; those changes and additions to the parties agreement rendered the trial court's adoption of the subsequently drafted final version error. *DeGarmo v. DeGarmo*, 269 Ga. 480, 499 S.E.2d 317 (1998).

Alteration of divorce decree in contempt proceeding. — Trial court erred in finding that a husband was not in contempt of a divorce decree because of impossibility, illegality, and a reasonable desire for clarification and in substantially altering the divorce decree as the husband forfeited the husband's automatically-granted appeal of the decree by the husband's failure to pay costs; the husband never moved to set aside the decree and the contempt proceeding was not the vehicle to alter the divorce decree. *Smith v. Smith*, 281 Ga. 204, 636 S.E.2d 519 (2006).

Trial court erred in holding a husband in contempt for refusing to sign an agreed domestic relations order because the trial court erroneously modified a divorce decree; in supplying the missing percentage allocation of a husband's military retirement benefits, the trial court did more than construe or clarify imprecise language in the agreement because the trial court eschewed the plain language of the

agreement allocating to the wife only such amounts as the Navy would “require” and substituted for that provision a fifty percent allocation. *Morgan v. Morgan*, 288 Ga. 417, 704 S.E.2d 764 (2011).

Spousal responsibility for paying note. — Divorce decree settling spousal responsibility for paying note is not binding upon noteholder. *McDonald v. McDonald*, 232 Ga. 190, 205 S.E.2d 850 (1974).

Trover and conversion relating to property awarded in divorce decree. — O.C.G.A. § 19-5-13 does not divest the state courts of jurisdiction over trover or conversion actions in which the alleged trover or conversion results from the defendant’s retention of property awarded to the plaintiff in a final divorce decree. *Dunlap v. Pope*, 177 Ga. App. 539, 339 S.E.2d 662 (1986).

If state court retains jurisdiction over property, federal court cannot appoint receiver. — Since a court hearing a suit for divorce and division of property asserts quasi in rem jurisdiction over the marital property, where the court’s order providing for the sale of the property and division of the proceeds had not yet been complied with, that court still had and continued to exercise quasi in rem jurisdiction over the property, and the federal district court therefore had no power to appoint a receiver to effectuate the sale of the property as required by the divorce decree. *Cavalino v. Cavalino*, 601 F. Supp. 74 (N.D. Ga. 1984).

Equitable division when spouse conveyed property to parent prior to divorce action. — Property which a spouse conveyed by deed to the spouse’s parent before the other spouse filed for a divorce was not subject to equitable division in the divorce action brought by the other spouse because the other spouse chose to abandon the avenue for recovery that the other spouse initiated to show that the property was still subject to equitable division. *Armour v. Holcombe*, 288 Ga. 50, 701 S.E.2d 169 (2010).

Generic final decree upheld. — Given all of the relevant facts and circumstances regarding the parties’ marriage, the trial court did not abuse the court’s discretion in finding that the proper disposition was to enter a generic final judg-

ment severing the marital relationship; hence, the trial court properly chose to allow the parties’ ownership interests in any marital property to remain as they were before the decree was entered. *Stanley v. Stanley*, 281 Ga. 672, 642 S.E.2d 94 (2007).

Valuation of property not required. — Considering the lack of any evidence of the value of the maintenance work performed by the husband, the testimony of the wife that he was paid for this work, the fact that the husband used a portion of the property rent-free as a commercial recording studio, and the fact that the property paid for the mortgage through the property’s own rents, the trial court had evidentiary support for the court’s finding that any increased value in the property attributable to the husband’s contributions and the expenditure of marital funds was nominal, and therefore a calculation of the current market value of the property was not needed. As there was ample evidence supporting the court’s conclusion, the trial court did not abuse the court’s broad discretion to divide marital property equitably. *Pina v. Pina*, 290 Ga. 878, 725 S.E.2d 301 (2012).

Equitable division of marital property upheld. — Trial court did not err in denying a husband’s motion for new trial as the wife presented sufficient evidence from which an equitable division of the value of two properties at issue could have been determined at the time the property’s value began to include an element of marital property. *Maddox v. Maddox*, 278 Ga. 606, 604 S.E.2d 784 (2004).

Former husband failed to carry the burden of proving error in the trial court’s division of property in a divorce action; although each spouse is entitled to an allocation of the marital property based upon his or her respective equitable interest therein, an award is not erroneous simply because one party receives a seemingly greater share of the marital property. *Harmon v. Harmon*, 280 Ga. 118, 622 S.E.2d 336 (2005).

In a divorce proceeding, a spouse’s claim on appeal that the evidence at trial was strongly against the jury’s verdict failed because the evidence was sufficient to authorize the verdict; the jury was pre-

sented with evidence of the parties' assets and liabilities and of their disparate earning power. *Moxley v. Moxley*, 281 Ga. 326, 638 S.E.2d 284 (2006).

On appeal from an order equitably distributing the parties' marital property, inasmuch as the issues on appeal depended upon the factual determinations made by the trial court as fact-finder, and neither party asked the trial court to make factual findings, the Supreme Court of Georgia was unable to conclude that the trial court's equitable distribution of marital property was improper as a matter of law or as a matter of fact. *Crowder v. Crowder*, 281 Ga. 656, 642 S.E.2d 97 (2007).

Because conflicting evidence was presented concerning the values of the parties' assets as well as the premarital and marital contributions of each spouse, the trial court, sitting as the trier of fact, was required to determine whether and to what extent a particular asset was marital or non-marital, exercise the court's discretion, and then divide the marital property equitably; hence, inasmuch as the issues on appeal depended upon the factual determinations made by the trial court as fact finder, and neither party asked the trial court to make factual findings, the equitable distribution of marital property was not improper as a matter of law or fact. *Mathis v. Mathis*, 281 Ga. 865, 642 S.E.2d 832 (2007).

Pension benefits. — Trial court did not abuse court's discretion in failing to classify the employer contributions to the parties' pension accounts as marital property, and then equitably divide the parties' entire pension benefits, because inasmuch as the issues on appeal depended upon the factual determinations made by the trial court, and neither party requested that the court make factual findings, the Supreme Court of Georgia had no choice but to uphold the trial court's decision. Further, although the husband's pension was marital property, the trial court was at least authorized to find, and might have indeed found, that in light of the wife's own vested retirement benefits, the absence of certain details therein, the wife's earnings potential, and other factors, an equitable distribution could best be achieved by actually dividing only the

parties' contributions as employees to their pensions. *Taylor v. Taylor*, 283 Ga. 63, 656 S.E.2d 828 (2008).

On appeal from an order dividing the parties' marital property, no error resulted from the trial court's order allowing one spouse to retain that spouse's separate property, as the other spouse executed a quitclaim deed to the property, and the record showed that the other spouse contributed significantly to the amount of debt secured by the property, ultimately diminishing the property's worth; moreover, given the overall distribution of assets between the parties and the detailed findings regarding the assets, no abuse resulted from allowing the one spouse to retain a retirement account. *Wood v. Wood*, 283 Ga. 8, 655 S.E.2d 611 (2008).

Award of certain personal property to a husband in the parties' divorce action was not an abuse of discretion because the wife failed to show that the trial court treated the wife inequitably in the court's decision regarding what constituted a fair division of the marital property between the parties; an equitable division did not necessarily require an equal division. *Rumley-Miawama v. Miawama*, 284 Ga. 811, 671 S.E.2d 827 (2009).

In a divorce action, a trial court did not abuse the court's discretion in declining to apply the doctrine of judicial estoppel to defeat the wife's claim to any share of her retirement accounts because the husband failed to show that the wife's retirement accounts were not excludable or exempt from the bankruptcy estate under 11 U.S.C. § 522(d)(12). *Klardie v. Klardie*, 287 Ga. 499, 697 S.E.2d 207 (2010).

At least some evidence supported the jury's determination that the husband's Individual Retirement Account (IRA) was the husband's separate property because as the final arbiter of questions of fact and witness credibility, the jury was free to reject portions of the husband's testimony and conclude from the remaining evidence that the particular IRA in the husband's name could in fact have remained separate property. *Curran v. Scharpf*, 290 Ga. 780, 726 S.E.2d 407 (2012).

Final decree upheld. — With respect to a final divorce decree that merely included a provision that one spouse would

retain title to eight parcels of real property that had been held exclusively in that spouse's name, because no transcript of the evidence admitted at trial was presented, the court had to presume that the evidence supported the trial court's award of none of the parcels to the other spouse. *Dasher v. Dasher*, 283 Ga. 436, 658 S.E.2d 571 (2008).

Cited in *Kirchman v. Kirchman*, 212 Ga. 488, 93 S.E.2d 685 (1956); *Davis v. Davis*, 216 Ga. 305, 116 S.E.2d 219 (1960); *Goodwill v. Goodwill*, 221 Ga. 757, 147 S.E.2d 313 (1966); *Cotts v. Cotts*, 245 Ga. 138, 263 S.E.2d 163 (1980); *Holler v. Holler*, 257 Ga. 27, 354 S.E.2d 140 (1987); *Nix v. Nix*, 185 Bankr. 929 (Bankr. N.D. Ga. 1994).

RESEARCH REFERENCES

Am. Jur. Trials. — “Increased Earning Power” of a Professional Degree or License as an Asset to be Equitably Distributed in Divorce Proceedings, 60 Am. Jur. Trials 391.

C.J.S. — 27C C.J.S., Divorce, §§ 584 et seq., 765.

ALR. — Divorce as affecting estate by entireties, 52 ALR 890; 59 ALR 718.

Divorce decree as *res judicata* in respect of community property, 85 ALR 339.

Effect of death of party to divorce suit before final decree, 104 ALR 654; 158 ALR 1205.

Propriety and effect of provision in decree in divorce suit in respect of policy of insurance on life of husband, 145 ALR 522.

Divorce of insured and beneficiary as affecting the latter's right in life insurance, 175 ALR 1220.

Divorce decree purporting to award life insurance to husband as terminating wife-beneficiary's rights notwithstanding failure to formally change beneficiary, 70 ALR3d 348.

Property settlement agreement as affecting divorced spouse's right to recover as named beneficiary under former spouse's life insurance policy, 31 ALR4th 59.

Proper date for valuation of property being distributed pursuant to divorce, 34 ALR4th 63.

Spouse's dissipation of marital assets prior to divorce as factor in divorce court's determination of property division, 41 ALR4th 416.

Divorce: equitable distribution doctrine, 41 ALR4th 481.

Divorce and separation: treatment of stock options for purposes of dividing marital property, 46 ALR4th 640.

Valuation of stock options for purposes of divorce court's property distribution, 46 ALR4th 689.

Divorce: excessiveness or adequacy of trial court's property award—modern cases, 56 ALR4th 12.

Divorce: propriety of property distribution leaving both parties with substantial ownership interest in same business, 56 ALR4th 862.

Divorce property distribution: real estate or trust property in which interest vested before marriage and was realized during marriage, 60 ALR4th 217.

Divorce property distribution: treatment and method of valuation of future interest in real estate or trust property not realized during marriage, 62 ALR4th 107.

Divorce: propriety of using contempt proceeding to enforce property settlement award or order, 72 ALR4th 298.

Divorce and separation: goodwill in medical or dental practice as property subject to distribution on dissolution of marriage, 76 ALR4th 1025.

Valuation of goodwill in accounting practice for purposes of divorce court's property distribution, 77 ALR4th 609.

Divorce and separation: goodwill in accounting practice as property subject to distribution on dissolution of marriage, 77 ALR4th 645.

Valuation of goodwill in law practice for purposes of divorce court's property distribution, 77 ALR4th 683.

Valuation of goodwill in medical or dental practice for purposes of divorce court's property distribution, 78 ALR4th 853.

Accrued vacation, holiday time, and sick leave as marital or separate property, 78 ALR4th 1107.

Divorce and separation: goodwill in law

practice as property subject to distribution on dissolution of marriage, 79 ALR4th 171.

Divorce and separation: consideration of tax consequences in distribution of marital property, 9 ALR5th 568.

Divorce and separation: attorney's contingent fee contracts as marital property subject to distribution, 44 ALR5th 671.

Copyright, patent, or other intellectual property as marital property for purposes of alimony, support, or divorce settlement, 80 ALR5th 487.

Divorce decree or settlement agreement as affecting divorced spouse's right to re-

cover as named beneficiary on former spouse's individual retirement account, 99 ALR5th 637.

Division of lottery proceeds in divorce proceedings, 124 ALR5th 537.

Inherited property as marital or separate property in divorce action, 38 ALR6th 313.

Divorce and separation: appreciation in value of separate property during marriage with contribution by either spouse as separate or community property (doctrine of "active appreciation"), 39 ALR6th 205.

19-5-14. New trials.

New trials may be granted in actions for divorce as in other cases. (Orig. Code 1863, § 1679; Code 1868, § 1722; Code 1873, § 1723; Code 1882, § 1723; Civil Code 1895, § 2441; Civil Code 1910, § 2960; Code 1933, § 30-130.)

Cross references. — New trial generally, T. 5, C. 5.

JUDICIAL DECISIONS

It is not cause for grant of new trial that verdict found generally in favor of plaintiff for a total divorce, without in express terms referring to the status of the defendant. *Miller v. Miller*, 139 Ga. 282, 77 S.E. 21 (1913).

Attorney with notice of trial but failing to notify client. — Former husband was not entitled to a new trial in a divorce action because the husband's attorney had actual notice of the trial date but failed to notify the husband; thus, a meritorious reason did not exist for granting a new trial. *Arkwright v. Arkwright*, 284 Ga. 545, 668 S.E.2d 709 (2008).

Trial court and appellate court can

grant partial new trial on an issue or issues in a case that are severable from other issues in the case, and therefore it is likewise proper for a litigant to move for a partial new trial in a divorce and alimony case when the issues are severable. *Swindell v. Swindell*, 231 Ga. 167, 200 S.E.2d 736 (1973).

Cited in *Gholston v. Gholston*, 31 Ga. 625 (1860); *Rorie v. Rorie*, 132 Ga. 719, 64 S.E. 1070 (1909); *Dugas v. Dugas*, 201 Ga. 190, 39 S.E.2d 658 (1946); *Huguley v. Huguley*, 204 Ga. 692, 51 S.E.2d 445 (1949); *Taylor v. Taylor*, 212 Ga. 637, 94 S.E.2d 744 (1956).

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Divorce and Separation, § 355 et seq.

C.J.S. — 27A C.J.S., Divorce, §§ 220, 221.

19-5-15. Effect of divorce.

A total divorce annuls a marriage from the time of the rendition of the decree, unless the divorce is granted for a cause rendering the marriage void originally, in which case the divorce serves to annul the marriage from its inception. However, the issue of the marriage shall not be rendered born out of wedlock by a divorce, except in cases of pregnancy of the wife by a man other than the husband at the time of the marriage, unknown to the husband. (Laws 1806, Cobb's 1851 Digest, p. 225; Ga. L. 1861, p. 62, § 1; Code 1863, § 1682; Code 1868, § 1725; Code 1873, § 1726; Code 1882, § 1726; Civil Code 1895, § 2444; Civil Code 1910, § 2963; Code 1933, § 30-119; Ga. L. 1988, p. 1720, § 2.)

Law reviews. — For article, "Annulment of Marriage in Georgia," see 5 Ga. B.J. 22 (1942).

JUDICIAL DECISIONS

Wife ceases to be member of husband's family. — Upon dissolution of marriage by total divorce, the wife ceases to be a member of the husband's family effectually as if she were dead. *Burns v. Lewis*, 86 Ga. 591, 13 S.E. 123 (1891).

Upon a divorce vinculo obtained by wife, defendant ceases to be her husband and accordingly his marital rights terminate. *Barclay v. Warning*, 58 Ga. 86 (1877).

Final verdict of total divorce shows jury intent to dissolve marriage. — Final verdict being in favor of a total

divorce for the plaintiff admits of no construction but that the jury intended the marriage should be dissolved. *Chance v. Chance*, 60 Ga. App. 889, 5 S.E.2d 399 (1939).

Common-law marriage. — When a former wife did not consistently claim or engage in conduct consistent with the existence of a common-law marriage, saying she was divorced or single when it was convenient for her to do so, there was insufficient proof of a common-law marriage. *In re Estate of Dunn*, 236 Ga. App. 211, 511 S.E.2d 575 (1999).

OPINIONS OF THE ATTORNEY GENERAL

Previous divorce not bar to remarriage of same parties. — Previously dissolved marriage neither bars the subsequent creation of a marital relationship

between the same parties nor does it serve in any way as evidence of a latter state of marriage between these parties. 1965-66 Op. Att'y Gen. No. 66-69.

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Divorce and Separation, §§ 1, 4.

C.J.S. — 27A C.J.S., Divorce, § 2.

ALR. — Death or divorce as affecting relationship by affinity as regards insurance, 99 ALR 593.

Action under declaratory judgment act to test validity or effect of a decree of divorce, 124 ALR 1336.

Divorce decree as res judicata or estoppel as to previous marital status, against or in favor of third person, 20 ALR2d 1163.

Effect of divorce, separation, desertion, unfaithfulness, and the like upon right to administer upon estate of spouse, 34 ALR2d 876.

Cohabitation under marriage contracted after divorce decree as adultery,

where decree is later reversed or set aside, 63 ALR2d 816.

Determination of paternity, legitimacy, or legitimation in action for divorce, separation, or annulment, 65 ALR2d 1381.

Effect, in subsequent proceedings, of paternity findings or implications in divorce or annulment decree or in support or custody order made incidental thereto, 78 ALR3d 846.

19-5-16. Restoration of maiden or prior name.

In all divorce actions, a party may pray in his pleadings for the restoration of a maiden or prior name. If a divorce is granted, the judgment or decree shall specify and restore to the party the name so prayed for in the pleadings. (Ga. L. 1880-81, p. 121, § 1; Code 1882, § 3586a; Civil Code 1895, § 2446; Civil Code 1910, § 2965; Code 1933, § 30-121.)

Cross references. — Proceedings for change of name generally, T. 19, C. 12.

JUDICIAL DECISIONS

Cited in Schwartz v. Schwartz, 237 Ga. 56, 226 S.E.2d 591 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Divorce and Separation, § 365.

C.J.S. — 27C C.J.S., Divorce, §§ 611, 612, 763.

ALR. — Correct name of married woman, 35 ALR 417.

Right of married woman to use maiden surname, 67 ALR3d 1266.

19-5-17. Determination of parties' rights; disability preventing remarriage forbidden.

When a divorce is granted, the jury or the judge, as the case may be, shall determine the rights of the parties. No person shall be placed under a disability that would prevent remarriage. (Code 1868, § 1726; Code 1873, § 1727; Code 1882, § 1727; Civil Code 1895, § 2445; Civil Code 1910, § 2964; Code 1933, § 30-122; Ga. L. 1946, p. 90, § 12; Ga. L. 1960, p. 1024, § 1; Ga. L. 1979, p. 466, § 5.)

JUDICIAL DECISIONS

“Rights and disabilities” (now “rights” only) and “divorce.” — Former Code 1933, § 30-122 did not mean that granting of divorce to one party automatically granted other party divorce as the words “rights and disabilities” (now “rights” only) and “divorce” were not synonymous terms. Schwartz v. Schwartz, 222 Ga. 460, 150 S.E.2d 809 (1966).

Reversible error as to jury charge. — It is reversible error to charge that, if the jury grants one party a divorce as a matter of law, the opposite party should also be granted a divorce; “rights and disabilities” (now “rights” only) and “divorce” are not synonymous terms. Perlotte v. Perlotte, 218 Ga. 27, 126 S.E.2d 220 (1962).

RESEARCH REFERENCES

ALR. — Inhibition by decree of divorce, or statute of state or country in which it is granted, against remarriage, as affecting

a marriage celebrated in another state or country, 32 ALR 1116; 51 ALR 325.

CHAPTER 6

ALIMONY AND CHILD SUPPORT

Article 1		Sec.	
General Provisions			
Sec.			
19-6-1.	Alimony defined; when authorized; how determined; lien on estate of party dying prior to order; certain changes in parties' assets prohibited pending determination.		donment, or driving off of spouse — Effect of subsequent cohabitation between spouses on permanent alimony.
		19-6-13.	Liability of parents for necessities furnished to children pending voluntary provision, order, or decree.
19-6-2.	Attorney's fees; when granted; grant of final judgment; how enforced; action by attorney.	19-6-14.	Child support and custody pending final divorce; effect on liability to third persons for necessities.
19-6-3.	Temporary alimony; petition and hearing; factors considered; discretion of judge; revision and enforcement of order; effect of failure to comply.	19-6-15.	Child support in final verdict or decree; guidelines for determining amount of award; continuation of duty to provide support; duration of support.
19-6-4.	When permanent alimony authorized; how enforced.	19-6-16.	Enforcement of child support orders, decrees, or verdicts.
19-6-5.	Factors in determining amount of alimony; effect of remarriage on obligations for alimony.	19-6-17.	Application for child support following custody award; service of petition; hearing; review; modification of order; enforcement; judgment.
19-6-6.	Liability after grant of alimony.		
19-6-7.	Interest in deceased party's estate after grant of permanent alimony.	19-6-18.	Revision of judgment rendered prior to July 1, 1977, for permanent alimony and child support; when authorized; petition and hearing; expenses for defense of litigation.
19-6-8.	Voluntary separation, abandonment, or driving off of spouse — Agreement for support as bar to alimony.		
19-6-9.	Voluntary separation, abandonment, or driving off of spouse — Equity may compel support.	19-6-19.	Revision of judgment for permanent alimony generally — When authorized; petition and hearing; cohabitation with third party as ground for revision; attorney's fees; temporary modification pending final trial.
19-6-10.	Voluntary separation, abandonment, or driving off of spouse — Petition for alimony or child support when no divorce pending — Notice; hearing; order and enforcement; equitable remedies; decree in equity; effect of filing for divorce.	19-6-20.	Revision of judgment for permanent alimony, generally — Merits not at issue.
		19-6-21.	Revision of judgment for permanent alimony — Not available in case of lump sum award.
19-6-11.	Voluntary separation, abandonment, or driving off of spouse — Petition for alimony or child support when no divorce pending — Appeals.	19-6-22.	Revision of judgment for permanent alimony — Expenses for defense of litigation.
19-6-12.	Voluntary separation, aban-	19-6-23.	Applicability of Code Section

- Sec.
- 19-6-18 or Code Sections 19-6-19 through 19-6-22 to judgments on or after March 9, 1955.
- 19-6-24. Applicability of Code Section 19-6-18 or Code Sections 19-6-19 through 19-6-22 to judgments prior to March 9, 1955.
- 19-6-25. Revision of permanent alimony for judgments entered prior to March 9, 1955.
- 19-6-26. Definitions; jurisdiction.
- 19-6-27. Application for permanent alimony or child support after grant of foreign divorce decree; venue; hearing; review; modification.
- 19-6-28. Enforcement of orders; contempt; service of rule nisi by mail; rule nisi form.
- 19-6-28.1. Suspension of, or denial of application or renewal of, license for noncompliance with child support order.
- 19-6-29. Inclusion of accident and sickness insurance coverage in order for child support; payroll deductions.

- Sec.
- 19-6-30. Provision for collection by continuing garnishment for support; child support subject to income deduction.
- 19-6-31. Definitions.
- 19-6-32. Entering income deduction order or medical support notice for award of child support; when order or notice effective; hearing on order.
- 19-6-33. Notice and service of income deduction order; hearing on enforcement of order; discharge of obligor; penalties.
- 19-6-33.1. Family support registry.
- 19-6-34. Inclusion of life insurance in order of support.
- 19-6-35. Child support obligee and obligor defined.

Article 2

Georgia Child Support Commission

- 19-6-50. Creation; responsibilities.
- 19-6-51. Members; terms; chairperson, other officers, and committees; staffing and funding.
- 19-6-52. Meetings; members' expenses.
- 19-6-53. Duties; powers; authorization to retain professional services.

Cross references. — Procedure for appeals from judgments or orders granting or refusing temporary or permanent alimony or holding or declining to hold persons in contempt of such alimony judgments or orders, § 5-6-35. Domestic relations long-arm statute, § 9-10-91(5).

Law reviews. — For annual survey of domestic relations law, see 35 Mercer L. Rev. 127 (1983). For annual survey of law of domestic relations, see 38 Mercer L. Rev. 179 (1986). For article, "Gender and Justice in the Courts: A Report to the

Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System," see 8 Ga. St. U.L. Rev. 539 (1992). For annual survey of domestic relations law, see 43 Mercer L. Rev. 243 (1991). For annual survey article on domestic relations, see 50 Mercer L. Rev. 217 (1998).

For note appraising the Georgia domestic relations long-arm statute, see 18 Ga. L. Rev. 691 (1984). For note on 1995 amendments and enactments of sections in this chapter, see 12 Ga. St. U.L. Rev. 169 (1995).

JUDICIAL DECISIONS

Term "former spouse" equates with "parent" when considering child support issues. — For the purposes of O.C.G.A. T. 19, Ch. 6 of the Georgia Domestic Relations Code, the term "former

spouse" is equated with "parent" when considering issues of child support. *Monroe v. Taylor*, 259 Ga. App. 600, 577 S.E.2d 810 (2003).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Change in Circumstances Justifying Modification of Child Support Order, 1 POF2d 1.

Wife's Ability to Support Herself, 2 POF2d 99.

Forensic Economics — Use of Economists in Cases of Dissolution of Marriage, 17 POF2d 345.

Abandonment of Marriage Without Cause — Defense in Alimony, Spousal Support, or Separate Maintenance Proceeding, 27 POF2d 737.

Spousal Support on Termination of Marriage, 32 POF2d 439.

Modification of Spousal Support Award, 32 POF2d 491.

Legal Malpractice in Domestic Relations, 44 POF2d 377.

Amount of Allowance for Attorney Fees in Domestic Relations Action, 45 POF2d 699.

Modification of Spousal Support on Ground of Supported Spouse's Cohabitation, 6 POF3d 765.

ALR. — Validity and enforceability of escalation clause in divorce decree relating to alimony and child support, 19 ALR4th 830.

Excessiveness or adequacy of amount of money awarded as permanent alimony following divorce, 28 ALR4th 786.

Order awarding temporary support or living expenses upon separation of unmarried partners pending contract action based on services relating to personal relationship, 35 ALR4th 409.

Divorce and separation: treatment of stock options for purposes of dividing marital property, 46 ALR4th 640.

Valuation of stock options for purposes of divorce court's property distribution, 46 ALR4th 689.

Postmajority disability as reviving parental duty to support child, 48 ALR4th 919.

Court's authority to reinstitute parent's

support obligation after terms of prior decree have been fulfilled, 48 ALR4th 952.

Necessity that divorce court value property before distributing it, 51 ALR4th 11.

Divorce and separation: method of valuation of life insurance policies in connection with trial court's division of property, 54 ALR4th 1203.

Divorce: excessiveness or adequacy of combined property division and spousal support awards—modern cases, 55 ALR4th 14.

Right to jury trial in state court divorce proceedings, 56 ALR4th 955.

Divorce: order requiring that party not compete with former marital business, 59 ALR4th 1075.

Divorce property distribution: real estate or trust property in which interest vested before marriage and was realized during marriage, 60 ALR4th 217.

Insanity as defense to divorce or separation suit — post-1950 cases, 67 ALR4th 277.

Divorce and separation: effect of court prohibiting sale or transfer of property on party's right to change beneficiary of insurance policy, 68 ALR4th 929.

What constitutes order made pursuant to state domestic relations law for purposes of qualified domestic relations order exception to antialienation provision of Employee Retirement Income Security Act of 1974 (29 USCS § 1056(d)), 79 ALR4th 1081.

Parent's child support liability as affected by other parent's fraudulent misrepresentation regarding sterility or use of birth control, or refusal to abort pregnancy, 2 ALR5th 337.

Authority of court, upon entering default judgment, to make orders for child custody or support which were not specifically requested in pleadings of prevailing party, 5 ALR5th 863.

Spouse's right to set off debt owed by other spouse against accrued spousal or child support payments, 11 ALR5th 259.

ARTICLE 1

GENERAL PROVISIONS

Editor's notes. — Ga. L. 2005, p. 224, § 1, not codified by the General Assembly, provides that: "The General Assembly finds and declares that it is important to assess periodically child support guidelines and determine whether existing guidelines continue to be viable and effective or whether they have failed or ceased to accomplish their original policy objectives. The General Assembly further finds that supporting Georgia's children is vitally important to the citizens of Georgia. Therefore, the General Assembly has determined that it is in the best interests of the state and its citizenry to undertake an

evaluation of the child support guidelines on a continuing basis. The General Assembly declares that it is important that all of Georgia's children are provided with adequate financial support whether the children's parents are living together or not living together. The General Assembly finds that both parents have a continuing obligation with respect to providing financial and emotional stability for their child or children. It is the hope of the members of the General Assembly that all parents work together to advance the best interest of their children."

19-6-1. Alimony defined; when authorized; how determined; lien on estate of party dying prior to order; certain changes in parties' assets prohibited pending determination.

(a) Alimony is an allowance out of one party's estate, made for the support of the other party when living separately. It is either temporary or permanent.

(b) A party shall not be entitled to alimony if it is established by a preponderance of the evidence that the separation between the parties was caused by that party's adultery or desertion. In all cases in which alimony is sought, the court shall receive evidence of the factual cause of the separation even though one or both of the parties may also seek a divorce, regardless of the grounds upon which a divorce is sought or granted by the court.

(c) In all other cases in which alimony is sought, alimony is authorized, but is not required, to be awarded to either party in accordance with the needs of the party and the ability of the other party to pay. In determining whether or not to grant alimony, the court shall consider evidence of the conduct of each party toward the other.

(d) Should either party die prior to the court's order on the issue of alimony, any rights of the other party to alimony shall survive and be a lien upon the estate of the deceased party.

(e) Pending final determination by the court of the right of either party to alimony, neither party shall make any substantial change in the assets of the party's estate except in the course of ordinary business affairs and except for bona fide transfers for value. (Orig. Code 1863,

§ 1688; Code 1868, § 1731; Code 1873, § 1736; Code 1882, § 1736; Civil Code 1895, § 2456; Civil Code 1910, § 2975; Code 1933, § 30-201; Ga. L. 1977, p. 1253, § 4; Ga. L. 1979, p. 466, § 6.)

Editor's notes. — Ga. L. 1979, p. 466, § 6, superseded the former version of Code 1933, § 30-201, in that it changed the language of the former section to provide that alimony may be assessed against either spouse. Cases decided prior to the 1979 enactment appear to remain valid except insofar as they may imply that a wife only is entitled to receive alimony or a husband only is obligated to pay alimony.

Law reviews. — For a survey of Georgia cases in the area of domestic relations from June 1979 through May 1980, see 32 Mercer L. Rev. 51 (1980). For article surveying developments in Georgia domestic relations law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 109 (1981). For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For article, "Tax Aspects of Divorce and Separation and the Innocent Spouse Rules," see 3 Ga. St. U.L. Rev. 201 (1987).

For article, "Georgia's Constitutional Scheme for State Appellate Jurisdiction," see 6 Ga. St. B.J. 24 (2001). For annual survey of domestic relations cases, see 57 Mercer L. Rev. 173 (2005). For annual survey of domestic relations law, see 58 Mercer L. Rev. 133 (2006). For annual survey of domestic relations law, see 59 Mercer L. Rev. 139 (2007). For annual survey of domestic relations law, see 60 Mercer L. Rev. 121 (2008). For annual survey of law on domestic relations, see 62 Mercer L. Rev. 105 (2010).

For note, "Georgia Becomes A Quasi Community Property State," see 17 Ga. St. B.J. 134 (1981). For note, "The Significance of Stokes v. Stokes: An Examination of Property Rights Upon Divorce in Georgia," see 16 Ga. L. Rev. 695 (1982).

For comment, "The Georgia Supreme Court's Creation of an Equitable Interest in Marital Property — Yours? Mine? Ours!," 34 Mercer L. Rev. 449 (1982).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

VALID MARRIAGE REQUIRED

FACTORS TO BE CONSIDERED

TEMPORARY ALIMONY

DEATH OF PARTY

General Consideration

Former language of section unconstitutional. — Statute imposed alimony obligations on husbands but not wives and violated the equal protection clause of the U.S. Const., amend. 14, and was therefore unconstitutional. *Stitt v. Stitt*, 243 Ga. 301, 253 S.E.2d 764 (1979).

Statute did not violate the due process clause of the state or federal Constitution because the legislative intent is clear and the statute provides "fair notice" of the statute's meaning. *Davenport v. Davenport*, 243 Ga. 613, 255 S.E.2d 695 (1979).

Challenge to constitutionality. — Pro se litigant sued government and court

officials alleging Georgia's alimony provisions, O.C.G.A. § 19-6-1 et seq., violated: (1) the right to privacy, protections of the equal protection clause, and prohibitions against involuntary servitude as contained in the U.S. Constitution; and (2) the right to privacy, due process provisions, equal protection provisions, privileges and immunities clause, prohibitions on involuntary servitude, and prohibitions against legislation based on social status as guaranteed by the Georgia Constitution. However, the federal court determined that the plaintiff must raise these constitutional challenges as part of the litigant's state divorce proceedings, and, furthermore, that Georgia had an

important state interest in enforcing these provisions. *Cormier v. Green*, 2005 U.S. App. LEXIS 14034 (11th Cir. July 12, 2005) (Unpublished).

O.C.G.A. § 19-6-1 provides that a party shall not be entitled to alimony if separation was caused by that party's adultery, and that in alimony cases the court shall receive evidence of the factual cause of the separation and the conduct of each party toward the other. *Owens v. Owens*, 247 Ga. 137, 274 S.E.2d 484 (1981).

Legislation amending this statute meets single subject matter requirement of Ga. Const. 1976, Art. III, Sec. VII, Para. IV (see now Ga. Const. 1983, Art. III, Sec. V, Para III), because the legislation's provisions all relate to changes in divorce and alimony procedure necessitated by the advent of "no fault" divorce, and because the lien provision has a natural connection with the main object of the legislation. *Davenport v. Davenport*, 243 Ga. 613, 255 S.E.2d 695 (1979).

Proceedings for divorce and alimony have always been regarded as equitable. *Early v. Early*, 243 Ga. 125, 252 S.E.2d 618 (1979).

Jurisdiction. — Once personal jurisdiction in divorce proceeding exists, jurisdiction continues with respect to alimony. *May v. May*, 162 Ga. App. 560, 290 S.E.2d 495 (1982).

No duty to determine amount when alimony not awarded. — In an action dissolving the marriage between the parties, having concluded that alimony would not be awarded, the trial court's consideration of the factors relevant to determining the amount thereof was obviated. *Stanley v. Stanley*, 281 Ga. 672, 642 S.E.2d 94 (2007).

Permanent alimony in conjunction with absolute divorce was unknown to common law or to the ecclesiastical courts. *Lloyd v. Lloyd*, 183 Ga. 751, 189 S.E. 903 (1937).

Permanent alimony statutory in nature. — Right to alimony after absolute divorce, and the granting in fee of a portion of the estate of the husband to the wife as permanent alimony is derivable solely from statutory provisions. *Lloyd v.*

Lloyd, 183 Ga. 751, 189 S.E. 903 (1937).

Alimony was introduced into divorce proceedings by early ecclesiastical courts of England, and in the early practice of these courts it was defined to be that support which the husband, on separation, is bound to provide for the wife, and is measured by the wants of the wife and the circumstances and the ability of the husband to pay. *Lloyd v. Lloyd*, 183 Ga. 751, 189 S.E. 903 (1937).

Term "alimony" is derived from Latin word which primarily meant to nourish; that is, to supply the necessities of life. *Lloyd v. Lloyd*, 183 Ga. 751, 189 S.E. 903 (1937).

As general rule, meaning of "alimony" is restricted to money; and unless expressly authorized by statute, no award can be made out of the property of the husband, divesting him of title to the same. *Lloyd v. Lloyd*, 183 Ga. 751, 189 S.E. 903 (1937).

Phrase "prior to the court's order on the issue of alimony," refers to either temporary or permanent alimony. *Davenport v. Davenport*, 243 Ga. 613, 255 S.E.2d 695 (1979).

Purpose. — Object of alimony is the support of children as well as the wife. *Eskew v. Eskew*, 199 Ga. 513, 34 S.E.2d 697 (1945).

Fundamental basis of the law is to require the husband to pay necessary expenses of his wife and minor children. *Finch v. Finch*, 213 Ga. 199, 97 S.E.2d 576 (1957).

Purpose of alimony is to provide support for wife (now either spouse) and minor children, the amount to be determined from consideration of needs and ability to pay. *McCurry v. McCurry*, 223 Ga. 334, 155 S.E.2d 378 (1967).

Strongest governmental purpose for Georgia's alimony laws is the provision of support for a needy spouse. *Sims v. Sims*, 245 Ga. 680, 266 S.E.2d 493 (1980).

Alimony is never for purpose of penalizing the husband or wife for his or her misconduct. *McCurry v. McCurry*, 223 Ga. 334, 155 S.E.2d 378 (1967).

Claim for alimony is different from ordinary debt. *Kirby v. Johnson*, 188 Ga. 701, 4 S.E.2d 643 (1939); *Jackson v. Jackson*, 203 Ga. 296, 46 S.E.2d 483 (1948).

General Consideration (Cont'd)

Dischargeability in bankruptcy. — Bankruptcy Court erred in ruling that the jury award of \$250,000.00 lump sum alimony was in the nature of alimony, maintenance, or support and thus was nondischargeable pursuant to 11 U.S.C. § 523. *Ackley v. Ackley*, 187 Bankr. 24 (N.D. Ga. 1995).

Jury award which requires appellant to pay appellee \$3,000.00 per month for 84 months is not in the nature of alimony, maintenance, or support and thus is dischargeable pursuant to 11 U.S.C. § 523. *Appling v. Rees*, 187 Bankr. 27 (N.D. Ga. 1995).

Fact that a lump sum alimony award to a wife was non-modifiable did not negate the possibility that the award was for the wife's maintenance and support; even though a lump sum alimony award was in the "nature" of a property settlement, when the evidence showed that the lump sum award was for the wife's maintenance and support, the finding that it was for that purpose, rather than a division of property which was dischargeable in bankruptcy, was affirmed. *Daniel v. Daniel*, 277 Ga. 871, 596 S.E.2d 608 (2004).

Alimony is not required to be awarded in no-fault divorce cases. *McElroy v. McElroy*, 242 Ga. 84, 249 S.E.2d 538 (1978).

Former wife is entitled to seek permanent alimony from her husband's estate in the form of property, a lump sum award, or periodic payments until the date of death. *Davenport v. Davenport*, 243 Ga. 613, 255 S.E.2d 695 (1979).

Lump sum installment award. — Discrete lump sum installment award by a jury can reasonably be interpreted as a recognition of pre-existing property rights based on equitable considerations, the satisfaction of a marital support obligation, which may include rehabilitation, or both. *Nix v. Nix*, 185 Bankr. 929 (Bankr. N.D. Ga. 1994).

Wife and minor children when living separate and apart from husband have legal demand upon him for support and maintenance, which is called alimony. To enforce this legal demand she may bring action and in the same proceed-

ing move to set aside any fraudulent transfer of his property. *McGahee v. McGahee*, 204 Ga. 91, 48 S.E.2d 675 (1948).

Law defining alimony contemplates "allowance" by judgment or decree of court, and not a mere provision for support in a private contract between the parties, even when the contract contains a recital that it is accepted by the wife "in full settlement of all alimony" and of all liability therefor. *Hayes v. Hayes*, 191 Ga. 237, 11 S.E.2d 764 (1940).

Alimony distinguished from property settlement. — Provisions in a decree specifying periodic payments to be made until a sum certain has been paid is a property settlement, while provision for periodic payments over a given time, or unlimited time, with no indication of a gross amount other than by multiplying the amounts due by the number of payment periods is alimony. *Taulbee v. Taulbee*, 243 Ga. 52, 252 S.E.2d 481 (1979); *Hathcock v. Hathcock*, 246 Ga. 233, 271 S.E.2d 147 (1980).

When other provisions of agreement provided specifically for weekly payments of alimony, payments of \$2,000 per year for ten years irrespective of remarriage or death of either party were a property settlement rather than alimony. *Hathcock v. Hathcock*, 246 Ga. 233, 271 S.E.2d 147 (1980).

Fact that parties call payments "alimony" for income tax purposes is not controlling. *Hathcock v. Hathcock*, 246 Ga. 233, 271 S.E.2d 147 (1980).

Both temporary award pending action, and amount fixed on final trial are alimony, and each is an allowance out of the husband's (now spouse's) estate, made for the support of the wife when living separate from him. *Pelot v. Pelot*, 193 Ga. 316, 18 S.E.2d 548 (1942).

Hospitalization insurance for wife is element of support, and is alimony. *Roberts v. Roberts*, 229 Ga. 689, 194 S.E.2d 100 (1972).

Obligation of husband to pay wife's debts is element of support and is "alimony". *Beach v. Beach*, 224 Ga. 701, 164 S.E.2d 114 (1968).

Husband's obligation to make a lump-sum cash payment to his ex-wife could not be characterized as

alimony for garnishment purposes, when the terms of the divorce decree described an exchange of assets between the parties, and it was clear that alimony was not involved. *Boyd v. Boyd*, 191 Ga. App. 718, 382 S.E.2d 730 (1989).

Divorce decree is ineffectual to vest in wife any interest in property acquired by husband in future as such expectation or interest cannot be a part of his estate out of which an allowance of alimony can be made. *Meeks v. Kirkland*, 228 Ga. 607, 187 S.E.2d 296 (1972).

Attorney's fees in divorce and alimony proceedings are not allowed as such, but as an intrinsic part of alimony awarded for the purpose of enabling the wife to contest the issues between herself and her husband. *Summers v. Summers*, 212 Ga. 614, 94 S.E.2d 725 (1956).

Spouse may settle claims and waive alimony. — Wife may, for a consideration, settle her claims against her husband's property by private agreement, and waive all claims for support, maintenance, or alimony. *In re Smith*, 436 F. Supp. 469 (N.D. Ga. 1977).

Alimony secured by promissory notes enforceable. — When in a divorce case the parties agreed upon a sum of money, payable in monthly installments, the several installments being represented by negotiable promissory notes payable to the wife and secured by a deed to land, the manifest intention of the parties was to fix a lump sum alimony, for which the husband would be unconditionally liable, and marriage of the wife to another man after obtaining a divorce would be no defense against payment of the notes and would not prevent the holder from enforcing payment as provided in the security deed. *Brown v. Farkas*, 195 Ga. 653, 25 S.E.2d 411 (1943).

Settlement of temporary alimony enforceable to prevent court order of same. — There is no express statutory law dealing with settlements of temporary alimony, but they are lawful and enforceable as a bar to the wife's recovering temporary alimony in court. *Finch v. Finch*, 213 Ga. 199, 97 S.E.2d 576 (1957).

Court may not adopt temporary settlement absent authorization in agreement. — When agreement relating

to temporary alimony contained no authorization that it be made the judgment of the court, the court could not lawfully make it such. *Finch v. Finch*, 213 Ga. 199, 97 S.E.2d 576 (1957).

Parental obligation to support child not applicable to alimony proceedings. — Statutory provision that the parent was liable for the support of his minor child has no application to proceedings for alimony. *Eskew v. Eskew*, 199 Ga. 513, 34 S.E.2d 697 (1945).

Award of alimony is erroneous when there is no prayer for that relief. *Pray v. Pray*, 223 Ga. 215, 154 S.E.2d 208 (1967).

Grant or refusal of temporary alimony is question for court; that of permanent alimony is for jury to determine. *Brown v. Brown*, 224 Ga. 90, 160 S.E.2d 343 (1968).

Judgment denying divorce and permanent alimony does not constitute res judicata or estoppel preventing recovery of temporary alimony for support and for the payment of attorney's fees incurred in prosecuting or defending the divorce and alimony proceeding. *Chlupacek v. Chlupacek*, 226 Ga. 520, 175 S.E.2d 834 (1970).

Retirement benefits. — Payments a husband was to make to his wife on his salary included retirement benefits. *Guntin v. Guntin*, 263 Ga. 241, 430 S.E.2d 6 (1993).

Military retirement pay. — Subjecting appellee's military pension to distribution as alimony did not conflict with the mandate of U.S. Supreme Court decision protecting military retirement benefits from distribution as community property in a divorce action, since Georgia law protects the ex-spouse by awarding alimony based on need and does not grant absolute right to one-half of such pension. *Stumpf v. Stumpf*, 249 Ga. 759, 294 S.E.2d 488 (1982).

Jury can hear evidence concerning all of the appellee's assets, including the appellee's military retirement pay, as relevant to an award of alimony, and the trial court erred when the court entered an order keeping evidence of such retirement pay from the jury. *Stumpf v. Stumpf*, 249 Ga. 759, 294 S.E.2d 488 (1982).

General Consideration (Cont'd)

Trial court's order that a husband designate a wife as the beneficiary of the survivor benefit plan under the husband's military pension was proper as essentially a life insurance protecting the husband's alimony obligation to the wife, even though the husband's pension was the husband's separate pre-marital property. *Hipps v. Hipps*, 278 Ga. 49, 597 S.E.2d 359 (2004).

Social security, interest, and dividends derived from a variety of sources are not compensation from an employer for services rendered and thus are not included in "salary" for alimony purposes. *Guntin v. Guntin*, 263 Ga. 241, 430 S.E.2d 6 (1993).

Trial court's award was excessive based on an exaggerated determination of the spouse's earning capacity. *Duncan v. Duncan*, 262 Ga. 872, 426 S.E.2d 857 (1993).

No error when some evidence supported decision. — When some evidence supported the trial court's decision, the trial court did not err in the court's determination of the amount of spousal support to be paid by a husband, including the wife's attorney fees. *Bloomfield v. Bloomfield*, 282 Ga. 108, 646 S.E.2d 207 (2007).

Alimony award proper. — Alimony award was not improper because, inter alia, there was nothing in the record to show the trial court did not take into account the evidence adduced at trial; moreover, the transcript showed many questions and comments by the trial court, several of which indicated that the court considered the wife's needs, the husband's ability to pay, and the factors set forth in O.C.G.A. § 19-6-5(a). *Sprouse v. Sprouse*, 285 Ga. 468, 678 S.E.2d 328 (2009).

Trial court did not abuse the court's discretion in setting alimony at \$1,250 per month, pursuant to O.C.G.A. §§ 19-6-1(c) and 19-6-5(a), because the trial court properly considered, inter alia, the value of the husband's pension, the overwhelming marital debt, the husband's contribution of inherited assets to the marriage, and the wife's recent promotion, accompa-

nied by a raise in salary and benefits. *Hammond v. Hammond*, 290 Ga. 518, 722 S.E.2d 729 (2012).

Finding as to husband's income proper. — Trial court's findings supporting the court's child support and alimony awards were proper because the trial court considered, inter alia, the husband's personal expenses paid by the husband's companies and the husband's loan application and financial affidavit in arriving at the court's determination of the husband's income; additionally, the trial court took into account the wife's status as a stay-at-home mother since the birth of the parties' son, the husband's conduct towards the wife, and the wife's potential income from the trial court's award to the wife of one of the husband's companies. The evidence also supported the trial court's finding that no deviation from the presumptive child support award was warranted under O.C.G.A. § 19-6-15(i) based on the alimony award. *Walton v. Walton*, 285 Ga. 706, 681 S.E.2d 165 (2009).

Cited in *Lundy v. Lundy*, 162 Ga. 42, 132 S.E. 389 (1926); *Lowry v. Lowry*, 170 Ga. 349, 153 S.E. 11 (1930); *McLendon v. McLendon*, 192 Ga. 70, 14 S.E.2d 477 (1941); *Attaway v. Attaway*, 193 Ga. 51, 17 S.E.2d 72 (1941); *Joel Bailey Davis, Inc. v. Poole*, 194 Ga. 824, 22 S.E.2d 795 (1942); *Green v. Starling*, 203 Ga. 10, 45 S.E.2d 188 (1947); *Von Kamp v. Gary*, 204 Ga. 875, 52 S.E.2d 591 (1949); *Finch v. Finch*, 213 Ga. 199, 97 S.E.2d 576 (1957); *Shivers v. Shivers*, 215 Ga. 536, 111 S.E.2d 376 (1959); *Thome v. Thome*, 218 Ga. 359, 127 S.E.2d 916 (1962); *Hewlett v. Hewlett*, 220 Ga. 656, 140 S.E.2d 898 (1965); *Hudson v. Hudson*, 220 Ga. 730, 141 S.E.2d 453 (1965); *Bugden v. Bugden*, 225 Ga. 413, 169 S.E.2d 337 (1969); *Barnes v. Barnes*, 230 Ga. 226, 196 S.E.2d 390 (1973); *Ryle v. Ryle*, 130 Ga. App. 680, 204 S.E.2d 339 (1974); *Murphy v. Murphy*, 232 Ga. 352, 206 S.E.2d 458 (1974); *Mullinax v. Mullinax*, 234 Ga. 553, 216 S.E.2d 802 (1975); *Byrd v. Byrd*, 238 Ga. 569, 233 S.E.2d 799 (1977); *Gorman v. Gorman*, 239 Ga. 312, 236 S.E.2d 652 (1977); *Kitchens v. Kitchens*, 239 Ga. 643, 238 S.E.2d 429 (1977); *Carr v. Carr*, 240 Ga. 161, 240 S.E.2d 50 (1977); *Stock v. Commissioner*,

551 F.2d 614 (5th Cir. 1977); *Moore v. Moore*, 240 Ga. 588, 242 S.E.2d 100 (1978); *Hargrett v. Hargrett*, 242 Ga. 725, 251 S.E.2d 235 (1978); *Bryan v. Bryan*, 242 Ga. 826, 251 S.E.2d 566 (1979); *Ford v. Ford*, 243 Ga. 763, 256 S.E.2d 446 (1979); *Stitt v. Stitt*, 243 Ga. 730, 256 S.E.2d 461 (1979); *Sims v. Sims*, 245 Ga. 680, 266 S.E.2d 493 (1980); *Smith v. Smith*, 245 Ga. 684, 266 S.E.2d 496 (1980); *Stokes v. Stokes*, 246 Ga. 765, 273 S.E.2d 169 (1980); *Owens v. Owens*, 247 Ga. 139, 274 S.E.2d 484 (1981); *Dolvin v. Dolvin*, 248 Ga. 439, 284 S.E.2d 254 (1981); *Head v. Hook*, 248 Ga. 818, 285 S.E.2d 718 (1982); *Hurley v. Hurley*, 249 Ga. 220, 290 S.E.2d 70 (1982); *Jackson v. Jackson*, 253 Ga. 576, 322 S.E.2d 725 (1984); *Smith v. Smith*, 254 Ga. 450, 330 S.E.2d 706 (1985); *Courtney v. Courtney*, 256 Ga. 97, 344 S.E.2d 421 (1986); *Head v. Head*, 234 Ga. App. 469, 507 S.E.2d 214 (1998).

Valid Marriage Required

Existence of valid marriage is essential to recovery of alimony. *Foster v. Foster*, 178 Ga. 791, 174 S.E. 532 (1934); *Reed v. Reed*, 202 Ga. 508, 43 S.E.2d 539 (1947).

Right to recover alimony depends upon a valid, subsisting marriage between the applicant and the party out of whose estate the allowance of alimony is claimed, and this is true even though it is claimed only for the support of a child. *Eskew v. Eskew*, 199 Ga. 513, 34 S.E.2d 697 (1945).

When marriage void due to previous marriage or legal incapacity. — On an interlocutory hearing, when it appeared conclusively from the pleadings and the evidence that no valid marriage ever existed between the parties, either because of a previously undissolved marriage or because of the legal incapacity of one of the parties to enter into the marital contract, the trial court could not properly make an award of temporary alimony and counsel fees to the wife. *Reed v. Reed*, 202 Ga. 508, 43 S.E.2d 539 (1947).

Grant of alimony improper when marriage void due to minority of parties. — When at the time of purported marriage, and at the time of order granting alimony on the application of the

mother for the support of their child, the partner was less than 17 years of age (now 16 years of age) the grant of such judgment against him was contrary to law, since there was no valid marriage to support it, and whether the father could in some way be held liable for support of the child, he could not be subject to such liability through a claim of alimony. *Eskew v. Eskew*, 199 Ga. 513, 34 S.E.2d 697 (1945).

Spouse not estopped to set up invalidity of marriage in alimony action.

— Although the applicant for temporary alimony and the alleged husband lived together some years after the marriage ceremony between them was performed, inasmuch as the disqualification to marry was not removed, the husband was not estopped from setting up the invalidity of his marriage to the plaintiff in the action for alimony. *Reed v. Reed*, 202 Ga. 508, 43 S.E.2d 539 (1947).

Factors to Be Considered

Necessities of spouse entitled to alimony, and spouse's ability to pay alimony, are controlling factors to be considered and followed in making an allowance for alimony, temporary or permanent. *Robertson v. Robertson*, 207 Ga. 686, 63 S.E.2d 876 (1951); *Wills v. Wills*, 215 Ga. 556, 111 S.E.2d 355 (1959).

Trial court did not err in awarding a wife \$200,000 in lump-sum alimony, to be paid in monthly installments of \$3,500 for five years because the record contained some evidence supporting the court's finding that the husband could pay the alimony awarded and that the wife needed it in as much as the husband was capable of earning a minimum of \$150,000 per year, lived with a girlfriend, and had virtually no living expenses, and the wife was forced to leave the marital residence due to its foreclosure, worked part-time as a waitress and was enrolled in college, and struggled with tuition payments as well as day-to-day living expenses. *Driver v. Driver*, 292 Ga. 800, 741 S.E.2d 631 (2013).

Spouse's "ability to pay" may be found from his or her assets or earning capacity. Although a person's income is some evidence of that person's earning

Factors to Be Considered (Cont'd)

capacity, it is not the only such evidence. A college student has capacity to earn even though his or her income is less than that of a person employed full time. *Gordan v. Gordan*, 244 Ga. 21, 257 S.E.2d 528 (1979).

Ability to earn an income is one factor which may be considered by the jury in awarding alimony to the wife, and the jury may award alimony on this basis although the husband may be temporarily impoverished. *Pierce v. Pierce*, 241 Ga. 96, 243 S.E.2d 46 (1978).

Husband's enhanced and wife's suppressed income potential during marriage properly considered. — In determining the amount of child support and alimony a husband was required to pay, the trial court correctly considered the parties' income and other assets, as well as the fact that during the marriage, the husband enhanced the ability to increase the husband's income potential and suppressed the wife's ability to earn the income. *McCoy v. McCoy*, 281 Ga. 604, 642 S.E.2d 18 (2007).

Indebtedness of parties is one factor to be considered in determining permanent alimony. *Hardy v. Hardy*, 221 Ga. 176, 144 S.E.2d 172 (1965).

Portion of proceeds from future sale of nonmarital property as alimony was not error. — Award of alimony to the wife in the form of a portion of the proceeds of a future sale was proper as the award was clearly made for the wife's maintenance and support; the trial court determined that the wife's earning capacity was diminished due to an unspecified disability, pursuant to O.C.G.A. § 19-6-5, and it appeared that in practicality, the marital home was the only non-liquid asset from which an award of alimony could be made. *Smelser v. Smelser*, 280 Ga. 92, 623 S.E.2d 480 (2005).

Jury may consider husband's present income and any previous allotment voluntarily made for support of the wife since the court may always give consideration to securing for the wife the same social standing, comforts, and luxuries of life as she probably would have enjoyed had there been no separation.

Wills v. Wills, 215 Ga. 556, 111 S.E.2d 355 (1959).

Relevance of conduct evidence. — In a divorce action wherein the wife challenged the trial court's denial of the wife's claim of alimony, the wife failed to demonstrate that the trial court did not weigh the several items of conduct evidence presented as to negative behavior on the part of the husband allegedly presented, such as causing the foreclosure of the marital home thereby harming the wife's credit and causing the wife to expend sums for the support of the couple's minor child; the reviewing court found that the transcript established that the evidence was not presented to the trial court for that purpose and no objection was made on that basis. *Jackson v. Jackson*, 282 Ga. 459, 651 S.E.2d 92 (2007).

Wife's desertion not established. — Sole evidence of a wife's desertion, offered by the husband, was a note given to him by the wife stating that she was leaving because she "needed to get away for awhile;" the note was given to the husband approximately two months before the wife filed a complaint for divorce, and the wife's separation from the husband for the two months preceding the filing for divorce did not establish the wife's desertion by a preponderance of the evidence; the trial court did not abuse the court's discretion in awarding alimony to the wife. *Cormier v. Cormier*, 280 Ga. 693, 631 S.E.2d 663 (2006).

Parties' conduct toward each other is relevant in cases in which alimony is sought by the wife. *Bigham v. Bigham*, 243 Ga. 171, 253 S.E.2d 91 (1979).

Factual causes of separation and conduct of parties is admissible on question of determining amount of alimony, even though the husband concedes that the wife is entitled to alimony in the case, and evidence of acts of misconduct occurring prior to the date of the enactment of this statute, as well as prior to the date of trial, is not void for retrospectivity. *Davidson v. Davidson*, 243 Ga. 848, 257 S.E.2d 269 (1979).

Wife failed to establish that a trial court manifestly abused the trial court's discretion in denying the wife's claim for alimony based on her allegations that the

husband abandoned the family; failed to support the couple's minor child; and caused the marital house to go into foreclosure as there was also evidence before the trial court that the wife initiated the parties' separation; that the wife was gainfully employed and had been so throughout most of the marriage; that the wife failed to cooperate with the husband in taking steps to alleviate the family's financial problems; that the wife had mismanaged marital funds and run up extravagant bills; that the wife failed to take advantage of low-cost health insurance coverage for the couple's minor child provided by the husband's employer; and that the wife unilaterally sold or otherwise disposed of the husband's share of the couple's personal property. *Jackson v. Jackson*, 282 Ga. 459, 651 S.E.2d 92 (2007).

Evidence of conduct subsequent to separation is relevant to show that such conduct prevented reconciliation of the parties. *Hand v. Hand*, 244 Ga. 41, 257 S.E.2d 507 (1979).

Prestatute conduct should be admitted where relevant. Thus, former Code 1933, § 30-201 may be applied to pre-July 1, 1977, acts of misconduct and is not void for retrospectivity. *Bryan v. Bryan*, 242 Ga. 826, 251 S.E.2d 566 (1979).

Evidence of spouse's husband's adultery occurring before this statute became effective is admissible because the spouse had no vested right to commit adultery. *Morris v. Morris*, 244 Ga. 120, 259 S.E.2d 65 (1979).

Adultery must be shown by means other than party testimony. — To the extent that the adultery of either spouse is admissible under O.C.G.A. § 19-6-1, it must be proved through evidence other than the testimony of the parties. *Owens v. Owens*, 247 Ga. 139, 274 S.E.2d 484 (1981).

Adultery must be cause of separation to constitute bar. — Subsection (b) of O.C.G.A. § 19-6-1 does not provide a bar in every instance of adultery. It is a bar only when the adultery has been shown to be the cause of the separation between the parties. *Clements v. Clements*, 255 Ga. 714, 342 S.E.2d 463 (1986).

Adultery by both parents. — Trial court did not err in finding that the wife's adultery did not cause the dissolution of the parties' marriage as there was evidence of adultery by both parties as well as evidence that the husband had physically injured the wife and that the husband's return to Ohio to work for his father caused the dissolution of the marriage; thus, even if the trial court's order that the husband pay a certain debt could be considered to be alimony, the order did not violate O.C.G.A. § 19-6-1(b). *Alejandro v. Alejandro*, 282 Ga. 453, 651 S.E.2d 62 (2007).

Even though adulterous spouse cannot obtain alimony, equitable property division is still permissible. *Peters v. Peters*, 248 Ga. 490, 283 S.E.2d 454 (1981).

Conduct of parties relevant when equitable division of property in issue. — When equitable division of property is in issue, conduct of parties, both during marriage and with reference to cause of divorce, is relevant and admissible. *Peters v. Peters*, 248 Ga. 490, 283 S.E.2d 454 (1981).

Recovery, as alimony, of expenses incurred in uncovering evidence of adultery. — When spouse seeking alimony incurs expenses in employing private investigator in order to uncover evidence of adultery committed by other spouse, these expenses are, at discretion of trial court, recoverable as part of alimony award. *Dunham v. Belinky*, 248 Ga. 479, 284 S.E.2d 397 (1981).

Adultery not proven thus no attorney's fees. — First spouse was entitled to alimony and attorney's fees as the second spouse had failed to show, pursuant to O.C.G.A. § 19-6-1(b), that the first spouse had engaged in adultery. *Vereen v. Vereen*, 284 Ga. 755, 670 S.E.2d 402 (2008).

Lump-sum alimony award was not dischargeable. — Lump-sum alimony award determined under federal law to be "actually in the nature of alimony, maintenance, or support" is not dischargeable pursuant to 11 U.S.C. § 523(a) (5), even though the award does not terminate upon the death or remarriage of the recipient. *Myers v. Myers*, 61 Bankr. 891 (Bankr. N.D. Ga. 1986).

Factors to Be Considered (Cont'd)

Distinction between periodic and lump sum alimony. — Obligation to pay periodic alimony and child support terminates at the death of either party while the obligation to pay lump sum alimony in installments over a period of time does not. *Winokur v. Winokur*, 258 Ga. 88, 365 S.E.2d 94 (1988).

When the words of the documents creating the obligation state the exact amount of each payment and the exact number of payments to be made without other limitations, conditions, or statements of intent, the obligation is for one lump sum payable in installments. *Winokur v. Winokur*, 258 Ga. 88, 365 S.E.2d 94 (1988).

Needs of child to whom payer has no responsibility. — Needs of wife's child from previous marriage cannot be taken into account in determining amount of alimony to be awarded to wife, but jury may take into account the expense of the child to the wife in determining the amount of alimony. *Barber v. Barber*, 257 Ga. 488, 360 S.E.2d 574 (1987).

Award of alimony erroneous because record completely devoid of any evidence of spouse's ability to pay. — Trial court's award of lump sum alimony in the amount of \$36,500 was erroneous because although the spouse's need for resources to meet reasonable housing desires and expected medical bills justified an award of alimony, the record was completely devoid of any evidence of the other spouse's ability to pay the lump sum alimony award; the paying spouse's separate estate consisted solely of an asset that could not be transferred or otherwise converted into cash, and a \$500 a week income. *Coker v. Coker*, 286 Ga. 20, 685 S.E.2d 70 (2009).

Temporary Alimony

So long as divorce litigation is pending, trial judge is authorized to exercise discretion in continuing temporary alimony. *Brown v. Brown*, 224 Ga. 90, 160 S.E.2d 343 (1968).

Court will not very strictly scrutinize conduct for purpose of determining right to temporary alimony. *Walden v. Walden*, 169 Ga. 586, 151 S.E. 22 (1929).

Judge may base grant of temporary alimony on application for permanent alimony. — When a husband and wife are living separately, and no action for divorce is pending, and the wife has instituted against the husband an action for permanent alimony, it is not illegal for the judge on her application, after the required notice to the husband, to grant temporary alimony. *Pelot v. Pelot*, 193 Ga. 316, 18 S.E.2d 548 (1942).

Proportion of estate to be given as permanent or temporary alimony is matter of judicial discretion; it is always less in the latter than in the former case as the court will not encourage vexatious suits by large grants to the wife. *Lloyd v. Lloyd*, 183 Ga. 751, 189 S.E. 903 (1937).

Temporary alimony and attorney's fees are awarded to afford wife (now spouse) means of contesting all the issues between herself and the husband. *Walden v. Walden*, 169 Ga. 586, 151 S.E. 22 (1929), later appeal, 171 Ga. 444, 155 S.E. 919 (1930); *Huggins v. Huggins*, 202 Ga. 738, 44 S.E.2d 778 (1947).

Temporary alimony pending action for permanent alimony does not cease with judgment when case is appealed to Supreme Court, but continues (within the discretion of the court) until the termination of the litigation in all the courts. *McKay v. McKay*, 93 Ga. App. 42, 90 S.E.2d 627 (1955); *Brown v. Brown*, 224 Ga. 90, 160 S.E.2d 343 (1968).

Amount of temporary alimony absolute unless modified by judge. — When a judge, in the exercise of judicial discretion, has fixed and allowed temporary alimony pending the cause for divorce and alimony or for permanent alimony, the right to the amount allowed becomes absolute until the final determination of the cause, unless in the meantime the allowance be revoked or modified by the judge. *Brown v. Brown*, 224 Ga. 90, 160 S.E.2d 343 (1968).

Judge's discretion as to temporary alimony not disturbed absent abuse.

— Appellate court may not control the discretion of a trial judge in awarding temporary alimony and attorney fees, unless it can be clearly shown by an appellant that the trial court committed grievous error or a gross abuse of discretion. *Bowman v. Bowman*, 242 Ga. 259, 248 S.E.2d 654 (1978).

As a matter of law "temporary alimony" includes attorney's fees. *Finch v. Finch*, 213 Ga. 199, 97 S.E.2d 576 (1957).

Attorney's fees are an intrinsic part of temporary alimony awarded for the purpose of enabling the wife to contest the issues between herself and her husband. *Brown v. Brown*, 224 Ga. 90, 160 S.E.2d 343 (1968).

Temporary alimony, including attorney's fees and expenses of litigation, is a part of alimony which a husband is required to supply for the support of his wife. *Brown v. Brown*, 224 Ga. 90, 160 S.E.2d 343 (1968).

Death of Party

Lien provision of subsection (d) of former Code 1933, § 30-201 did not create new rights in wife extending beyond date of husband's death. Instead, the lien clause preserved an inchoate right to temporary or permanent alimony existing at the date of death for subsequent determination and satisfaction from the estate. *Davenport v. Davenport*, 243 Ga. 613, 255 S.E.2d 695 (1979).

Right to support survives as lien on estate after spouse dies. — When the

husband dies before an order awarding temporary alimony has been entered by the court and before a divorce has been granted, the wife's right to support during the period of separation until the date of death survives as a lien on the estate. *Davenport v. Davenport*, 243 Ga. 613, 255 S.E.2d 695 (1979).

Alimony payments terminate on death of spouse obligated to pay. — According to the weight of authority, a decree, granted in connection with an absolute divorce, for the regular periodical payments of alimony to the wife for her maintenance and support is terminated upon the husband's death, in the absence, at least, of some stipulation in the order which would require payments after his death. *Berry v. Berry*, 208 Ga. 285, 66 S.E.2d 336 (1951).

Attorney fees authorized after party dies. — Trial court is authorized to award attorney fees for legal services performed on behalf of a party to a divorce action when, during the pendency of the action, the party dies. *Love v. Love*, 251 Ga. 846, 310 S.E.2d 504 (1984).

Property subject to division despite title change upon death. — When the issue of the division of marital assets of a former husband and wife had not been resolved at the time of the husband's death, property acquired as a direct result of the labor and investments of the former husband during the course of the marriage was subject to equitable division in spite of the fact that it was titled in the former wife's name after the former husband's death as a matter of contract law. *White v. White*, 253 Ga. 267, 319 S.E.2d 447 (1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, §§ 571 et seq., 587 et seq., 662 et seq., 671 et seq.

C.J.S. — 27A C.J.S., Divorce, § 2. 27B C.J.S., Divorce, § 306 et seq.

ALR. — Right to alimony, counsel fees, or suit money in case of invalid marriage, 4 ALR 926; 110 ALR 1283.

Financial condition of parties as affecting allowance of suit money in divorce suit, 35 ALR 1099.

Alimony as affected by remarriage, 64 ALR 1269; 112 ALR 246.

Gratuities or expectations as affecting amount of alimony, 66 ALR 219.

Wife in respect of her right to maintenance or alimony as within protection of statute or rule avoiding conveyances or transfers in fraud of creditors or persons to whom maker is under legal liability, 79 ALR 421.

Power to reopen decree of divorce which

is silent as to or expressly provides against alimony so as to permit modification in that regard, 83 ALR 1248.

Retrospective operation of statutes relating to alimony or suit money in divorce, 97 ALR 1188.

Power of court to appoint receiver of future earnings of husband in order to enforce judgment for alimony, 106 ALR 588.

Directing payment of alimony to trustee, 170 ALR 253.

Misconduct of wife to whom divorce is decreed as affecting allowance of alimony, or amount allowed, 9 ALR2d 1026.

Pension of husband as resource which court may consider in determining amount of alimony, 22 ALR2d 1421.

Allowance of permanent alimony to wife against whom divorce is granted, 34 ALR2d 313.

Right to allowance of permanent alimony in connection with decree of annulment, 54 ALR2d 1410.

Husband's right to alimony, maintenance, suit money, or attorneys' fees, 66 ALR2d 880.

Allocation or apportionment of previous combined award of alimony and child support, 78 ALR2d 1110.

Court's establishment of trust to secure alimony or child support in divorce proceedings, 3 ALR3d 1170.

Wife's possession of independent means as affecting her right to alimony pendente lite, 60 ALR3d 728.

Evaluation of interest in law firm or medical partnership for purposes of division of property in divorce proceedings, 74 ALR3d 621.

Provision in divorce decree requiring husband to pay certain percentage of future salary increases as additional alimony or child support, 75 ALR3d 493.

Statute expressly allowing alimony to wife, but not expressly allowing alimony to husband, as unconstitutional sex discrimination, 85 ALR3d 940.

Adulterous wife's right to permanent alimony, 86 ALR3d 97.

Fault as consideration in alimony, spousal support, or property division awards pursuant to no-fault divorce, 86 ALR3d 1116.

Pension or retirement benefits as sub-

ject to award or division by court in settlement of property rights between spouses, 94 ALR3d 176.

Spouse's professional degree or license as marital property for purposes of alimony, support, or property settlement, 4 ALR4th 1294.

Husband's death as affecting periodic payment provisions of separation agreement, 5 ALR4th 1153.

Validity and enforceability of escalation clause in divorce decree relating to alimony and child support, 19 ALR4th 830.

Divorce and separation: appreciation in value of separate property during marriage without contribution by either spouse as separate or communal property, 24 ALR4th 453.

Excessiveness or adequacy of amount of money awarded for alimony and child support combined, 27 ALR4th 1038.

Reconciliation as affecting decree for limited divorce, separation, alimony, separate maintenance, or spousal support, 36 ALR4th 502.

Divorced or separated spouse's living with member of opposite sex as affecting other spouse's obligation or support under separation agreement, 47 ALR4th 38.

Divorce: excessiveness or adequacy of combined property division and spousal support awards—modern cases, 55 ALR4th 14.

Death of obligor spouse as affecting alimony, 79 ALR4th 10.

Divorce: court's authority to institute or increase spousal support award after discharge of prior property award in bankruptcy, 87 ALR4th 353.

Divorce and separation: award of interest on deferred installment payments of marital asset distribution, 10 ALR5th 191.

Alimony as affected by recipient spouse's remarriage in absence of controlling specific statute, 47 ALR5th 129.

Validity, construction, and application of provision in separation agreement affecting distribution or payment of attorney's fees, 47 ALR5th 207.

Propriety of equalizing income of spouses through alimony awards, 102 ALR5th 395.

Spouse's professional degree or license as marital property for purposes of ali-

mony, support, or property settlement, 3
ALR6th 447.

**19-6-2. Attorney’s fees; when granted; grant of final judgment;
how enforced; action by attorney.**

(a) The grant of attorney’s fees as a part of the expenses of litigation, made at any time during the pendency of the litigation, whether the action is for alimony, divorce and alimony, or contempt of court arising out of either an alimony case or a divorce and alimony case, including but not limited to contempt of court orders involving property division, child custody, and child visitation rights, shall be:

- (1) Within the sound discretion of the court, except that the court shall consider the financial circumstances of both parties as a part of its determination of the amount of attorney’s fees, if any, to be allowed against either party; and
- (2) A final judgment as to the amount granted, whether the grant is in full or on account, which may be enforced by attachment for contempt of court or by writ of fieri facias, whether the parties subsequently reconcile or not.

(b) Nothing contained in this Code section shall be construed to mean that attorney’s fees shall not be awarded at both the temporary hearing and the final hearing.

(c) An attorney may bring an action in his own name to enforce a grant of attorney’s fees made to him pursuant to this Code section. (Code 1933, § 30-202.1, enacted by Ga. L. 1967, p. 591, § 1; Ga. L. 1976, p. 1017, § 1; Ga. L. 1977, p. 312, § 1; Ga. L. 1979, p. 466, § 8; Ga. L. 1985, p. 877, § 1.)

Law reviews. — For article, “Attorney’s Fees in Alimony and Divorce Cases,” see 19 Ga. B.J. 23 (1956). For survey of Georgia cases dealing with domestic relations from June 1977 through May 1978, see 30 Mercer L. Rev. 59 (1978). For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For article, “Domestic Relations Law,” see 53 Mercer L. Rev. 265 (2001). For annual survey of

domestic relations law, see 56 Mercer L. Rev. 221 (2004). For annual survey of domestic relations law, see 58 Mercer L. Rev. 133 (2006). For survey article on domestic relations law, see 59 Mercer L. Rev. 139 (2007) and 60 Mercer L. Rev. 121 (2008). For annual survey on domestic relations, see 65 Mercer L. Rev. 107 (2013).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

ATTORNEY’S FEES

CONTEMPT

General Consideration

Law was constitutional and any modification or repeal must necessarily be made by the General Assembly of Georgia and not by the court. *Murphy v. Murphy*, 232 Ga. 352, 206 S.E.2d 458 (1974), cert. denied, 421 U.S. 929, 95 S. Ct. 1656, 44 L. Ed. 2d 87 (1975).

Court must consider financial circumstances. — When the trial court did not consider the financial circumstances of both parties as part of the court's determination of the amount of attorney fees, if any, to be allowed in a contempt proceeding, there was no evidence that the ex-wife was able to pay the attorney fees ordered. Thus, if she failed to pay the awarded fees, the failure would not necessarily be a refusal to abide by the court's order, but might simply arise from an inability to pay, tantamount to imprisonment for debt. *Thedieck v. Thedieck*, 220 Ga. App. 764, 470 S.E.2d 265 (1996).

Court's express reservation of jurisdiction. — Fact that court may expressly reserve jurisdiction to make additional award does not mean such reservation is mandatory. *Richardson v. Richardson*, 237 Ga. 830, 229 S.E.2d 641 (1976).

Court jurisdiction over matter of attorney fees. — Trial court does not lose jurisdiction of matter of attorney fees simply because term of court ended. *Richardson v. Richardson*, 237 Ga. 830, 229 S.E.2d 641 (1976).

Fee award modifiable while suit pending. — Although the grant of attorney fees is a final judgment which may be enforced by attachment or by writ notwithstanding reconciliation of the parties, this does not necessarily mean that the fee award, like other elements of temporary alimony, may not be modified by the court at any time while the suit is pending and is within the jurisdiction of the court. *Haim v. Haim*, 251 Ga. 618, 308 S.E.2d 179 (1983).

Words "on account" need not appear in temporary order to prevent the award of attorney fees from being final and complete. *Richardson v. Richardson*, 237 Ga. 830, 229 S.E.2d 641 (1976).

Oral pronouncement of fees must be reduced to writing. — Husband's

concern about the interest rate of 11.25 percent imposed on an award of attorneys fees was justified under circumstances in which the husband asserted that the date of the judgment was October 1, 2007, and the applicable prime rate was 7.75 percent, while the wife argued that the applicable prime rate was 8.25 percent, the rate on July 20, 2007, the day the trial court orally pronounced the court's judgment; however, an oral pronouncement was not a judgment. It had to have been reduced to writing and entered as a judgment to have been effective. *Mongerson v. Mongerson*, 285 Ga. 554, 678 S.E.2d 891 (2009), overruled on other grounds, 288 Ga. 670, 706 S.E.2d 456 (2011).

Cited in *Roberts v. Roberts*, 226 Ga. 203, 173 S.E.2d 675 (1970); *Margeson v. Givens*, 231 Ga. 552, 203 S.E.2d 186 (1974); *Mullinax v. Mullinax*, 234 Ga. 553, 216 S.E.2d 802 (1975); *Evans v. Evans*, 242 Ga. 57, 247 S.E.2d 857 (1978); *Swinson v. Swinson*, 242 Ga. 305, 248 S.E.2d 675 (1978); *Kight v. Kight*, 242 Ga. 563, 250 S.E.2d 451 (1978); *Griffin v. Griffin*, 243 Ga. 149, 253 S.E.2d 80 (1979); *Atkins v. Zachary*, 243 Ga. 453, 254 S.E.2d 837 (1979); *Ford v. Ford*, 243 Ga. 763, 256 S.E.2d 446 (1979); *Stitt v. Stitt*, 243 Ga. 730, 256 S.E.2d 461 (1979); *Kaufmann v. Kaufmann*, 246 Ga. 266, 271 S.E.2d 175 (1980); *Griffin v. Griffin*, 248 Ga. 743, 285 S.E.2d 710 (1982); *Keith v. Keith*, 248 Ga. 819, 286 S.E.2d 434 (1982); *Reno v. Reno*, 249 Ga. 855, 295 S.E.2d 94 (1982); *Easler v. Fuller*, 169 Ga. App. 110, 311 S.E.2d 534 (1983); *Norman v. Norman*, 255 Ga. 32, 334 S.E.2d 687 (1985); *Cotting v. Cotting*, 261 Ga. App. 370, 582 S.E.2d 527 (2003); *Cotting v. Cotting*, 261 Ga. App. 370, 582 S.E.2d 527 (2003); *Page v. Baylard*, 281 Ga. 586, 642 S.E.2d 14 (2007); *Stanley v. Stanley*, 281 Ga. 672, 642 S.E.2d 94 (2007); *Wood v. Wood*, 283 Ga. 8, 655 S.E.2d 611 (2008); *Mongerson v. Mongerson*, 285 Ga. 554, 678 S.E.2d 891 (2009), overruled on other grounds, 288 Ga. 670, 706 S.E.2d 456 (2011); *Harris v. Williams*, 304 Ga. App. 390, 696 S.E.2d 131 (2010); *Baars v. Freeman*, 288 Ga. 835, 708 S.E.2d 273 (2011); *Avren v. Garten*, 289 Ga. 186, 710 S.E.2d 130 (2011); *Blumenshine v. Hall*, 329 Ga. App.

449, 765 S.E.2d 647 (2014).

Attorney's Fees

Georgia law permits award of attorney fees in original action for temporary or permanent alimony in an amount sufficient to ensure proper legal representation. *Hilsman v. Hilsman*, 245 Ga. 555, 266 S.E.2d 173 (1980).

Purpose of allowing attorney fees. — Allowance of attorney's fees in applications for divorce or alimony is a necessary provision to enable the wife to properly protect her interests. *Brady v. Brady*, 228 Ga. 617, 187 S.E.2d 258 (1972).

In the allowance of attorney's fees, while the financial condition of the husband must have due weight with the court, still, except in cases where the husband is unable to pay a fee, or more than merely nominal compensation, the allowance for attorney's fees should be sufficient to insure to the wife proper legal representation by a competent attorney. *Brady v. Brady*, 228 Ga. 617, 187 S.E.2d 258 (1972).

Purpose of allowing attorney fees to the wife is to enable her to contest issues between herself and her husband, and the amount of such fees is to be set in accord with this purpose. *Richardson v. Richardson*, 237 Ga. 830, 229 S.E.2d 641 (1976).

Purpose of allowing attorney fees is to ensure effective representation of both spouses so that all issues can be fully and fairly resolved. *Johnson v. Johnson*, 260 Ga. 443, 396 S.E.2d 234 (1990).

Attorney fees are part of alimony. *McClain v. McClain*, 237 Ga. 80, 227 S.E.2d 5 (1976).

Award of attorney fees in divorce proceedings constitutes alimony and therefore is nondischargeable in bankruptcy. *Westmoreland, Patterson & Moseley v. Painter*, 21 Bankr. 846 (Bankr. M.D. Ga. 1982).

Attorney fees are considered temporary alimony. *Ford v. Ford*, 245 Ga. 569, 266 S.E.2d 183 (1980).

Attorney fees improperly awarded in modification action when original proceedings arose out of divorce action. — Attorney fees improperly awarded in action to set aside paternity and modification of child support, as the

proceedings did not arise out of the original divorce case, as required by O.C.G.A. § 19-6-2, but arose instead out of a paternity and modification action. *Cothran v. Mehosky*, 286 Ga. App. 640, 649 S.E.2d 838 (2007).

Award not authorized in legitimation proceeding. — In a proceeding to legitimate a child, the trial court erred in awarding the custodial parent attorney's fees under O.C.G.A. § 19-6-2(a) as the statute only permitted such an award in alimony and divorce cases. *Appling v. Tatum*, 295 Ga. App. 78, 670 S.E.2d 795 (2008).

Trial court has authority to exercise sound discretion in awarding or denying attorney's fees. *Wilson v. Wilson*, 243 Ga. 637, 256 S.E.2d 334 (1979).

Attorney fees in an action for non-payment of alimony and child support are within the discretion of the trial court. *Aycock v. Aycock*, 251 Ga. 104, 303 S.E.2d 456 (1983).

Discretion of judge as to amount of allowance will not be controlled, unless there is an abuse of discretion. *Brady v. Brady*, 228 Ga. 617, 187 S.E.2d 258 (1972).

Appellate court may not control the discretion of a trial judge in awarding temporary alimony and attorney fees, unless it can be clearly shown by an appellant that the trial court committed grievous error or a gross abuse of discretion. *Bowman v. Bowman*, 242 Ga. 259, 248 S.E.2d 654 (1978).

In a divorce action wherein both parties presented evidence regarding each parties' respective financial conditions, the trial court did not err by denying the wife's claim for attorney fees pursuant to O.C.G.A. § 19-6-2; additionally, contrary to the wife's argument, the husband's alleged unwillingness to settle the divorce proceedings was irrelevant to the inquiry whether attorney fees should be awarded. *Jackson v. Jackson*, 282 Ga. 459, 651 S.E.2d 92 (2007).

Consideration of parties' financial circumstances. — In a divorce action, in the absence of a transcript, an appellate court had to presume that, in accordance with O.C.G.A. § 19-6-2(a)(1), the trial court had considered the parties' financial circumstances and did not abuse the

Attorney's Fees (Cont'd)

court's discretion in not ordering one spouse to pay the other spouse's attorney's fees. *Dasher v. Dasher*, 283 Ga. 436, 658 S.E.2d 571 (2008).

In a divorce action, a trial court properly considered the parties' financial circumstances under O.C.G.A. § 19-6-2(a)(1) in awarding a former wife \$16,000 in attorney's fees. *Arkwright v. Arkwright*, 284 Ga. 545, 668 S.E.2d 709 (2008).

In a divorce proceeding, there was no merit to a husband's contention that the trial court actually based the court's award of attorney's fees to a wife on O.C.G.A. § 9-15-14 merely because the court noted the impact of the husband's litigious conduct on the reasonableness of the attorney fees the wife incurred because the trial court expressly awarded the wife attorney fees pursuant to O.C.G.A. § 19-6-2 and explicitly stated that the court was looking solely at the parties' financial circumstances and disregarding the husband's conduct in making the court's award. *Kautter v. Kautter*, 286 Ga. 16, 685 S.E.2d 266 (2009).

There was no abuse of discretion in a trial court's denial of attorney fees to either party pursuant to O.C.G.A. § 19-6-2(a)(1) in their divorce action as the trial court properly based the court's determination upon consideration of the parties' relative financial positions; the husband could not seek attorney fees under O.C.G.A. § 13-6-11. *Sponsler v. Sponsler*, 287 Ga. 725, 699 S.E.2d 22 (2010).

In a divorce proceeding, a trial court's failure to award attorney's fees to a former spouse under O.C.G.A. § 19-6-2 was not an abuse of discretion as the trial court properly considered the relative financial positions of the parties. *Hunter v. Hunter*, 289 Ga. 9, 709 S.E.2d 263 (2011).

In an appeal pursuant to Ga. Sup. Ct. R. 34(4), a trial court did not abuse the court's discretion by considering evidence that the husband and wife received financial assistance from a close relative (their respective mothers) since there was no statutory limitation on the type of evidence of financial circumstances a trial court may consider when a trial court

makes an attorney's fee award under O.C.G.A. § 19-6-2 and because the award of fees under § 19-6-2 was within the trial court's discretion. *Jarvis v. Jarvis*, 291 Ga. 818, 733 S.E.2d 747 (2012).

Direct testimony as to value of services is not required in determining attorney fees in cases involving alimony. *Hilsman v. Hilsman*, 245 Ga. 555, 266 S.E.2d 173 (1980).

Expert evidence as to value of attorney fees not required. — While trial court is vested with sound discretion to award or refuse to award attorney fees based on the financial condition of the parties and other circumstances of the case, it may not decline to grant attorney fees solely because no expert evidence as to their value was presented. *Webster v. Webster*, 250 Ga. 57, 295 S.E.2d 828 (1982).

Grant of attorney's fees may be enforced either by writ of fi. fa. or by attachment for contempt against the husband. *Kay v. Vaughan*, 224 Ga. 875, 165 S.E.2d 131 (1968).

Deadline for requesting attorney fees. — Attorney fees must be requested at some time prior to the entry of the final judgment in a divorce trial (i.e., prior to the conclusion of the hearing on the remaining issues); but once such a request is made, the issue of attorney fees is preserved, without further reservation by the trial judge or additional application by the parties, for a decision by the trial court. *Blanchet v. Blanchet*, 251 Ga. 379, 306 S.E.2d 907 (1983).

Judge may award fees after verdict. — When there has been an application for attorney's fees, a hearing thereon prior to the verdict for a divorce, and the judge has reserved decision on the question until after the verdict, an award of attorney's fees after the verdict is not invalid simply because the award was made after the verdict granting a divorce. *McCurry v. McCurry*, 223 Ga. 334, 155 S.E.2d 378 (1967).

Improperly awarded attorney's fees for refusal to settle. — Whether a party is at "fault" for a refusal to settle is wholly irrelevant to the inquiry whether attorney fees should be awarded in the first instance, such that the trial court's decision

to grant the husband's request for attorney fees was an abuse of the court's discretion. *Weaver v. Weaver*, 263 Ga. 56, 428 S.E.2d 79 (1993).

Attorney fees for separate litigation. — Neither the plain language of O.C.G.A. § 19-6-2(a) nor its purpose of ensuring the adequate representation of the respective needs of both spouses in a divorce supports the inclusion of fees from separate litigation in a fee award under § 19-6-2(a); accordingly, in a divorce case the trial court erred in awarding fees for attorneys who represented the wife in a prior divorce action that was dismissed and in a proceeding before the IRS. *Padilla v. Padilla*, 282 Ga. 273, 646 S.E.2d 672 (2007).

Bankruptcy court denied a Chapter 13 debtor's ex-wife's request for reimbursement of attorneys' fees she incurred to obtain a judgment against the debtor which found that a state court's award of attorneys' fees in her divorce action was a debt in the nature of support that was nondischargeable under 11 U.S.C. § 523(a)(5) and was entitled to priority under 11 U.S.C. § 507(a)(1). Nothing in the state court's order awarding the ex-wife attorneys' fees allowed her to recover additional fees for enforcing the order, and there was no merit to the ex-wife's claims that she was entitled to the additional fees under O.C.G.A. § 19-6-2, and under O.C.G.A. § 9-15-14 because the debtor had acted in bad faith. *Owoade-Taylor v. Babatunde* (In re Babatunde), No. 11-5564, 2012 Bankr. LEXIS 5053 (Bankr. N.D. Ga. Oct. 10, 2012).

Alleged misconduct of husband irrelevant to attorney's fees award. — Contrary to a wife's argument, any alleged misconduct by the husband, including allegedly being disingenuous regarding sources of income during discovery and at trial, was irrelevant to the award of attorneys' fees pursuant to O.C.G.A. § 19-6-2; the trial court did not err when the court failed to award the wife attorneys' fees for finding the husband in wilful contempt of the original temporary support order. *Johnson v. Johnson*, 284 Ga. 366, 667 S.E.2d 350 (2008).

Attorney's fees in proceeding under the Family Violence Act. — Trial court

erred by applying the divorce and alimony "disparity of income" standard under paragraph (a)(1) of O.C.G.A. § 19-6-2 to a motion for attorney's fees filed under the Family Violence Act, O.C.G.A. § 19-13-1 et seq. *Suarez v. Halbert*, 246 Ga. App. 822, 543 S.E.2d 733 (2000).

Attorney fees award not excessive. — In a divorce proceeding, given the financial statements of both parties, because the record and the transcript of the final hearing established that the trial court properly considered their relative financial positions, the trial court did not abuse the court's discretion when the court awarded attorney fees to the wife. *Rieffel v. Rieffel*, 281 Ga. 891, 644 S.E.2d 140 (2007).

Denial of request for attorney fees in divorce case proper. — There was no error in denying a wife's request for attorney fees because the trial court found that both parties had utilized marital property to pay attorney fees, and the trial court did consider the respective financial conditions of the parties. *Patel v. Patel*, 285 Ga. 391, 677 S.E.2d 114 (2009).

Failure to make required findings. — Trial court erred in awarding the wife attorney fees in relation to the general divorce action because the trial court failed to make the required findings of fact. *McCarthy v. Ashment-McCarthy*, 295 Ga. 231, 758 S.E.2d 306 (2014).

Insufficient grounds for court's award. — Award of attorney's fees in a divorce and child custody proceeding was improper because it was not possible to determine the statutory ground for the award or whether the evidence was sufficient to support the award under the appropriate statutory ground. Accordingly, the case was remanded to the trial court for a statement of the statutory basis for the award of attorney fees and any finding that must be made to support the award. *Moon v. Moon*, 277 Ga. 375, 589 S.E.2d 76 (2003).

Award of attorney fees to the ex-husband was reversed as attorney fees were not authorized in an action seeking a change of custody by the noncustodial parent, even if child support was also sought; there was nothing in the record to suggest that the attorney fees were

Attorney's Fees (Cont'd)

awarded under O.C.G.A. § 9-15-14, as the trial court did not rule on the ex-husband's motion seeking an amendment to the order to include reference to O.C.G.A. § 9-15-14 and seeking findings of fact to support the order. *Thornton v. Intveldt*, 272 Ga. App. 906, 614 S.E.2d 175 (2005).

Award of attorney fees to the estate, if predicated on O.C.G.A. § 9-15-14(b), was erroneous as the findings necessary to support such an award were not made; further, if the attorney's fee award was based on O.C.G.A. § 19-6-2, it was also erroneous as there was no evidence of the parties' financial circumstances that authorized such an award. *Findley v. Findley*, 280 Ga. 454, 629 S.E.2d 222 (2006).

Trial court's award of attorney's fees to a wife was not predicated on the parties' economic standing, but on the husband's "stubborn stance" in the proceeding, which was not consistent with an award of attorney's fees under O.C.G.A. § 19-6-2. *McGahee v. Rogers*, 280 Ga. 750, 632 S.E.2d 657 (2006).

Because the trial court failed to make findings sufficient to support an attorney's fee award under either O.C.G.A. § 19-6-2 or O.C.G.A. § 9-15-14(b), this issue had to be remanded for an explanation of the statutory basis for the award and any findings necessary to support the award. *Cason v. Cason*, 281 Ga. 296, 637 S.E.2d 716 (2006).

Because a review of the record showed that, after a thorough consideration of the parties' financial circumstances, the trial court denied a spouse's request for attorney's fees, the trial court did not abuse the discretion granted to the court by O.C.G.A. § 19-6-2(a)(1). *Taylor v. Taylor*, 283 Ga. 63, 656 S.E.2d 828 (2008).

In a divorce case, an award of attorney fees to the wife was reversed because the trial court did not specify whether the court was awarding fees under O.C.G.A. § 19-6-2 or O.C.G.A. § 9-15-14 and had not made any findings in support of the court's award. *Leggette v. Leggette*, 284 Ga. 432, 668 S.E.2d 251 (2008).

Award of attorney's fees and expenses in

a petition to modify child custody was improper because there was no evidence presented to the trial court regarding the reasonableness of the fees. *Lurry v. McCants*, 302 Ga. App. 184, 690 S.E.2d 496 (2010).

Trial court erred in awarding a husband attorney fees because the court merely ordered the wife to pay attorney fees to the husband without findings of fact and without any cogent evidence of the work performed by the husband's counsel and the nature thereof. *Holloway v. Holloway*, 288 Ga. 147, 702 S.E.2d 132 (2010).

Insufficient evidence regarding reasonableness of fees. — In a contempt proceeding and modification of visitation following a finding that a mother had repeatedly refused to allow a father visitation, an award of attorney's fees to the father was not supported by any testimony regarding the reasonableness of the fees, and no statutory basis was specified, requiring reversal. *Weeks v. Weeks*, 324 Ga. App. 785, 751 S.E.2d 575 (2013).

Attorney's fees award proper. — There was no abuse of discretion in the trial court's award of \$50,000 in attorney's fees to the wife in a divorce case; the trial court considered evidence of the financial circumstances of the parties and evidence that the wife incurred over \$75,000 in litigation expenses in her efforts to obtain necessary financial documents and to effectively present the complicated financial issues raised in the case. *Walton v. Walton*, 285 Ga. 706, 681 S.E.2d 165 (2009).

There was sufficient evidence regarding the husband's assets to warrant awarding the wife attorney fees for a contempt proceeding to enforce the divorce decree, but the amount had to be reexamined on remand to the extent that it was based on an erroneous award concerning the wife's share of the husband's 401(k) account. *Killingsworth v. Killingsworth*, 286 Ga. 234, 686 S.E.2d 640 (2009).

Record did not support a husband's claim that the trial court made an attorney fees award because the court thought it was improper for a man to seek alimony and that the case should have settled because the trial court specifically set forth in the divorce decree that in denying

alimony, the court considered the conditions of the parties and that rehabilitative alimony to the husband was not warranted since the request was premised on his less-than-credible claim that the wife had agreed with his lack of employment and his being a stay-at-home parent; as to the award of fees in favor of the wife, the trial court expressly considered the parties' fiscal circumstances as the court was obligated to do under O.C.G.A. § 19-6-2(a)(1). *Klardie v. Klardie*, 287 Ga. 499, 697 S.E.2d 207 (2010).

Trial court's award of \$60,000 attorney's fees to a wife under O.C.G.A. § 9-15-14 was upheld based on the trial court's order, which recounted several instances of the husband's misconduct during the litigation and found that they caused numerous delays, extra motions, and extra conversations, and forced the wife's counsel to make multiple requests for documents and answers and to go to otherwise unnecessary efforts to obtain needed documents. The award was also proper under O.C.G.A. § 19-6-2(a)(1) to ensure effective representation of both spouses. *Miller v. Miller*, 288 Ga. 274, 705 S.E.2d 839 (2010).

Trial court did not abuse the court's discretion in awarding a wife attorney fees because the court considered the relative financial positions of the wife and the husband, and although the final judgment and decree did not cite a statutory basis for the attorney fee award, that omission did not mean that the basis of the award was in question; the award was made pursuant to O.C.G.A. § 19-6-2 because no motion for attorney fees was made pursuant to O.C.G.A. § 9-15-14, and there was no indication that the trial court considered an award of attorney fees on that basis. *Simmons v. Simmons*, 288 Ga. 670, 706 S.E.2d 456 (2011).

Trial court did not err in awarding the wife attorney fees without citing to O.C.G.A. § 19-6-2 as there was no requirement that the statute be cited in the trial court's order and there was evidence that the wife's counsel charged a reasonably hourly rate for a family law attorney with the attorney's training and experience. *Horn v. Shepherd*, 292 Ga. 14, 732 S.E.2d 427 (2012).

Hearing proper as was subsequent award. — Husband's complaint that he was not afforded a hearing on the issue of attorney fees was without merit; the trial court began the final hearing by stating that the issues remaining for resolution at the hearing were alimony and attorney fees, and reminded the parties that testimony was regarding alimony and attorney fees only, and during the hearing, the husband's counsel argued that no award of attorney fees should be made due to the husband's financial condition. After the evidence was presented, the trial court orally announced a ruling on the issue of attorney fees and the husband voiced no objection. *Mongerson v. Mongerson*, 285 Ga. 554, 678 S.E.2d 891 (2009), overruled on other grounds, 288 Ga. 670, 706 S.E.2d 456 (2011).

Contempt

Action for contempt and modification of support and visitation. — When the ex-wife's action was not purely an action for modification of visitation, but included an action for contempt and an action to modify child support, an award of attorney fees was within the discretion of the court. *McDonogh v. O'Connor*, 260 Ga. 849, 400 S.E.2d 310 (1991).

Award of attorneys' fees to the mother was proper because evidence was presented regarding the reasonableness of the fees and expenses requested and the fee was predicated on the finding of contempt. *Vines v. Vines*, 292 Ga. 550, 739 S.E.2d 374 (2013).

Use of remedial proceeding of attachment for contempt. — Administrator of wife's estate has standing to use remedial proceeding of attachment for contempt against the husband for failure to obey the order of the court requiring the payment of attorney's fees. *Kay v. Vaughan*, 224 Ga. 875, 165 S.E.2d 131 (1968).

When the liability of the husband for the attorney's fees awarded to the wife had accrued prior to her death, the right to enforce such award survived her death and vested in her personal representative. *Kay v. Vaughan*, 224 Ga. 875, 165 S.E.2d 131 (1968).

Contempt (Cont'd)

Incarceration for contempt. — When a trial court in a civil contempt proceeding sought to obtain an ex-wife's compliance with the visitation provisions of the final divorce decree by conditioning her avoidance of, or release from, incarceration upon payment of the attorney fees award, it exceeded its authority. *Thedieck v. Thedieck*, 220 Ga. App. 764, 470 S.E.2d 265 (1996).

Attorney fees in contempt proceeding. — Attorney fees are not recoverable in contempt proceeding concerning only child custody or visitation rights. *Smith v. Smith*, 244 Ga. 230, 259 S.E.2d 480 (1979).

O.C.G.A. § 19-6-2(a)(1) allows the recovery of attorney fees even in a contempt proceeding involving only child custody or visitation rights. *Thedieck v. Thedieck*, 220 Ga. App. 764, 470 S.E.2d 265 (1996).

Trial court's award of attorney's fees based on the court's finding of contempt for violating a provision of the parties' divorce agreement prohibiting cohabitation in the presence of the parties' children was reversed and remanded for the trial court to determine the parties' intended meaning of "cohabitation" when the parties included that term in the agreement, and a determination of whether the mother violated that provision. *Todd v. Casciano*, 256 Ga. App. 631, 569 S.E.2d 566 (2002).

Since, in the context of a contempt matter brought against the client, a husband's attorney was never given proper notice of the possibility that the attorney fees hearing could have resulted in an award against the attorney pursuant to O.C.G.A. § 9-15-14(b), the award was improper; a claim for attorney fees under O.C.G.A. § 19-6-2 was not considered a realistic opportunity to contest the need for legal services forming the basis of an O.C.G.A. § 9-15-14(b) award because the basis for an award of fees under the two statutes was different. *Williams v. Cooper*, 280 Ga. 145, 625 S.E.2d 754 (2006).

Although an award of attorney fees to a wife in a declaratory judgment action brought by a husband seeking a determination of the husband's obligations under

a divorce decree was not authorized by either O.C.G.A. § 9-4-9 or O.C.G.A. § 13-6-11, the award was allowed by O.C.G.A. § 19-6-2(a)(1) because the wife's separate contempt action based on the husband's failure to comply with the divorce decree was consolidated for disposition with the husband's declaratory judgment action, and the trial court found in favor of the wife in that declaratory judgment action. *Waits v. Waits*, 280 Ga. App. 734, 634 S.E.2d 799 (2006).

Trial court properly held a parent in contempt in a post-divorce matter as the parent acknowledged that the parent refused to return the parties' children to the custodial parent after summer visitation and helped the children obtain legal counsel to file a modification of custody proceeding, which was prohibited by prior trial court orders. Further, the custodial parent properly filed the contempt petition in the county wherein that parent resided and, since the custodial parent was successful in having the other parent found in contempt, the custodial parent was properly awarded attorney fees. *Brochin v. Brochin*, 294 Ga. App. 406, 669 S.E.2d 203 (2008).

As a final divorce decree was not yet entered when a wife refused to sell the parties' house to the husband, and moreover, the decree did not require her to sell him the house, a trial court erred in holding her in contempt and in ordering her to pay the husband's attorney fees pursuant to O.C.G.A. § 19-6-2. *Farris v. Farris*, 285 Ga. 331, 676 S.E.2d 212 (2009).

Because the father was prohibited in filing the counterclaim for contempt and the trial court was not authorized to consider it, the trial court was also not authorized to order the mother to pay the father's attorney fees resulting therefrom. *Mullins-Leholm v. Evans*, 322 Ga. App. 869, 746 S.E.2d 628 (2013).

Payment condition for purging contempt. — Trial court was authorized to award attorney fees in a contempt action arising out of a divorce and alimony case, but the court should not have made payment a condition for purging the contempt without first allowing a reasonable time to pay the fees. *Gay v. Gay*, 268 Ga. 106, 485 S.E.2d 187 (1997).

State court award of attorney fees is nondischargeable. — Award of attorney's fees made by the state court in connection with divorce proceedings in that forum is nondischargeable; such fees are intended as support and should be held to be nondischargeable pursuant to 11 U.S.C. § 523(a) (5). *Myers v. Myers*, 61 Bankr. 891 (Bankr. N.D. Ga. 1986).

Award reversed when award altered jury's allocation of resources. — Trial court's award of a substantial sum in litigation expenses to the wife worked a change "in matter of substance" of the jury's allocation of resources between the parties necessitating reversal under

O.C.G.A. § 9-12-7, when such allocation was based upon the jury's expectation that no party would be required to pay litigation costs incurred by the other party. *Stone v. Stone*, 258 Ga. 716, 373 S.E.2d 627 (1988).

Error to award fees in default proceeding. — Court erred in awarding attorney fees in a default proceeding since the issue of attorney fees had never been alleged, averred, or prayed for, and since there had been no notice whatsoever to the defendant that the issue of attorney fees would arise. *Jayson v. Gardocki*, 221 Ga. App. 455, 471 S.E.2d 545 (1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, §§ 618 et seq., 634, 640, 643, 649 et seq.

C.J.S. — 27B C.J.S., Divorce, §§ 343, 345 et seq.

ALR. — Right to alimony, counsel fees, or suit money in case of invalid marriage, 4 ALR 926; 110 ALR 1283.

Liability of husband in independent action for services rendered by attorney to wife in divorce suit, 25 ALR 354; 42 ALR 315.

Validity and effect of agreement by which attorney's right to compensation or the amount thereof is contingent upon divorce or amount of alimony, 30 ALR 188.

Financial condition of parties as affecting allowance of suit money in divorce suit, 35 ALR 1099.

Right to attorney's fees in suit or proceeding to enforce payment of past due alimony awarded by decree of divorce a vinculo or a mensa et thoro, 82 ALR 726.

Validity of statutory provision for attorney's fees, 90 ALR 530.

Allowance against husband in suit for divorce, of amount for expense of taking deposition of wife or paying cost of her transportation to place of trial, 111 ALR 1098.

Order in divorce suit for payment of counsel fees to attorney for wife, rather than to wife, 118 ALR 1138.

Right to allowance of counsel fees to wife in action for divorce or separation, as affected by misconduct or lack of good faith of her attorney, 150 ALR 1181.

Order granting or refusing motion for temporary alimony or suit money in divorce action as appealable, 167 ALR 360.

Wife's misconduct or fault as affecting her right to temporary alimony or suit money, 2 ALR2d 307.

Right of former wife to counsel fees upon application after absolute divorce to increase or decree alimony, 15 ALR2d 1252.

Enforcement of claim for alimony or support, or for attorneys' fees and costs incurred in connection therewith, against exemptions, 54 ALR2d 1422.

What constitutes "trial," "final trial," or "final hearing" under statute authorizing allowance of attorneys' fees as costs on such proceeding, 100 ALR2d 397.

Necessity and sufficiency of notice and hearing as to allowance of suit money or counsel fees in divorce or other marital action, 10 ALR3d 280.

Divorce: wife's right to award of counsel fees in final judgment of trial or appellate court as affected by the fact that judgment was rendered against her, 32 ALR3d 1227.

Validity of statute allowing attorney's fee to successful claimant but not to defendant, or vice-versa, 73 ALR3d 515.

Right of party who is an attorney and appears for himself to award of attorney's fees against opposing party as element of costs, 78 ALR3d 1119.

Authority of divorce court to award prospective or anticipated attorneys' fees to enable parties to maintain or defend divorce suit, 22 ALR4th 407.

Court's authority to award temporary alimony or suit money in action for divorce, separate maintenance, or alimony where the existence of a valid marriage is contested, 34 ALR4th 814.

Excessiveness or adequacy of attorney's fees in domestic relations cases, 17 ALR5th 366.

Alimony or child-support awards as subject to attorneys' liens, 49 ALR5th 595.

19-6-3. Temporary alimony; petition and hearing; factors considered; discretion of judge; revision and enforcement of order; effect of failure to comply.

(a) Whenever an action for divorce or for permanent alimony is pending, either party may apply at any time to the presiding judge of the court in which the same is pending, by petition, for an order granting the party temporary alimony pending the issuance of a final judgment in the case. After hearing both parties and the evidence as to all the circumstances of the parties and as to the fact of marriage, the court shall grant an order allowing such temporary alimony, including expenses of litigation, as the condition of the parties and the facts of the case may justify.

(b) In arriving at a decision, the judge shall consider the peculiar necessities created for each party by the pending litigation and any evidence of a separate estate owned by either party. If the separate estate of the party seeking alimony is ample as compared with that of the other party, temporary alimony may be refused.

(c) At a hearing on the application for temporary alimony, the merits of the case are not in issue; however, the judge, in fixing the amount of alimony, may inquire into the cause and circumstances of the separation rendering the alimony necessary and in his discretion may refuse it altogether.

(d) On application, an order allowing temporary alimony shall be subject to revision by the court at any time and may be enforced either by writ of fieri facias or by attachment for contempt.

(e) A failure to comply with the order allowing temporary alimony shall not deprive a party of the right either to prosecute or to defend the case. (Orig. Code 1863, §§ 1689-1692; Code 1868, §§ 1732-1735; Code 1873, §§ 1737-1740; Code 1882, §§ 1737-1740; Civil Code 1895, §§ 2457-2460; Civil Code 1910, §§ 2976-2979; Code 1933, §§ 30-202, 30-203, 30-204, 30-205; Ga. L. 1979, p. 466, §§ 7, 9, 10.)

Law reviews. — For article, "Attorney's Fees in Alimony and Divorce Cases," see 19 Ga. B.J. 23 (1956). For article surveying developments in Georgia domestic relations law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 109 (1981).

For review of 1996 domestic relations legislation, see 13 Ga. St. U.L. Rev. 127 (1996).

For comment, "Antenuptial Agreements and Divorce in Georgia: Scherer v. Scherer," see 17 Ga. L. Rev. 231 (1982).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

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ATTORNEY'S FEES

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ENFORCEMENT PROCEDURES

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General Consideration

Law providing that alimony judgment may be enforced by writ of fi. fa. was constitutional. *Wood v. Atkinson*, 231 Ga. 271, 201 S.E.2d 394 (1973), appeal dismissed, 416 U.S. 901, 94 S. Ct. 1603, 40 L. Ed. 2d 106 (1974).

History of application of section. — Prior to the passage of the married woman's property act, it was the rule and practice in this state, almost as a matter of course, to grant temporary alimony to the wife in her pending divorce suit. *Frankel v. Frankel*, 212 Ga. 643, 94 S.E.2d 728 (1956).

Temporary alimony is common-law right; it was an established right in England when we adopted the common law, and it is no less a common-law right because it grew up under the ecclesiastical courts. *Lloyd v. Lloyd*, 183 Ga. 751, 189 S.E. 903 (1937).

Prior to any statute on the subject, it was held that the courts had the power to provide temporary alimony for the wife as incidental to the power to grant divorce. *Lloyd v. Lloyd*, 183 Ga. 751, 189 S.E. 903 (1937).

"Order" of court contemplated by statute was order by court of this state and not an order of a court of a foreign state; thus, a court could not issue an alimony order by virtue of a foreign decree since the court's power was merely to issue an ordinary money judgment based on the foreign decree. *Henderson v. Henderson*, 86 Ga. App. 812, 72 S.E.2d 731 (1952).

As foreign alimony decrees occupy the same status as ordinary foreign money judgments so far as Georgia courts are concerned, such decrees must be reduced to judgment in this state before the de-

crees can be enforced in this state. When the decrees are reduced to judgment in Georgia, the decrees can only be enforced by execution as other money judgments. *Henderson v. Henderson*, 86 Ga. App. 812, 72 S.E.2d 731 (1952).

Two prerequisites to temporary alimony award. — Two things are necessary to entitle the plaintiff in divorce to temporary alimony, namely, marriage, and the pendency of a suit for divorce, because the duty of the husband to support his wife is based upon the existence of a marriage between them. *Methvin v. Methvin*, 15 Ga. 97 (1854); *Frith v. Frith*, 18 Ga. 273 (1855); *Pennaman v. Pennaman*, 153 Ga. 647, 112 S.E. 829 (1922).

Before temporary alimony can be allowed, there must be pending suit for divorce or for alimony; and, if there is neither, no allowance for temporary alimony can be made. *Sellers v. Sellers*, 175 Ga. 47, 164 S.E. 769 (1932).

Party against whom alimony is allowed, should have notice and an opportunity of being heard. *Goss v. Goss*, 29 Ga. 109 (1859); *Luke v. Luke*, 154 Ga. 800, 115 S.E. 666 (1923).

Existing conjugal relation. — Right to temporary alimony, including attorney's fees, rests upon existing conjugal relation; and when a final verdict and decree of divorce has been granted to the parties prior to the institution by the former wife of an ancillary motion or petition for attorney's fees, and since marital relation was entirely dissolved and destroyed, the rights of the former wife to recover and the liability of the former husband to pay temporary alimony were extinguished. *Harrison v. Harrison*, 208 Ga. 70, 65 S.E.2d 173 (1951).

Woman's right to alimony, attorney's

General Consideration (Cont'd)

fees, and interlocutory relief depends upon her present — not past or future — status as wife. Until a challenged divorce judgment is actually set aside, there is no pending action for divorce or permanent alimony as is required for the grant of temporary alimony or other relief. *Thome v. Thome*, 218 Ga. 359, 127 S.E.2d 916 (1962).

Instances in which court cannot award alimony. — Court cannot award alimony when proceedings were not under former Code 1933, § 30-204 (see now O.C.G.A. § 19-6-3) for temporary alimony pending an action for divorce, or under former Code 1933, § 30-213 (see now O.C.G.A. § 19-6-10) for alimony when no action for divorce is pending, these being the only two instances when a court can award alimony. *Henderson v. Henderson*, 86 Ga. App. 812, 72 S.E.2d 731 (1952).

No final adjudication of property rights at temporary alimony hearing. — Trial court may not at temporary alimony hearing make final adjudication of property rights of those parties before it. *Walton v. Walton*, 223 Ga. 85, 153 S.E.2d 554 (1967).

Effect of spouse's death on right to temporary alimony. — When the husband dies before an order awarding temporary alimony has been entered by the court and before a divorce has been granted, the wife's right to support during the period of separation until the date of death survives as a lien on the estate. *Davenport v. Davenport*, 243 Ga. 613, 255 S.E.2d 695 (1979).

When the husband dies after a divorce has been granted but before any determination of temporary or permanent alimony has been made, the wife's inchoate right to temporary alimony from separation until the date of death survives as a lien on the estate. This determination can be made after the husband's death, and the executor may attempt to prove any disability which would deprive the wife of her right to alimony. *Davenport v. Davenport*, 243 Ga. 613, 255 S.E.2d 695 (1979).

Judge is authorized to deny temporary alimony when there is evidence that wife voluntarily abandoned husband,

or when there is evidence that the separation between the husband and wife was caused by the adultery of the wife, uncondoned by the husband. *Bullock v. Bullock*, 188 Ga. 699, 4 S.E.2d 630 (1939).

When wife has willfully deserted husband, it is error to award temporary alimony. *Hudson v. Hudson*, 189 Ga. 410, 5 S.E.2d 912 (1939).

Wife is not entitled to an award of temporary alimony or attorney's fees since it appears without dispute that she abandoned her husband and refuses to live with him without just cause. *Mullikin v. Mullikin*, 200 Ga. 638, 38 S.E.2d 281 (1946); *Frankel v. Frankel*, 212 Ga. 643, 94 S.E.2d 728 (1956).

When wife abandoned husband without just cause, it is the duty of the court to deny temporary alimony and attorney's fees. *Acree v. Acree*, 201 Ga. 359, 40 S.E.2d 54 (1946).

Decree for temporary alimony is rendered void by subsequent voluntary cohabitation of the parties. *Embry v. Embry*, 228 Ga. 468, 186 S.E.2d 104 (1971).

Visitation privileges and alimony. — Neither visitation privileges nor alimony should be conditioned upon compliance with the other. *Griffin v. Griffin*, 226 Ga. 781, 177 S.E.2d 696 (1970).

Spouse's right to use credit following temporary alimony award. — While the court is authorized to prohibit the wife from using the credit of the husband for necessities in an award of temporary alimony, the wife is a feme sole as to her separate estate and the court has no power to prohibit her from using credit extended solely to her in her individual capacity. *Barnett v. Barnett*, 231 Ga. 808, 204 S.E.2d 168 (1974).

Findings of fact and law not required in temporary alimony proceeding. — Because merits are not in issue, proceedings on temporary alimony do not require findings of fact and law. *Wilbanks v. Wilbanks*, 238 Ga. 660, 234 S.E.2d 915 (1977).

Grant or refusal of temporary alimony is question for the court; that of permanent alimony is for the jury to determine. *Aud v. Aud*, 199 Ga. 714, 35 S.E.2d 198 (1945); *Powell v. Powell*, 200

Ga. 379, 37 S.E.2d 191 (1946).

Judgment denying temporary alimony is appealable. Gray v. Gray, 226 Ga. 767, 177 S.E.2d 575 (1970).

Judgment for temporary alimony cannot be treated as final so long as either party has the right to have the judgment reviewed by the Supreme Court. George v. George, 233 Ga. 637, 212 S.E.2d 813 (1975).

Temporary alimony pending an action for permanent alimony does not cease with judgment in superior court, when the case is brought to the Supreme Court, but continues within the discretion of the court until the termination of the litigation in all the courts. Holleman v. Holleman, 69 Ga. 676 (1882); Aud v. Aud, 199 Ga. 714, 35 S.E.2d 198 (1945); Powell v. Powell, 200 Ga. 379, 37 S.E.2d 191 (1946); Fried v. Fried, 210 Ga. 457, 80 S.E.2d 796 (1954); McKay v. McKay, 93 Ga. App. 42, 90 S.E.2d 627 (1955); Moody v. Moody, 237 Ga. 374, 228 S.E.2d 788 (1976), cert. denied, 431 U.S. 921, 97 S. Ct. 2192, 53 L. Ed. 2d 234 (1977); Pierce v. Pierce, 241 Ga. 96, 243 S.E.2d 46 (1978).

Temporary alimony continues when awarded until final termination of the cause. McKay v. McKay, 93 Ga. App. 42, 90 S.E.2d 627 (1955).

Judgment for temporary alimony continues in force and effect until a final judgment in the case, until the termination of the litigation of all courts, and as long as the case is pending, including litigation in the Supreme Court. Chlupacek v. Chlupacek, 226 Ga. 520, 175 S.E.2d 834 (1970); George v. George, 233 Ga. 637, 212 S.E.2d 813 (1975).

Cited in Potter v. Potter, 145 Ga. 60, 88 S.E. 546 (1916); Webb v. Webb, 165 Ga. 305, 140 S.E. 872 (1927); Bradley v. Bradley, 168 Ga. 648, 148 S.E. 591 (1929); Giradot v. Giradot, 170 Ga. 905, 154 S.E. 352 (1930); Pace v. Bergquist, 173 Ga. 112, 159 S.E. 678 (1931); Walker v. Walker, 177 Ga. 743, 171 S.E. 292 (1933); Collins v. Collins, 180 Ga. 194, 178 S.E. 446 (1935); Mosely v. Mosely, 181 Ga. 543, 182 S.E. 849 (1935); Deaderick v. Deaderick, 182 Ga. 96, 185 S.E. 89 (1936); Kennedy v. Kennedy, 182 Ga. 586, 186 S.E. 553 (1936); Statham v. Statham, 182 Ga. 805, 187 S.E. 17 (1936); Grant v. Grant, 184

Ga. 339, 191 S.E. 98 (1937); Thomas v. Smith, 185 Ga. 243, 194 S.E. 502 (1937); Brim v. Brim, 185 Ga. 359, 195 S.E. 157 (1938); Bulloch v. Bulloch, 188 Ga. 699, 4 S.E.2d 630 (1939); Fulenwider v. Fulenwider, 188 Ga. 856, 5 S.E.2d 20 (1939); Hudson v. Hudson, 189 Ga. 410, 5 S.E.2d 912 (1939); Roberts v. Roberts, 190 Ga. 649, 10 S.E.2d 62 (1940); Ayers v. Ayers, 191 Ga. 777, 13 S.E.2d 778 (1941); Evans v. Evans, 191 Ga. 752, 14 S.E.2d 95 (1941); Allen v. Allen, 194 Ga. 591, 22 S.E.2d 136 (1942); Twilley v. Twilley, 195 Ga. 297, 24 S.E.2d 46 (1943); Verner v. Verner, 195 Ga. 592, 24 S.E.2d 666 (1943); Cox v. Cox, 197 Ga. 260, 29 S.E.2d 83 (1944); Aud v. Aud, 199 Ga. 714, 35 S.E.2d 198 (1945); Moss v. Moss, 200 Ga. 8, 36 S.E.2d 431 (1945); Lybrand v. Lybrand, 204 Ga. 312, 49 S.E.2d 515 (1948); Murray v. Murray, 206 Ga. 702, 58 S.E.2d 420 (1950); Johnson v. Johnson, 207 Ga. 508, 52 S.E.2d 908 (1950); Carter v. Carter, 208 Ga. 329, 66 S.E.2d 734 (1951); Meeks v. Meeks, 209 Ga. 588, 74 S.E.2d 861 (1953); Swinson v. Swinson, 210 Ga. 110, 78 S.E.2d 25 (1953); Harbuck v. Harbuck, 210 Ga. 220, 78 S.E.2d 508 (1953); Womble v. Womble, 214 Ga. 438, 105 S.E.2d 324 (1958); Wills v. Wills, 215 Ga. 556, 111 S.E.2d 355 (1959); Johnson v. Johnson, 218 Ga. 28, 126 S.E.2d 229 (1962); Adams v. Adams, 218 Ga. 286, 127 S.E.2d 365 (1962); Thome v. Thome, 218 Ga. 359, 127 S.E.2d 916 (1962); Roehrman v. Roehrman, 219 Ga. 52, 131 S.E.2d 558 (1963); Choate v. Choate, 219 Ga. 250, 132 S.E.2d 671 (1963); Walton v. Walton, 219 Ga. 729, 135 S.E.2d 886 (1964); Hardee v. Hardee, 222 Ga. 309, 149 S.E.2d 686 (1966); Smith v. Smith, 222 Ga. 313, 149 S.E.2d 683 (1966); White v. Bowen, 223 Ga. 94, 153 S.E.2d 706 (1967); Lovett v. Lovett, 225 Ga. 251, 167 S.E.2d 590 (1969); Roberts v. Roberts, 226 Ga. 203, 173 S.E.2d 675 (1970); Chlupacek v. Chlupacek, 226 Ga. 520, 175 S.E.2d 834 (1970); Stroud v. Stroud, 226 Ga. 769, 177 S.E.2d 574 (1970); Fint v. Johnson, 229 Ga. 188, 190 S.E.2d 32 (1972); Wood v. Atkinson, 229 Ga. 179, 190 S.E.2d 46 (1972); Goldman v. Goldman, 230 Ga. 245, 196 S.E.2d 427 (1973); Maloof v. Maloof, 231 Ga. 811, 204 S.E.2d 162 (1974); Murphy v. Murphy, 232 Ga. 352, 206 S.E.2d

General Consideration (Cont'd)

458 (1974); *Mullinax v. Mullinax*, 234 Ga. 553, 216 S.E.2d 802 (1975); *Stern v. Stern*, 235 Ga. 212, 219 S.E.2d 106 (1975); *Daniel v. Daniel*, 239 Ga. 466, 238 S.E.2d 108 (1977); *Wills v. Wills*, 239 Ga. 656, 238 S.E.2d 360 (1977); *Carter v. Carter*, 240 Ga. 597, 242 S.E.2d 94 (1978); *Antico v. Antico*, 241 Ga. 294, 244 S.E.2d 820 (1978); *Ford v. Ford*, 243 Ga. 763, 256 S.E.2d 446 (1979); *Stitt v. Stitt*, 243 Ga. 730, 256 S.E.2d 461 (1979); *Brodie v. Brodie*, 155 Ga. App. 593, 271 S.E.2d 725 (1980); *McKinnon v. McKinnon*, 158 Ga. App. 776, 282 S.E.2d 220 (1981); *Upton v. Duck*, 249 Ga. 267, 290 S.E.2d 92 (1982); *Shelor v. Shelor*, 259 Ga. 462, 383 S.E.2d 895 (1989).

Pleadings and Evidence

Requirement of pleadings and evidence of marriage. — No judgment for temporary alimony may be rendered in absence of pleadings and evidence that showed parties to be married. *Powell v. Powell*, 200 Ga. 379, 37 S.E.2d 191 (1946).

Fact of the marriage of the parties is a matter to be determined in the hearing on temporary alimony. The determination of this issue in a temporary alimony hearing is not binding on a jury in a subsequent annulment trial. *Shepherd v. Shepherd*, 231 Ga. 257, 200 S.E.2d 893 (1973).

Pleadings in alimony case stand on same footing as those in injunction proceeding. *Moss v. Moss*, 196 Ga. 340, 26 S.E.2d 628 (1943).

Rules of evidence need not be strictly enforced in temporary alimony hearings. *Wilbanks v. Wilbanks*, 238 Ga. 660, 234 S.E.2d 915 (1977).

Rules of evidence are not as strictly applied at an interlocutory hearing on an application for temporary alimony as in the final trial of the case. *Gaulding v. Gaulding*, 184 Ga. 689, 192 S.E. 724 (1937); *Gray v. Gray*, 226 Ga. 767, 177 S.E.2d 575 (1970).

On hearing for temporary alimony, judge may hear testimony either by affidavits or orally. *Rogers v. Rogers*, 103 Ga. 763, 30 S.E. 659 (1898); *Moss v. Moss*, 196 Ga. 340, 26 S.E.2d 628 (1943).

Pleadings sworn to considered in evidence without formal introduction. — On the hearing of an application for temporary alimony, pleadings sworn to from the knowledge of the affiant, and not from the affiant's own information and belief, may be considered in evidence without formal introduction. *Moss v. Moss*, 196 Ga. 340, 26 S.E.2d 628 (1943).

Attorney's Fees

Attorney's fees are treated as part of temporary alimony and may be allowed by the court although there was no separate prayer for those fees. *Stokes v. Stokes*, 127 Ga. 160, 56 S.E. 303 (1906); *Durham v. Durham*, 160 Ga. 586, 128 S.E. 788 (1925); *McClain v. McClain*, 237 Ga. 80, 227 S.E.2d 5 (1976); *Coleman v. Coleman*, 240 Ga. 417, 240 S.E.2d 870 (1977); *Ford v. Ford*, 245 Ga. 569, 266 S.E.2d 183 (1980).

Statute comprehended allowance to the wife of attorney's fees for representing her in the case as a part of temporary alimony. *Thomas v. Smith*, 185 Ga. 243, 194 S.E. 502 (1937); *Brim v. Brim*, 185 Ga. 359, 195 S.E. 157 (1938).

Attorney fees are part of temporary alimony. *Tucker v. Tucker*, 164 Ga. App. 477, 298 S.E.2d 159 (1982).

"Expenses of litigation" referred to in statute were those incurred in divorce or alimony action. *Shepherd v. Shepherd*, 231 Ga. 257, 200 S.E.2d 893 (1973).

Attorney's fees were allowed as "expenses of litigation," and were a part of temporary alimony within the terms of statute. *Lewis v. Lewis*, 215 Ga. 7, 108 S.E.2d 812 (1959).

Counsel fees are allowed to the wife as a part of "expenses of litigation" pending an action for divorce or an action for the wife for permanent alimony. *Woodward v. Woodward*, 193 Ga. 892, 20 S.E.2d 430 (1942).

Counsel fees for representing a wife in an application for permanent alimony are allowable as expenses of litigation, as temporary alimony is allowed. *Powell v. Powell*, 196 Ga. 694, 27 S.E.2d 393 (1943).

Attorney's fees may be awarded without specific award of temporary alimony. *Walton v. Walton*, 223 Ga. 85, 153 S.E.2d 554 (1967).

Attorney's fees not recoverable when party voluntarily ends action.

— When wife who had brought suit for divorce, permanent alimony, temporary alimony, and attorney's fees notified her attorneys in writing that she did not desire to prosecute the case any further, and requested them to dismiss the action, the judge erred in allowing her attorneys to continue the prosecution in their own behalf, in order to prove and recover attorney's fees for the services rendered in the case by them, and in view of the statutes and public policy in this state relating to the subject, the judgment awarding attorney's fees was an abuse of discretion by the judge, and would be reversed. *Williams v. Williams*, 188 Ga. 536, 4 S.E.2d 195 (1939).

Rationale behind award of temporary alimony. — Temporary alimony is awarded to afford wife (now either party) means of contesting all issues between herself and her husband in such a case. *La Fitte v. La Fitte*, 171 Ga. 404, 155 S.E. 521 (1930); *Huggins v. Huggins*, 202 Ga. 738, 44 S.E.2d 778 (1947); *Fried v. Fried*, 210 Ga. 457, 80 S.E.2d 796 (1954); *White v. Bowen*, 223 Ga. 94, 153 S.E.2d 706 (1967); *Leonard v. Leonard*, 236 Ga. 623, 225 S.E.2d 9 (1976); *Coleman v. Coleman*, 240 Ga. 417, 240 S.E.2d 870 (1977); *Gordon v. Gordon*, 244 Ga. 21, 257 S.E.2d 528 (1979).

Necessity of allowance of attorney's fees. — Allowance of attorney's fees is necessary provision to enable wife (now either party) to properly protect her interest, which has been recognized from earliest times. *Preston v. Preston*, 160 Ga. 200, 127 S.E. 860 (1925); *Maxwell v. Maxwell*, 177 Ga. 483, 170 S.E. 362 (1933); *Brady v. Brady*, 228 Ga. 617, 187 S.E.2d 258 (1972).

Wife might be lawfully awarded temporary alimony in the form of attorney fees to enable her to prosecute her case even though she ultimately loses it. *Sullivan v. Sullivan*, 224 Ga. 679, 164 S.E.2d 130 (1968).

Allowance for attorney's fees should be sufficient to ensure to the wife proper legal representation by a competent attorney; and the exercise of sound legal discretion in applying these principles in the

allowance of attorney's fees will not be disturbed. *Brady v. Brady*, 228 Ga. 617, 187 S.E.2d 258 (1972); *Hodges v. Hodges*, 235 Ga. 848, 221 S.E.2d 597 (1976).

Granting of allowance for attorney's fees is properly function of judge as an incident to the grant of temporary alimony for the purpose of enabling the wife to be properly represented in the litigation. *Alford v. Alford*, 189 Ga. 630, 7 S.E.2d 278 (1940).

Judicial discretion as to allowed sum of attorney fees. — Judge may allow as counsel fees such sum as in the judge's discretion appears proper under all the facts and circumstances of the case, although there is no evidence before the judge fixing any amount as the value of the services rendered and to be rendered by the plaintiff's counsel. *Sweat v. Sweat*, 123 Ga. 801, 51 S.E. 716 (1905); *Preston v. Preston*, 160 Ga. 200, 127 S.E. 860 (1925).

Criterion for amount of attorney's fees. — Reasonable compensation for such counsel as are necessary in the case should be the criterion in determining the amount to be allowed as expenses of litigation. *Rogers v. Rogers*, 103 Ga. 763, 30 S.E. 659 (1898); *Preston v. Preston*, 160 Ga. 200, 127 S.E. 860 (1925).

Litigation expenses may include transcription costs. — General requirement in civil cases that the cost of transcribing the evidence and the cost of the record were paid by the appellant did not prevent the appellant wife from being reimbursed these expenses by the appellee husband in divorce cases if the trial judge saw fit in the judge's discretion to award such expenses. *Adderholt v. Adderholt*, 240 Ga. 626, 242 S.E.2d 11 (1978).

Judge is not bound to hear expert evidence as to counsel fees. *Bradley v. Bradley*, 233 Ga. 83, 210 S.E.2d 1 (1974).

While trial court is vested with sound discretion to award or refuse to award attorney fees based on the financial condition of parties and other circumstances of the case, the court may not decline to grant attorney fees solely because no expert evidence as to their value was presented. *Webster v. Webster*, 250 Ga. 57, 295 S.E.2d 828 (1982).

It is error to require husband to reimburse for fees paid to attorneys in

Attorney's Fees (Cont'd)

previous litigation between the parties in another court. *Shepherd v. Shepherd*, 231 Ga. 257, 200 S.E.2d 893 (1973).

Fee award modifiable while suit pending. — Although the grant of attorney fees is a final judgment which may be enforced by attachment or by writ notwithstanding reconciliation of the parties, this does not necessarily mean that the fee award, like other elements of temporary alimony, may not be modified by the court at any time while the suit is pending and is within the jurisdiction of the court. *Haim v. Haim*, 251 Ga. 618, 308 S.E.2d 179 (1983).

Award of attorney fees as alimony is not subject to discharge in bankruptcy. *Leonard v. Leonard*, 236 Ga. 623, 225 S.E.2d 9 (1976).

Determining Amount of Award

Provision for temporary alimony is somewhat different in character and purpose from award of permanent alimony, inasmuch as it is designed to meet the exigencies arising out of the domestic crisis of a pending proceeding for divorce. *Childs v. Childs*, 203 Ga. 9, 45 S.E.2d 418 (1947); *Coleman v. Coleman*, 240 Ga. 417, 240 S.E.2d 870 (1977).

When parties have agreed upon annuity for maintenance, no temporary alimony will be allowed. *McLaren v. McLaren*, 33 Ga. 99 (1864).

Court has full power and authority to make agreement between parties as to temporary alimony its judgment under the facts of the case, and it is a valid judgment not subject to change without the intervention of the court, despite provision in the agreement that it should continue until further agreement of the parties. *Evans v. Evans*, 62 Ga. App. 618, 9 S.E.2d 99 (1940).

Court may refuse to approve agreement if it is shown by one of the parties that the agreement was procured by fraud or duress. *Williams v. Williams*, 243 Ga. 6, 252 S.E.2d 404 (1979).

Trial judge is empowered to allow temporary alimony from date of separation to the date of the hearing. *Shepherd v.*

Shepherd, 231 Ga. 257, 200 S.E.2d 893 (1973).

Amount of temporary alimony is not limited to fair proportion of husband's income, but may trench upon the corpus of his estate. *Walton v. Walton*, 219 Ga. 729, 135 S.E.2d 886 (1964).

Proportion of estate to be given as temporary alimony is a matter of judicial discretion. *Lloyd v. Lloyd*, 183 Ga. 751, 189 S.E. 903 (1937).

Available resources from which alimony might be paid. — It is proper for court to consider available resources from which alimony might be paid. Available resources is defined as either capacity to labor and earn or the ownership of property. *Hannah v. Hannah*, 191 Ga. 134, 11 S.E.2d 779 (1940); *Walton v. Walton*, 219 Ga. 729, 135 S.E.2d 886 (1964).

Necessities of wife and husband's ability to pay are controlling factors in making an allowance for alimony. *Walton v. Walton*, 219 Ga. 729, 135 S.E.2d 886 (1964); *McCurry v. McCurry*, 223 Ga. 334, 155 S.E.2d 378 (1967); *Barnett v. Barnett*, 231 Ga. 808, 204 S.E.2d 168 (1974); *Childre v. Childre*, 237 Ga. 437, 228 S.E.2d 829 (1976); *Williams v. Williams*, 243 Ga. 6, 252 S.E.2d 404 (1979).

Factors to consider in award. — What will be a support for the wife pendente lite depends upon the wealth of the husband, her personal income, if any, aside from his property, the number of children or others dependent upon him, and the circle of society in which she is accustomed to move; the amount is not limited to a fair proportion of income, but may trench upon the corpus of his estate. *Lloyd v. Lloyd*, 183 Ga. 751, 189 S.E. 903 (1937).

Amount of temporary alimony is determined by respective wealth and earning capacity of the parties, and the standard of living before the separation. *Hall v. Hall*, 220 Ga. 677, 141 S.E.2d 400 (1965).

Court may give consideration to securing for wife same social standing, comforts, and luxuries of life as she probably would have enjoyed had there been no separation. *Walton v. Walton*, 219 Ga. 729, 135 S.E.2d 886 (1964).

When it appears wife has separate estate, court should take into consider-

ation the estate's present value and annual income as compared to the husband's and his obligations to support other members of the family before putting the entire burden of the wife's support upon him. *Hawes v. Hawes*, 66 Ga. 142 (1880). See also *Methvin v. Methvin*, 15 Ga. 97, 60 Am. Dec. 664 (1854).

Judicial inquiry into cause and circumstances of separation. — On hearing of application for temporary alimony, judge may inquire into cause and circumstances of the separation. *Rogers v. Rogers*, 103 Ga. 763, 30 S.E. 659 (1898); *Ray v. Ray*, 106 Ga. 260, 32 S.E. 91 (1898).

Trial court may consider the cause of separation in awarding temporary alimony. *Coleman v. Coleman*, 240 Ga. 417, 240 S.E.2d 870 (1977).

Court has authority to award use of home and household goods to the wife as temporary alimony. *Lloyd v. Lloyd*, 183 Ga. 751, 189 S.E. 903 (1937); *Golden v. Golden*, 209 Ga. 915, 76 S.E.2d 697 (1953).

Temporary alimony in form of temporary use and possession of property. — Trial court may award temporary alimony in form of temporary use and possession of property, although in awarding temporary alimony in such form, the trial judge may not make a final adjudication of title or property rights. *Williams v. Williams*, 243 Ga. 6, 252 S.E.2d 404 (1979).

Reasonable allowance for temporary alimony is proper, even though husband may have no property or employment, and be merely of a robust health with an earning capacity. *Taylor v. Taylor*, 189 Ga. 110, 5 S.E.2d 374 (1939); *Golden v. Golden*, 209 Ga. 915, 76 S.E.2d 697 (1953).

Discretion of Trial Court

Temporary alimony is matter entirely within discretion of trial judge, and it was still the duty of the judge to allow a reasonable amount as temporary alimony for the support of the wife and for attorney's fees, to enable her to support herself until the final trial of the case and enable her to employ counsel to assert her rights before a jury. *Brown v. Brown*, 169 Ga. 580, 151 S.E. 14 (1929).

Broad judicial discretion. — In passing upon question of temporary alimony,

trial judge is vested with broad discretion. *Maxwell v. Maxwell*, 177 Ga. 483, 170 S.E. 362 (1933).

In granting or denying temporary alimony and attorney's fees to the wife, pending a suit by or against her for divorce, the trial judge is vested with sound legal discretion. *Long v. Long*, 91 Ga. 606, 13 S.E.2d 349 (1941).

Matter of temporary alimony is usually within the sound discretion of the trial judge. *Williams v. Williams*, 243 Ga. 6, 252 S.E.2d 404 (1979).

Temporary alimony may not be arbitrarily refused. — While judge, in the judge's discretion, may refuse temporary alimony altogether, the judge may not arbitrarily refuse the temporary alimony. *Maxwell v. Maxwell*, 177 Ga. 483, 170 S.E. 362 (1933).

Discretion of trial court not controlled unless abused. — Supreme Court will not control the discretion of the trial court in allowing temporary alimony, unless it has been flagrantly abused. *Carlton v. Carlton*, 44 Ga. 216 (1871); *Besore v. Besore*, 49 Ga. 378 (1873); *Etheridge v. Etheridge*, 149 Ga. 44, 99 S.E. 37 (1919); *Metcalf v. Metcalf*, 153 Ga. 775, 112 S.E. 828 (1922); *Osborne v. Osborne*, 157 Ga. 902, 122 S.E. 877 (1924); *Brown v. Brown*, 159 Ga. 323, 125 S.E. 712 (1924); *Preston v. Preston*, 160 Ga. 200, 127 S.E. 860 (1925); *Tillman v. Tillman*, 187 Ga. 567, 1 S.E.2d 676 (1939); *Lybrand v. Lybrand*, 204 Ga. 312, 49 S.E.2d 515 (1948); *Chambless v. Chambless*, 214 Ga. 431, 105 S.E.2d 221 (1958); *Johnson v. Johnson*, 236 Ga. 647, 225 S.E.2d 36 (1976).

Discretion of the trial judge in allowing or disallowing temporary alimony will not be controlled unless that discretion is shown to have been flagrantly abused. *Caswell v. Caswell*, 179 Ga. 676, 177 S.E. 247 (1934); *Moss v. Moss*, 196 Ga. 340, 26 S.E.2d 628 (1943); *Cook v. Cook*, 197 Ga. 703, 30 S.E.2d 479 (1944); *Hightower v. Hightower*, 202 Ga. 643, 44 S.E.2d 116 (1947); *Brannen v. Brannen*, 208 Ga. 88, 65 S.E.2d 161 (1951); *Golden v. Golden*, 209 Ga. 915, 76 S.E.2d 697 (1953).

Judgment will not ordinarily be disturbed. — Unless under the peculiar facts and circumstances of a case a judg-

Discretion of Trial Court (Cont'd)

ment allowing or refusing temporary alimony shows abuse of the discretion vested in the judge, the judge's judgment will not be disturbed. *Mathis v. Mathis*, 199 Ga. 55, 33 S.E.2d 428 (1945); *Frankel v. Frankel*, 212 Ga. 643, 94 S.E.2d 728 (1956). See also *Houston v. Houston*, 186 Ga. 140, 197 S.E. 237 (1938); *Childs v. Childs*, 203 Ga. 9, 45 S.E.2d 418 (1947); *Brady v. Brady*, 228 Ga. 617, 187 S.E.2d 258 (1972); *Shepherd v. Shepherd*, 231 Ga. 257, 200 S.E.2d 893 (1973); *Williams v. Williams*, 243 Ga. 6, 252 S.E.2d 404 (1979).

When evidence conflicts. — When the testimony as to the material facts on an application for alimony is conflicting, and there is enough to support the finding of the lower court, the Supreme Court will not interfere with the judge's discretion. *Glass v. Wynn*, 76 Ga. 319 (1886); *Heaton v. Heaton*, 102 Ga. 578, 27 S.E. 677 (1897); *Kelly v. Kelly*, 146 Ga. 362, 91 S.E. 120 (1917).

When, on application for temporary alimony and attorney's fees, the evidence is conflicting, the discretion of the judge in allowing such amounts of alimony and fees as seem reasonable and appropriate will not be disturbed by this court. *Nolan v. Nolan*, 179 Ga. 677, 177 S.E. 248 (1934).

When, under the evidence, a marked conflict was presented as to the cause and circumstances of the separation of the parties, it could not be said that the refusal of the trial judge to allow temporary alimony was a flagrant abuse of discretion. *Moss v. Moss*, 196 Ga. 340, 26 S.E.2d 628 (1943).

When the record shows there was a conflict in the evidence which authorized the trial court to use the court's discretion in determining the amount of the court's award, the Supreme Court will not interfere with the trial court's discretion unless there is a flagrant abuse of discretion. *Barnett v. Barnett*, 231 Ga. 808, 204 S.E.2d 168 (1974).

When the trial judge inquires into the cause of the separation of the parties, and the evidence is conflicting as to the cause of the separation, the judge's discretion in disallowing temporary alimony, including

expenses of litigation, will not be controlling. *Gray v. Gray*, 226 Ga. 767, 177 S.E.2d 575 (1970). See also *Gaulding v. Gaulding*, 184 Ga. 689, 192 S.E. 724 (1937); *Hall v. Hall*, 185 Ga. 502, 195 S.E. 731 (1938); *Bartlett v. Bartlett*, 228 Ga. 541, 186 S.E.2d 754 (1972).

Abuse of discretion is legal ground for reversing judgment for temporary alimony. *Alford v. Alford*, 190 Ga. 562, 9 S.E.2d 895 (1940).

Reversal of judgment. — When judge did not exercise discretion as to whether to allow temporary alimony, judgment must be reversed. *Joyner v. Joyner*, 197 Ga. 479, 29 S.E.2d 266 (1944).

When wife was employed and owned property, grant of temporary alimony against insolvent husband was abuse of discretion. *Hamilton v. Hamilton*, 174 Ga. 624, 163 S.E. 158 (1932).

Enforcement Procedures

Writ of fi. fa. — Right to temporary alimony may be enforced by writ of fi. fa. *Gibson v. Patterson*, 75 Ga. 549 (1885).

Alimony may be collected by garnishment unless husband shows that new conditions have arisen justifying a change in terms. *Halpern v. Austin*, 385 F. Supp. 1009 (N.D. Ga. 1974).

Contempt and garnishment as enforcement methods. — Both contempt and garnishment are appropriate methods of enforcing temporary alimony. *Morrison v. Morrison*, 153 Ga. App. 818, 266 S.E.2d 521 (1980).

Both garnishment and contempt actions may be pursued simultaneously for the collection or satisfaction of the payments owed. *Herring v. Herring*, 138 Ga. App. 145, 225 S.E.2d 697 (1976); *Brodie v. Brodie*, 155 Ga. App. 593, 271 S.E.2d 725 (1980).

Alimony judgment may be enforced either by execution or by attachment for contempt against the person of the husband, and the two remedies for the judgment's enforcement may be lawfully and concurrently pursued to work a satisfaction of the judgment and neither one can be pled in abatement of the other. *Lenett v. Lutz*, 215 Ga. 369, 110 S.E.2d 628 (1959).

Execution for alimony may also issue at same time as proceedings for contempt are initiated, and the proceeding for contempt does not prevent or suspend the execution. *Lipton v. Lipton*, 211 Ga. 442, 86 S.E.2d 299 (1955).

Clerk of court is required by law to issue fi. fa. for payment of alimony on request of plaintiff; and a judgment need not be obtained from the court for that purpose. *Stephens v. Stephens*, 171 Ga. 590, 156 S.E. 188 (1930).

When judgment for alimony is payable in installments, no fi. fa. issued can lawfully include any amount included in previous fi. fa. but, if such is done, it is a defect which may be cured by amendment. *Stephens v. Stephens*, 171 Ga. 590, 156 S.E. 188 (1930).

Alimony judgments are subject to dormancy and revival statutes and any applicable statute of limitation. *Bryant v. Bryant*, 232 Ga. 160, 205 S.E.2d 223 (1974).

Lump-sum alimony judgment is dormant after expiration of seven years and is not subject to revival after the expiration of ten years. *Bryant v. Bryant*, 232 Ga. 160, 205 S.E.2d 223 (1974).

Alimony installments that became due within seven years preceding execution are collectible and enforceable. *Bryant v. Bryant*, 232 Ga. 160, 205 S.E.2d 223 (1974); *O'Neil v. Williams*, 232 Ga. 170, 205 S.E.2d 226 (1974).

Revival of dormant installment payments of alimony judgments. — Installment payments of alimony judgments that are dormant are subject to being revived through the applicable statutory revival procedure. *Bryant v. Bryant*, 232 Ga. 160, 205 S.E.2d 223 (1974); *O'Neil v. Williams*, 232 Ga. 170, 205 S.E.2d 226 (1974).

Temporary order regarding alimony pending appeal of final judgment is enforceable through contempt proceedings pending review of the divorce judgment in this court. *Walker v. Walker*, 239 Ga. 175, 236 S.E.2d 263 (1977).

Distinction between civil and criminal contempt for nonpayment of alimony. — Purpose of civil contempt is to coerce compliance with court order; if alimony payments are current when alleged

contemnor appears in court, a coercive sentence would be inappropriate; full payment at time of hearing is not necessarily a defense to criminal contempt, however, because criminal contempt is imposed as punishment for past willful failure to obey court's order (i.e., make timely payments). *Hopkins v. Jarvis*, 648 F.2d 981 (5th Cir. 1981).

Law makes nonpayment of alimony contempt regardless of whether order of court commands payment of alimony. *Robbins v. Robbins*, 221 Ga. 627, 146 S.E.2d 628 (1966); *Joyce v. Joyce*, 236 Ga. 601, 225 S.E.2d 25 (1976). See also *Coggins v. Coggins*, 223 Ga. 421, 156 S.E.2d 40 (1967); *Shepherd v. Shepherd*, 223 Ga. 609, 157 S.E.2d 268 (1967); *Sullivan v. Sullivan*, 224 Ga. 679, 164 S.E.2d 130 (1968); *Roberts v. Roberts*, 229 Ga. 689, 194 S.E.2d 100 (1972); *Duke v. Smith*, 242 Ga. 207, 248 S.E.2d 617 (1978); *Martin v. Martin*, 244 Ga. 68, 257 S.E.2d 903 (1979).

When contempt is not proper remedy to compel obedience to judgment. — Contempt is not proper remedy to compel obedience to judgment that merely declares rights of parties in accordance with agreement between the parties in regard to the allowance of reasonable visitation privileges. The only portion of such a divorce and alimony decree which may be enforced by punishment for contempt is that which commands the parties to obey, and this has been construed only to extend to the payment of alimony unless the order expressly commands the parties to give full recognition of the others' rights. *Palmer v. Bunn*, 218 Ga. 244, 127 S.E.2d 372 (1962).

When contract setting alimony is incorporated in divorce decree, decree is enforceable by contempt. *McClain v. McClain*, 235 Ga. 659, 221 S.E.2d 561 (1975).

Contempt proceeding impermissible when alimony award void. — Award of temporary alimony by a court not having jurisdiction of the parties, or void for any other cause, cannot be made the basis of the valid proceeding for contempt. *Hagan v. Hagan*, 209 Ga. 313, 72 S.E.2d 295 (1952).

When original judgment for divorce was void for lack of jurisdiction, court

Enforcement Procedures (Cont'd)

erred in requiring payment of alimony and attaching respondent as for contempt. *Jones v. Jones*, 181 Ga. 747, 184 S.E. 271 (1936).

While the power to enforce a decree for alimony by attachment for contempt by the judges of the superior courts of this state is adequate yet, if in such a proceeding it appears that the judgment awarding alimony is void for any reason, the husband is privileged to collaterally attack the judgment, and in such case the court has no power to punish him for contempt. *Allen v. Baker*, 188 Ga. 696, 4 S.E.2d 642 (1939).

Defenses to contempt for failure to pay alimony. — One defense to either civil or criminal contempt for failure to pay alimony and child support would be that payments were in fact timely made, and another defense common to both civil and criminal contempt would be that alleged contemnor is financially unable to make payments; an additional defense to civil contempt would be that payments, although not timely made, are current at time of hearing. *Hopkins v. Jarvis*, 648 F.2d 981 (5th Cir. 1981).

Estoppel to plead void award. — When a party, in temporary alimony proceedings, contends that he is not subject to a judgment therefor because he had made a final alimony settlement with his wife by contract, under the doctrine of estoppel by judgment, he is concluded in a subsequent contempt proceeding from contending that the judgment awarding temporary alimony was void because he was never his wife's lawful husband. *Powell v. Powell*, 200 Ga. 379, 37 S.E.2d 191 (1946).

Contempt proceedings for refusal to abide by alimony decrees authorize only conditional punishment pending the contemnor purging oneself by paying such sums as the contemnor is able as shown by the evidence. *Stanton v. Stanton*, 223 Ga. 664, 157 S.E.2d 453 (1967).

Attachment for contempt was civil proceeding in nature. — Purpose of the proceeding for contempt being to compel payment of money allowed as alimony, and not solely for the purpose of vindicating the authority of the court, the attach-

ment of the husband for contempt was in the nature of a civil proceeding. *Curtright v. Curtright*, 187 Ga. 122, 200 S.E. 711 (1938).

Attachment for contempt not available against nonresident. — Attachment for contempt is not an available remedy for failure to pay alimony when the husband is a nonresident. *Kirchman v. Kirchman*, 212 Ga. 488, 93 S.E.2d 685 (1956).

Enforcement by attachment against party resident in other county. — Superior court awarding alimony in virtue of the court's jurisdiction originally invoked by the plaintiff in a divorce suit had jurisdiction to enforce the court's payment by attachment for contempt against the plaintiff after the plaintiff had changed the plaintiff's residence to another county. *Curtright v. Curtright*, 187 Ga. 122, 200 S.E. 711 (1938).

Imprisonment for civil contempt in alimony case constitutionally permissible. — Imprisonment for civil contempt in a case involving alimony, when the contemnor, although ordered imprisoned, may purge oneself prior to the imprisonment, is constitutionally permissible. *Kaufmann v. Kaufmann*, 246 Ga. 266, 271 S.E.2d 175 (1980).

Imprisonment for criminal contempt in alimony case constitutionally permissible. — Finding of criminal contempt with the sanction of unconditional imprisonment for nonpayment of alimony is constitutionally permissible. *Kaufmann v. Kaufmann*, 246 Ga. 266, 271 S.E.2d 175 (1980).

Enforcement of alimony judgment by attachment for contempt is not imprisonment for debt. *Heflinger v. Heflinger*, 172 Ga. 889, 159 S.E. 242 (1931).

Imprisonment for contempt is always conditional and solely within sound discretion of judge and the judge may at any time, in the exercise of that discretion, discharge one so imprisoned. The Supreme Court will not interfere with the discretion vested in the trial judge unless the judge's discretion has been manifestly abused. *Corriher v. McElroy*, 209 Ga. 885, 76 S.E.2d 782 (1953).

When court should resort to imprisonment for contempt. — Imprisonment

for contempt ought never to be resorted to, except as penal process, founded on the unwillingness of the party to obey; the moment it appears that there is inability, it would clearly be the duty of the judge to discharge the party, because it is only the contempt, the disobedience upon which the power rests. *Corriher v. McElroy*, 209 Ga. 885, 76 S.E.2d 782 (1953).

When uncontroverted evidence shows husband's inability to pay judgment awarded for alimony, it is error to keep him in jail under an order adjudging him in contempt; but when his ability to pay may be drawn from the evidence and reasonable deductions therefrom, it is not erroneous to decline to discharge him from confinement. The punishment of the husband for contempt by confinement in jail is a remedial process to secure to the wife the alimony awarded her. *Heflinger v. Heflinger*, 172 Ga. 889, 159 S.E. 242 (1931).

When the evidence showed without dispute that the defendant was financially unable to pay the sum awarded as alimony and attorney's fees, it was error to adjudge that he was in contempt of court because of his failure to pay the sums. *Porter v. Porter*, 178 Ga. 784, 174 S.E. 527 (1934).

Wife has no right to require that the defendant be imprisoned for contempt of court because of his failure to pay the full amount when he is unable to pay the full amount. We do not allow imprisonment for debt in this state. *Corriher v. McElroy*, 209 Ga. 885, 76 S.E.2d 782 (1953).

Proof by husband of inability to comply with judgment for alimony is good defense to a rule for contempt. *Snider v. Snider*, 190 Ga. 381, 9 S.E.2d 654 (1940).

Good faith showing. — It is not sufficient for defendant to show merely that he has no money, or property which he might convert into money, with which to satisfy the alimony installments, but it must be made to appear clearly that he has in good faith exhausted all the resources at his command and has made a diligent and bona fide effort to comply with the order of the court. *Snider v. Snider*, 190 Ga. 381, 9 S.E.2d 654 (1940).

Determination of whether party is in contempt for failure to pay alimony is question for discretion of judge, and the Supreme Court will not interfere with the discretion vested in the trial judge unless that discretion has been manifestly abused. *Burch v. Kenmore*, 206 Ga. 277, 56 S.E.2d 508 (1949).

Trial court has discretion whether or not, under the facts in a case, to adjudicate the defendant in contempt of court, and the discretion of the trial court will not be disturbed unless abused. *Martin v. Martin*, 209 Ga. 850, 76 S.E.2d 390 (1953).

Trial court in a contempt case has wide discretion to determine whether the court's orders have been violated. The court's determination will not be disturbed on appeal in the absence of an abuse of discretion. *Kaufmann v. Kaufmann*, 246 Ga. 266, 271 S.E.2d 175 (1980).

Modification of divorce decree in contempt proceeding. — Trial court has no authority in contempt proceeding to modify divorce decree. *Stanley v. Stanley*, 244 Ga. 417, 260 S.E.2d 328 (1979).

Court may not modify a previous decree in a contempt order; however, a court may always interpret and clarify the court's own orders. The test to determine whether an order is clarified or modified is whether the clarification is reasonable or whether it is so contrary to the apparent intention of the original order as to amount to a modification. *Kaufmann v. Kaufmann*, 246 Ga. 266, 271 S.E.2d 175 (1980).

Revision of Order

When judge has fixed temporary alimony, right to amount allowed becomes absolute unless revoked or modified by the judge. *Aud v. Aud*, 199 Ga. 714, 35 S.E.2d 198 (1945); *Powell v. Powell*, 200 Ga. 379, 37 S.E.2d 191 (1946).

Order granting temporary alimony is always in breast of court, and the court is authorized at any time, in the exercise of sound discretion, to revise or revoke such an order. *Brim v. Brim*, 185 Ga. 359, 195 S.E. 157 (1938); *Williams v. Williams*, 194 Ga. 332, 21 S.E.2d 229 (1942).

Revision of Order (Cont'd)

Court has power to alter or revoke at any time the court's judgments awarding temporary alimony. *Alford v. Alford*, 190 Ga. 562, 9 S.E.2d 895 (1940). See also *Banda v. Banda*, 192 Ga. 5, 14 S.E.2d 479 (1941); *Strickland v. Strickland*, 201 Ga. 293, 39 S.E.2d 483 (1946); *Golden v. Golden*, 209 Ga. 915, 76 S.E.2d 697 (1953).

Trial judge has wide discretion in fixing temporary alimony, and in subsequently modifying the temporary alimony. *Williams v. Williams*, 206 Ga. 341, 57 S.E.2d 190 (1950).

Discretion in modifying prior order for temporary alimony is similar to discretion in granting or refusing such alimony, and an abuse of discretion in either case is legal ground for reversing the judgment. *Fried v. Fried*, 210 Ga. 457, 80 S.E.2d 796 (1954).

Right to revise temporary alimony not limited to instances when there is change in condition of parties. *Brim v. Brim*, 185 Ga. 359, 195 S.E. 157 (1938).

Power of the trial court to set aside a prior order for alimony which has not been affirmed by the Supreme Court does not depend solely upon a change of conditions subsequent to the grant of the previous order. In all cases, the trial judge's order setting aside a prior award of temporary alimony must be based upon evidence, and the exercise of the judge's discretion must be legal and not arbitrary. *Fried v. Fried*, 210 Ga. 457, 80 S.E.2d 796 (1954).

Court may consider party's request for revision based on inability to pay. — If, after an allowance for temporary alimony and counsel fees, the husband becomes unable to meet the payments, he is entitled to show this, and the court has

jurisdiction to entertain an application for a reduction of the amounts. *Taylor v. Taylor*, 189 Ga. 110, 5 S.E.2d 374 (1939); *Childs v. Childs*, 203 Ga. 9, 45 S.E.2d 418 (1947).

Additional services rendered by attorney. — When it is shown that attorney was compelled to render additional services, court may increase temporary alimony. *Snider v. Snider*, 183 Ga. 734, 189 S.E. 512 (1937).

Adultery as cause for modification of temporary alimony. — Adultery on the part of the wife subsequent to the grant of temporary alimony, or prior thereto but unknown to the husband until after the granting of the order for temporary alimony, is a sufficient cause to warrant the court in modifying or revoking the order. *Jennison v. Jennison*, 136 Ga. 202, 71 S.E. 244, 1912C Am. Cas. 441 (1911).

Revocation or modification of previous order. — It is error, upon subsequent hearing, to revoke or modify previous order solely upon consideration of evidence adduced at previous hearing and additional evidence as to the value of the attorney's services. *Brim v. Brim*, 185 Ga. 359, 195 S.E. 157 (1938).

Temporary alimony award affirmed by Supreme Court. — Trial judge may not set aside award of temporary alimony when award has been affirmed by Supreme Court, in the absence of additional facts such as would authorize a revocation or modification of the prior order. *Fried v. Fried*, 210 Ga. 457, 80 S.E.2d 796 (1954).

After final decree in divorce and alimony action is rendered, trial court is without jurisdiction to award further counsel fees on application made subsequent to such final decree. *Jones v. Jones*, 221 Ga. 284, 144 S.E.2d 388 (1965).

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, §§ 586 et seq., 774 et seq.

Am. Jur. Pleading and Practice Forms. — 8B Am. Jur. Pleading and Practice Forms, Divorce and Separation, § 175.

8C Am. Jur. Pleading and Practice Forms, Divorce and Separation, § 228.

C.J.S. — 27B C.J.S., Divorce, §§ 312 et seq., 336 et seq., 371, 445 et seq.

ALR. — Statute expressly or impliedly denying power to enforce by process of contempt, order, judgment, or decree, for

money, as applicable to order or decree for alimony, 8 ALR 1156.

Right of wife to allowance of counsel fees to prosecute or defend appeal in matrimonial action, 18 ALR 1494.

Financial condition of parties as affecting allowance of suit money in divorce suit, 35 ALR 1099.

Liability of husband in independent action for services rendered by attorney to wife in divorce suit, 42 ALR 315.

Nonpayment of alimony or suit money as ground for denying right to participate in trial or other proceeding in suit for divorce, 62 ALR 663.

Demand as condition precedent to enforcement of payment of alimony by contempt proceedings, 63 ALR 1220.

Findings or order upon application for alimony pendente lite in action for divorce or separation as *res judicata*, 105 ALR 1406.

Allowance against husband in suit for divorce, of amount for expense of taking deposition of wife or paying cost of her transportation to place of trial, 111 ALR 1098.

What provisions in divorce suit for financial benefit of wife, other than for payment of money to her or her agents or attorneys, are enforceable by contempt proceedings, 124 ALR 145.

Power of appellate court to grant alimony, maintenance, or attorneys' fees pending appeal in matrimonial suit, 136 ALR 502.

Contempt proceedings to enforce payment of alimony or support as affected by security for its payment or availability of other remedy for its enforcement, 136 ALR 689.

Right to allowance of counsel fees to wife in action for divorce or separation, as affected by misconduct or lack of good faith of her attorney, 150 ALR 1181.

Final decree or dismissal of suit for divorce as affecting subsequent enforceability by contempt or otherwise of past defaults in payment of temporary alimony, 154 ALR 530.

Decree of divorce *a vinculo* as affecting prior award of alimony or support ordered or decreed in a suit for divorce *a mensa et thoro* or for separate maintenance, 166 ALR 1004.

Order granting or refusing motion for temporary alimony or suit money in divorce action as appealable, 167 ALR 360.

Wife's misconduct or fault as affecting her right to temporary alimony or suit money, 2 ALR2d 307.

Decree for alimony rendered in another state or country (or domestic decree based thereon) as subject to enforcement by equitable remedies or by contempt proceedings, 18 ALR2d 862.

Pleading and burden of proof, in contempt proceedings, as to ability to comply with order for payment of alimony or child support, 53 ALR2d 591.

Use of affidavits to establish contempt, 79 ALR2d 657.

Right to credit for payments on temporary alimony pending appeal, against liability for permanent alimony, 86 ALR2d 696.

Wife's possession of independent means as affecting her right to alimony pendente lite, 60 ALR3d 728.

Excessiveness or adequacy of money awarded as temporary alimony, 26 ALR4th 1218.

Court's authority to award temporary alimony or suit money in action for divorce, separate maintenance, or alimony where the existence of a valid marriage is contested, 34 ALR4th 814.

Divorce: excessiveness or adequacy of combined property division and spousal support awards—modern cases, 55 ALR4th 14.

Power to modify spousal support award for a limited term, issued in conjunction with divorce, so as to extend the term or make the award permanent, 62 ALR4th 180.

Withholding visitation rights for failure to make alimony or support payments, 65 ALR4th 1155.

19-6-4. When permanent alimony authorized; how enforced.

(a) Permanent alimony may be granted in the following cases:

(1) In cases of divorce;

(2) In cases of voluntary separation; or

(3) Where one spouse, against the will of that spouse, is abandoned or driven off by the other spouse.

(b) A grant of permanent alimony may be enforced either by writ of fieri facias or by attachment for contempt. (Orig. Code 1863, §§ 1691, 1693; Code 1868, §§ 1734, 1736; Code 1873, §§ 1739, 1744; Code 1882, §§ 1739, 1744; Civil Code 1895, §§ 2459, 2464; Civil Code 1910, §§ 2978, 2983; Code 1933, §§ 30-204, 30-210; Ga. L. 1979, p. 466, §§ 10, 15.)

Editor's notes. — Ga. L. 1979, p. 466 amended prior law so as to provide that alimony may be assessed against either spouse. Cases decided prior to the 1979

enactment appear to remain valid except insofar as they may imply that a wife only is entitled to receive alimony or a husband only is obligated to pay the same.

JUDICIAL DECISIONS

Former Code 1933, §§ 30-210, 30-211, 30-212 and 30-213 plainly provided for alimony which may be sought in the wife's (now either spouse's) suit for divorce, her suit for alimony alone, or in a suit by the husband for divorce. The wife's right cannot be defeated by a failure of the husband to obtain a divorce. *Ridgeway v. Ridgeway*, 224 Ga. 310, 161 S.E.2d 866 (1968).

Alimony not mandatory. — Former Code 1933, §§ 30-207, 30-209, and 30-210 did not declare that alimony must or shall be granted in any case. *Brown v. Brown*, 230 Ga. 566, 198 S.E.2d 182 (1973).

Alimony in any form is simply support for the wife (now either spouse), supplied by the husband, and it rests entirely upon the law requiring the husband to support his wife. It makes no difference what this support is called, whether "temporary alimony" or "permanent alimony" or "necessaries." It is the same thing, and intended for the same purpose in each instance. *Hudson v. Hudson*, 189 Ga. 410, 5 S.E.2d 912 (1939).

Alimony need not be awarded in every case. — It is not law that in every case in which wife is granted total divorce, permanent alimony must also be awarded to her. Various other facts and circumstances may require consideration. *Simmons v. Simmons*, 194 Ga. 649, 22 S.E.2d 399 (1942); *Brown v. Brown*, 230 Ga. 566, 198 S.E.2d 182 (1973).

Action for alimony without prayer for divorce. — Wife has the right to sue her husband, residing in this state, for alimony, after a voluntary separation, without suing for divorce, and without the necessity of showing a legal residence as required in a suit for divorce. *Craig v. Craig*, 53 Ga. App. 632, 186 S.E. 755 (1936).

Wife (now either spouse) can bring action for alimony without prayer for divorce or she may be entitled to alimony in connection with a divorce. *Sherman v. United States*, 334 F. Supp. 1311 (N.D. Ga. 1971), modified, 462 F.2d 577 (5th Cir. 1972).

Failure of divorce action will not bar action for alimony. — Failure of the wife's divorce action will not bar subsequent action for permanent alimony based upon the allegation that the parties are living in a state of voluntary separation. *Davenport v. Davenport*, 210 Ga. 687, 82 S.E.2d 654 (1954).

Effect of foreign state decree for alimony upon Georgia action. — Fact that decree of another state was for alimony will not make Georgia action on such decree alimony case, since it is simply an action on a debt of record, and accordingly, such a suit in a Georgia court does not come within the statutes and more liberal rules as to extraordinary relief in favor of a wife, who has already filed or is about to file in this state an action for

divorce and alimony or alimony alone, and who needs such additional equitable protection against threatened conveyances by the husband until the termination of the question of alimony. *Lawrence v. Lawrence*, 196 Ga. 204, 26 S.E.2d 283 (1943).

Full force and effect given to contracts for payment of alimony. — Contracts for payment of alimony should be given full force and effect and continue for the period provided by the contract which may be beyond the death of the husband. *Sherman v. United States*, 334 F. Supp. 1311 (N.D. Ga. 1971), modified, 462 F.2d 577 (5th Cir. 1972).

Agreement to pay alimony is enforceable when obligation is part of overall settlement. *Sherman v. United States*, 334 F. Supp. 1311 (N.D. Ga. 1971), modified, 462 F.2d 577 (5th Cir. 1972).

Alimony improper if no legal marriage existed between parties. — In this state a judge of the superior court has no power to grant a judgment awarding alimony, if at the time of the institution of suit therefor the relationship of husband and wife does not exist between the parties, by reason of the marriage being void ab initio or by reason of a total divorce theretofore granted between the parties. *Allen v. Baker*, 188 Ga. 696, 4 S.E.2d 642 (1939).

Alimony improper when evidence shows common-law marriage did not exist. — When the evidence demanded a finding that the plaintiff did not enter into a common-law marriage de praesenti with the defendant, which is a valid married status in this state, and there being in this state no common-law marriage de futuro cum copula, the court erred in allowing alimony and attorney's fees on either theory of alleged common-law marriage between the parties. *Peacock v. Peacock*, 196 Ga. 441, 26 S.E.2d 608 (1943).

Wife properly denied permanent alimony when guilty of willful desertion. — If willful desertion by the wife demands a denial of temporary alimony in such a judgment, to allow her permanent alimony in the same case after a jury has determined that the facts show she is guilty of the identical wrong for which she was denied temporary alimony would be an inconsistency that could not be justi-

fied. *Hudson v. Hudson*, 189 Ga. 410, 5 S.E.2d 912 (1939).

Alimony denied to wife. — Alimony should not be awarded to wife who abandons husband without just cause. *Mullikin v. Mullikin*, 200 Ga. 638, 38 S.E.2d 281 (1946).

Abandonment as ground for alimony is not required to continue for specific period of time. *Shivers v. Shivers*, 215 Ga. 536, 111 S.E.2d 376 (1959).

When husband obtains divorce for cruel treatment, jury determines whether they will allow wife permanent alimony, and a charge restricting the right of the wife to alimony to a verdict solely in her favor is error. *Shivers v. Shivers*, 215 Ga. 536, 111 S.E.2d 376 (1959).

When prior maintenance award is entirely superseded. — When trial court adjudicates issue of permanent alimony, prior maintenance award is entirely superseded. *Browne v. Browne*, 242 Ga. 107, 249 S.E.2d 594 (1978).

Court hearing a divorce case has the authority, if alimony is sought and the court sees fit to do so, to enter a permanent alimony award which will supersede a prior separate maintenance judgment. *Browne v. Browne*, 242 Ga. 107, 249 S.E.2d 594 (1978).

When no valid divorce granted, decree awarding alimony will be set aside without prejudice to plaintiff wife and the minor children. *Harmon v. Harmon*, 209 Ga. 474, 74 S.E.2d 75 (1953).

Distinction between civil and criminal contempt for nonpayment of alimony. — Purpose of civil contempt is to coerce compliance with court order; if alimony payments are current when alleged contemnor appears in court, a coercive sentence would be inappropriate; full payment at time of hearing is not necessarily a defense to criminal contempt, however, because criminal contempt is imposed as punishment for past willful failure to obey the court's order (i.e., make timely payments). *Hopkins v. Jarvis*, 648 F.2d 981 (5th Cir. 1981).

Defenses to contempt for failure to pay alimony. — One defense to either civil or criminal contempt for failure to pay alimony and child support would be that payments were in fact timely made

and another defense common to both civil and criminal contempt would be that alleged contemnor is financially unable to make payments; an additional defense to civil contempt would be that payments, although not timely made, are current at time of hearing. *Hopkins v. Jarvis*, 648 F.2d 981 (5th Cir. 1981).

Lump-sum alimony award was not dischargeable. — Lump-sum alimony award determined under federal law to be “actually in the nature of alimony, maintenance, or support” is not dischargeable pursuant to 11 U.S.C. § 523(a)(5), even though the award does not terminate upon the death or remarriage of the recipient. *Myers v. Myers*, 61 Bankr. 891 (Bankr. N.D. Ga. 1986).

Cited in *Gore v. Plair*, 173 Ga. 88, 159 S.E. 698 (1931); *Cash v. Cash*, 177 Ga. 47, 169 S.E. 311 (1933); *Kennedy v. Kennedy*, 182 Ga. 586, 186 S.E. 553 (1936); *Brock v. Brock*, 183 Ga. 860, 190 S.E. 30 (1937); *Fulenwider v. Fulenwider*, 188 Ga. 856, 5 S.E.2d 20 (1939); *Alford v. Alford*, 189 Ga.

630, 7 S.E.2d 278 (1940); *Mell v. Mell*, 190 Ga. 508, 9 S.E.2d 756 (1940); *McCallie v. McCallie*, 192 Ga. 699, 16 S.E.2d 562 (1941); *Powell v. Powell*, 199 Ga. 723, 35 S.E.2d 298 (1945); *Acree v. Acree*, 201 Ga. 359, 40 S.E.2d 54 (1946); *Green v. Starling*, 203 Ga. 10, 45 S.E.2d 188 (1947); *Dempsey v. Dempsey*, 203 Ga. 225, 46 S.E.2d 156 (1948); *Spain v. Spain*, 203 Ga. 411, 47 S.E.2d 279 (1948); *Moore v. Moore*, 205 Ga. 355, 53 S.E.2d 343 (1949); *Craddock v. Foster*, 205 Ga. 534, 54 S.E.2d 406 (1949); *Cohen v. Cohen*, 209 Ga. 459, 74 S.E.2d 95 (1953); *Atha v. Atha*, 210 Ga. 540, 81 S.E.2d 454 (1954); *Endicott v. Endicott*, 213 Ga. 631, 100 S.E.2d 458 (1957); *Hardee v. Hardee*, 222 Ga. 309, 149 S.E.2d 686 (1966); *Stanton v. Stanton*, 223 Ga. 664, 157 S.E.2d 453 (1967); *Boggus v. Boggus*, 236 Ga. 126, 223 S.E.2d 103 (1976); *McKinnon v. McKinnon*, 158 Ga. App. 776, 282 S.E.2d 220 (1981); *Head v. Head*, 234 Ga. App. 469, 507 S.E.2d 214 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, §§ 233, 577, 664.

Am. Jur. Pleading and Practice Forms. — 8B Am. Jur. Pleading and Practice Forms, Divorce and Separation, § 175.

8C Am. Jur. Pleading and Practice Forms, Divorce and Separation, § 228.

C.J.S. — 27B C.J.S., Divorce, §§ 309, 312, 314, 369.

ALR. — Right to impose fine for failure to pay alimony, 14 ALR 717.

Specific performance, or other equitable enforcement, of agreement for wife's support or alimony, 154 ALR 323.

Inherent power of court to secure future payment of alimony and support money, 165 ALR 1243.

Allowance of permanent alimony to wife against whom divorce is granted, 34 ALR2d 313.

Right to allowance of permanent alimony in connection with decree of annulment, 54 ALR2d 1410; 81 ALR3d 281.

Enforcement of claim for alimony against exemptions, 54 ALR2d 1422.

Allowance of alimony in lump sum in action for separate maintenance without divorce, 61 ALR2d 946.

Power to modify spousal support award for a limited term, issued in conjunction with divorce, so as to extend the term or make the award permanent, 62 ALR4th 180.

Withholding visitation rights for failure to make alimony or support payments, 65 ALR4th 1155.

Divorce: propriety of using contempt proceeding to enforce property settlement award or order, 72 ALR4th 298.

19-6-5. Factors in determining amount of alimony; effect of remarriage on obligations for alimony.

(a) The finder of fact may grant permanent alimony to either party, either from the corpus of the estate or otherwise. The following shall be considered in determining the amount of alimony, if any, to be awarded:

- (1) The standard of living established during the marriage;
- (2) The duration of the marriage;
- (3) The age and the physical and emotional condition of both parties;
- (4) The financial resources of each party;
- (5) Where applicable, the time necessary for either party to acquire sufficient education or training to enable him to find appropriate employment;
- (6) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party;
- (7) The condition of the parties, including the separate estate, earning capacity, and fixed liabilities of the parties; and
- (8) Such other relevant factors as the court deems equitable and proper.

(b) All obligations for permanent alimony, however created, the time for performance of which has not arrived, shall terminate upon remarriage of the party to whom the obligations are owed unless otherwise provided. (Laws 1806, Cobb's 1851 Digest, pp. 224, 225; Code 1863, § 1676; Code 1868, § 1719; Code 1873, § 1720; Code 1882, § 1720; Civil Code 1895, § 2435; Civil Code 1910, § 2954; Code 1933, § 30-209; Ga. L. 1966, p. 160, § 1; Ga. L. 1979, p. 466, § 14; Ga. L. 1981, p. 615, § 1; Ga. L. 1982, p. 3, § 19.)

Editor's notes. — Ga. L. 1979, p. 466 amended prior law so as to provide that alimony may be assessed against either spouse. Cases decided prior to the 1979 enactment appear to remain valid except insofar as they may imply that a wife only is entitled to receive alimony or a husband only is obligated to pay the same.

Law reviews. — For article surveying developments in Georgia domestic relations law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 109 (1981). For annual survey of domestic relations cases, see 57 Mercer L. Rev. 173

(2005). For annual survey of domestic relations law, see 58 Mercer L. Rev. 133

(2006). For article, "Are We Witnessing the Erosion of Georgia's Separate Property Distinction?," see 13 Ga. St. B.J. 14

(2007). For survey article on domestic relations law, see 59 Mercer L. Rev. 139

(2007). For survey article on domestic relations law, see 60 Mercer L. Rev. 121

(2008). For annual survey of law on domestic relations, see 62 Mercer L. Rev. 105

(2010). For article on domestic relations, see 66 Mercer L. Rev. 65 (2014).

For note, "The Significance of Stokes v.

Stokes: An Examination of Property Rights Upon Divorce in Georgia," see 16 Ga. L. Rev. 695 (1982).

For comment, "The Georgia Supreme

Court's Creation of an Equitable Interest in Marital Property — Yours? Mine? Ours!," 34 Mercer L. Rev. 449 (1982).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
FACTORS TO BE CONSIDERED
EFFECT OF REMARRIAGE

General Consideration

Constitutionality. — Former Code 1933, § 30-209 (see now O.C.G.A. § 19-6-5), insofar as it undertook to affect the obligations of a valid contract in existence at the time of statute's passage so as to provide for the duration of alimony is null and void as violative of Ga. Const. 1945, Art. I, Sec. III, Para. II (see now Ga. Const. 1983, Art. I, Sec. I, Para. X) and U.S. Const., Art. I, Sec. 10, Cl. 1. *Candler v. Wilkerson*, 223 Ga. 520, 156 S.E.2d 358 (1967).

Statute was strictly construed, and the effect should not be extended beyond its terms. *Landis v. Sanner*, 146 Ga. 606, 91 S.E. 688 (1917).

Statute did not declare that alimony must or shall be granted in any case, although it has been held that when the wife has no separate estate or means of support and the husband is able to support her, a verdict granting a divorce but denying alimony is contrary to law as to the latter feature. *Simmons v. Simmons*, 194 Ga. 649, 22 S.E.2d 399 (1942); *Brown v. Brown*, 230 Ga. 566, 198 S.E.2d 182 (1973).

Statute was a restraint upon alienation of property, and the statute's effect on title, when the husband has conveyed pending a suit for divorce and alimony, should be strictly construed. *Perry v. First Mut. Bldg. & Loan Ass'n*, 174 Ga. 914, 164 S.E. 804 (1932).

Statute was applicable to wife's remarriage to anyone, thus the wife may retain the property previously awarded her as permanent alimony regardless of her remarriage to her former husband or to anyone else. *Travis v. Travis*, 227 Ga. 406, 181 S.E.2d 61 (1971).

"Alimony" in its strict or technical sense contemplates money payments at regular intervals. *Hamilton v. Finch*, 238 Ga. 78, 230 S.E.2d 881 (1976).

Alimony may be awarded either from husband's earnings or from corpus of his estate as by granting to the wife the title or use of property in the possession of the husband. *Jones v. Jones*, 220 Ga. 753, 141 S.E.2d 457 (1965).

No duty to determine amount when alimony not awarded. — In an action dissolving the marriage between the parties, having concluded that alimony would not be awarded, the trial court's consideration of the factors relevant to determining the amount thereof was obviated. *Stanley v. Stanley*, 281 Ga. 672, 642 S.E.2d 94 (2007).

No requirement that findings be included in decree. — Alimony award was not improper because, inter alia, with respect to alimony, there was no statutory requirement that findings be included in the decree. *Sprouse v. Sprouse*, 285 Ga. 468, 678 S.E.2d 328 (2009).

It was not valid objection to award of alimony that husband had no "estate" out of which it can be paid because the award may be "from the corpus of the estate or otherwise." *Poppell v. O'Quinn*, 131 Ga. App. 223, 205 S.E.2d 509 (1974).

Husband's enhanced and wife's suppressed income potential during marriage properly considered. — In determining the amount of child support and alimony a husband was required to pay, the trial court correctly considered the parties' income and other assets, as well as the fact that during the marriage, the husband enhanced his ability for increase in income potential and suppressed the wife's ability for increased income po-

tential. *McCoy v. McCoy*, 281 Ga. 604, 642 S.E.2d 18 (2007).

It was not a valid objection that alimony award payment is to be made at future time; because otherwise there would be no continuing liability for future sums. *Poppell v. O'Quinn*, 131 Ga. App. 223, 205 S.E.2d 509 (1974).

Purpose of alimony is to provide support for wife (now either party) and minor children, the amount to be determined from consideration of needs and ability to pay. *McCurry v. McCurry*, 223 Ga. 334, 155 S.E.2d 378 (1967).

Alimony is never for the purpose of penalizing husband or wife for his or her misconduct. *McCurry v. McCurry*, 223 Ga. 334, 155 S.E.2d 378 (1967).

Alimony should never be excessive; and, with proper regard for the husband's ability, it should never be inadequate or insufficient for his wife's support in keeping with the family standard of living established by the husband. *Hilburn v. Hilburn*, 210 Ga. 497, 81 S.E.2d 1 (1954).

No error when some evidence supported decision. — When some evidence supported the trial court's decision, the trial court did not err in the court's determination of the amount of spousal support to be paid by a husband, including the wife's attorney fees. *Bloomfield v. Bloomfield*, 282 Ga. 108, 646 S.E.2d 207 (2007).

Consent judgments for alimony have been uniformly recognized in this state, and have been given the same force and effect as judgments rendered in due course of litigation upon findings by a jury. *Estes v. Estes*, 192 Ga. 94, 14 S.E.2d 681 (1941).

Parties cannot change or alter decree of permanent alimony. *Martin v. Martin*, 209 Ga. 850, 76 S.E.2d 390 (1953).

Dischargeability in bankruptcy. — Bankruptcy Court erred in ruling that the jury award of \$250,000.00 lump sum alimony was in the nature of alimony, maintenance, or support and thus was nondischargeable pursuant to 11 U.S.C. § 523. *Ackley v. Ackley*, 187 Bankr. 24 (N.D. Ga. 1995).

Agreement to pay insurance premiums. — Portion of a settlement agreement creating an obligation to pay insur-

ance premiums constitutes periodic alimony rather than equitable property division, which, absent a manifest intention of the parties to the contrary, the obligation to pay periodic alimony terminates on the death of the paying spouse or of the surviving spouse. *Gray v. Higgins*, 205 Ga. App. 52, 421 S.E.2d 341 (1992).

Court may order that spouse receive insurance policy when order in accord with verdict. — When the decision that the plaintiff-wife receive the policy of life insurance is in full accord with the undisputed evidence and the verdict of the jury in a divorce case, the trial court did not err in inserting provisions requiring the husband to carry out the purpose and intent of that verdict. *Ritchea v. Ritchea*, 244 Ga. 476, 260 S.E.2d 871 (1979).

Obligation to maintain life insurance terminated. — Because the cost to the husband and the value to the wife of the requirement that he maintain \$100,000 in life insurance for her benefit for 12 years were indefinite when the decree was entered, as the amount of that award depended on how long the husband would live, the award was periodic alimony as a matter of law; and, as permanent periodic alimony, the husband's life insurance obligation terminated upon the wife's remarriage because the divorce decree did not expressly provide otherwise. *White v. Howard*, 295 Ga. 210, 758 S.E.2d 824 (2014).

Military retirement pay. — Trial court's order that a husband designate a wife as the beneficiary of the survivor benefit plan under the husband's military pension was proper, as essentially a life insurance protecting the husband's alimony obligation to the wife, even though the husband's pension was the husband's separate pre-marital property. *Hipps v. Hipps*, 278 Ga. 49, 597 S.E.2d 359 (2004).

Alimony obligation ambiguous. — If the alimony obligation is ambiguous, it is the function of the trial court to resolve that ambiguity and determine the intent of the parties following the ordinary rules of construction. *Fisher v. Fredrickson*, 262 Ga. 229, 416 S.E.2d 512 (1992), overruled on other grounds, *Andrews v. Whitaker*, 265 Ga. 76, 433 S.E.2d 735 (1995).

General Consideration (Cont'd)

Order to pay hospital costs as part of alimony too vague. — In action for permanent alimony, portion of verdict that defendant “shall pay the total cost of the operation and hospitalization of plaintiff” was too vague and indefinite to authorize a decree as to these items, the pleadings being equally as indefinite in reference to operation and hospitalization, and the court erred in overruling the motion to arrest the judgment, so far as the judgment applied to these subjects. *Martin v. Martin*, 183 Ga. 787, 189 S.E. 843 (1937).

Jury may grant sum certain as alimony. — Rendering of a money judgment for a sum certain as alimony is within the power of the jury. *Roberson v. Roberson*, 199 Ga. 627, 34 S.E.2d 836 (1945).

Lump sum installment award. — Discrete lump sum installment award by a jury can reasonably be interpreted as a recognition of pre-existing property rights based on equitable considerations, the satisfaction of a marital support obligation, which may include rehabilitation, or both. *Nix v. Nix*, 185 Bankr. 929 (Bankr. N.D. Ga. 1994).

Estate not liable for continued alimony to wife. — Since a provision in the parties’ separation agreement entitling the wife to alimony until she remarried or died did not evidence a manifest intention to reverse the normal rule that the death of the obligor terminated the obligation to pay alimony, and the settlement agreement lacked a clear expression of intent to extend alimony payments beyond the death of the ex-husband, the trial court properly denied the wife’s motion to hold the estate responsible for the alimony obligation. *Findley v. Findley*, 280 Ga. 454, 629 S.E.2d 222 (2006).

Jury instructions. — When, in a divorce suit resulting in the divorce of both parties, the wife prays for permanent alimony and the jury awards her none, a ground of her motion for new trial which complains that the court nowhere in the court’s charge instructed the jury as to what is permanent alimony, or under what circumstances the jury would in the jury’s discretion be authorized to grant

the alimony, is meritorious and affords cause for the grant of a new trial, since the evidence is such as to justify the jury in granting permanent alimony. *Alford v. Alford*, 189 Ga. 630, 7 S.E.2d 278 (1940).

Motion to set aside judgment sustained when alimony award grossly inadequate. — When verdict for permanent alimony was grossly inadequate and insufficient the motion to vacate it and set the judgment aside for that reason should have been sustained. *Hilburn v. Hilburn*, 210 Ga. 497, 81 S.E.2d 1 (1954).

Unacceptable stipulation as to alimony. — Trial court’s failure to inform the parties during the trial that their stipulation as to alimony was unacceptable, or to afford the parties an opportunity in a later hearing to address the issue with evidence, was reversible error. *Hodges v. Hodges*, 261 Ga. 843, 413 S.E.2d 191 (1992).

Following obligations in a divorce agreement were deemed dischargeable in bankruptcy proceedings: (1) the obligation to pay additional “alimony” of \$432.69 per month for 12 years, regardless of remarriage or death, to cover the monthly first mortgage payments on the former marital home; (2) the assumption of a second mortgage on the home; (3) the assumption of a bank note secured by the ex-spouse’s car; and (4) payment of the ex-spouse’s law school expenses. *Bedingfield v. Bedingfield*, 42 Bankr. 641 (S.D. Ga. 1983).

Evidence of unvested retirement funds was relevant and admissible on the issue of alimony. *Courtney v. Courtney*, 256 Ga. 97, 344 S.E.2d 421 (1986).

Discovery of information regarding trust. — When the husband was a beneficiary and cotrustee of a trust, the sole asset of which was stock in a company owned by members of his family, the wife was entitled to production at a deposition of certain evidence, including testimony and documents regarding the formation of the trust, the value and financial records of the company, and the compensation and benefits that the husband received from the company, although the company was entitled to an order which would provide reasonable protection for the company’s legitimate proprietary concerns regarding

the company's financial information. *McGinn v. McGinn*, 273 Ga. 292, 540 S.E.2d 604 (2001).

Trust to fund future payments authorized. — Discretion accorded trial courts under the child support guidelines included authorizing the use of a trust to secure unaccrued child support obligations. *Henry v. Beacham*, 301 Ga. App. 160, 686 S.E.2d 892 (2009), cert. denied, No. S10C0537, 2010 Ga. LEXIS 350 (Ga. 2010).

Child support order properly created a trust to secure unaccrued child support obligations because it was in the child's best interests since the father had numerous other child support obligations, he had been in arrears of a temporary support order, and he spent large amounts of money while having large debts. *Henry v. Beacham*, 301 Ga. App. 160, 686 S.E.2d 892 (2009), cert. denied, No. S10C0537, 2010 Ga. LEXIS 350 (Ga. 2010).

Cited in *Meadows v. Meadows*, 161 Ga. 90, 129 S.E. 659 (1925); *Smith v. Smith*, 167 Ga. 98, 145 S.E. 63 (1928); *Chero-Cola Co. v. May*, 169 Ga. 273, 149 S.E. 895 (1929); *Lowry v. Lowry*, 170 Ga. 349, 153 S.E. 11 (1930); *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937); *Alford v. Alford*, 189 Ga. 630, 7 S.E.2d 278 (1940); *Norvell v. Norvell*, 192 Ga. 1, 14 S.E.2d 440 (1941); *Fried v. Fried*, 211 Ga. 149, 84 S.E.2d 576 (1954); *Tolbert v. Tolbert*, 221 Ga. 159, 143 S.E.2d 743 (1965); *DuPree v. DuPree*, 224 Ga. 52, 159 S.E.2d 708 (1968); *Standridge v. Standridge*, 224 Ga. 102, 160 S.E.2d 377 (1968); *Bryant v. Bryant*, 224 Ga. 360, 162 S.E.2d 391 (1968); *Crawford v. Schelver*, 226 Ga. 105, 172 S.E.2d 686 (1970); *Butterworth v. Butterworth*, 227 Ga. 301, 180 S.E.2d 549 (1971); *Rowe v. Rowe*, 228 Ga. 302, 185 S.E.2d 69 (1971); *Sessler v. Sessler*, 230 Ga. 527, 198 S.E.2d 178 (1973); *Weaver v. Dutton*, 232 Ga. 832, 209 S.E.2d 175 (1974); *Morris v. Padgett*, 233 Ga. 750, 213 S.E.2d 647 (1975); *Mullinax v. Mullinax*, 234 Ga. 553, 216 S.E.2d 802 (1975); *Anthony v. Anthony*, 237 Ga. 753, 229 S.E.2d 609 (1976); *Anderson v. Anderson*, 237 Ga. 886, 230 S.E.2d 272 (1976); *Bisno v. Bisno*, 239 Ga. 388, 236 S.E.2d 755 (1977); *Coleman v. Coleman*, 240 Ga. 417, 240 S.E.2d 870 (1977); *Stock v. Commissioner*, 551

F.2d 614 (5th Cir. 1977); *In re Smith*, 436 F. Supp. 469 (N.D. Ga. 1977); *Taylor v. Taylor*, 243 Ga. 506, 255 S.E.2d 32 (1979); *Burns v. Rivers*, 244 Ga. 631, 261 S.E.2d 581 (1979); *Sims v. Sims*, 245 Ga. 680, 266 S.E.2d 493 (1980); *Stokes v. Stokes*, 246 Ga. 765, 273 S.E.2d 169 (1980); *Head v. Hook*, 248 Ga. 818, 285 S.E.2d 718 (1982); *Biggers v. Biggers*, 250 Ga. 248, 297 S.E.2d 257 (1982).

Factors to be Considered

Question of alimony cannot be determined by mathematical formula as the facts and circumstances in each case are different. *Worrell v. Worrell*, 242 Ga. 44, 247 S.E.2d 847 (1978).

In absence of any mathematical formula, jurors are given wide latitude in fixing the amount of alimony and child support, and to this end jurors are to use their experience as enlightened persons in judging the amount necessary for support under the evidence as disclosed by the record and all the facts and circumstances of the case. *McNally v. McNally*, 223 Ga. 246, 154 S.E.2d 209 (1967); *Worrell v. Worrell*, 242 Ga. 44, 247 S.E.2d 847 (1978).

Alimony should be adjusted to wife's necessities and consistent with husband's ability to pay. *Hilburn v. Hilburn*, 210 Ga. 497, 81 S.E.2d 1 (1954).

Necessities of the wife, when entitled to alimony, and the husband's ability to pay alimony, are the controlling factors to be considered and followed in making an allowance for alimony; thus, awards therefor which are substantially disproportionate to either should not be permitted to stand. *Fried v. Fried*, 211 Ga. 149, 84 S.E.2d 576 (1954); *Childs v. Childs*, 224 Ga. 531, 163 S.E.2d 693 (1968); *Baldwin v. Baldwin*, 226 Ga. 680, 177 S.E.2d 85 (1970); *Moon v. Moon*, 237 Ga. 635, 229 S.E.2d 440 (1976).

Controlling factors to be considered by the jury in making an award of permanent alimony and child support are the necessities of the wife and the husband's ability to pay. *McCarthy v. McCarthy*, 225 Ga. 326, 168 S.E.2d 164 (1969).

Two controlling factors in determining whether or not an alimony or child support award is excessive are the wife's and

Factors to be Considered (Cont'd)

children's need for the award and the husband's ability to pay the award. *Worrell v. Worrell*, 242 Ga. 44, 247 S.E.2d 847 (1978).

Ability to earn income is one factor which may be considered by the jury in awarding alimony to the wife, and it may award alimony on this basis although the husband may be temporarily impoverished. *Worrell v. Worrell*, 242 Ga. 44, 247 S.E.2d 847 (1978).

Expert may testify regarding a husband's future earning capacity to the extent the wife contends that differs from his present income. *Lowery v. Lowery*, 262 Ga. 20, 413 S.E.2d 731 (1992).

Property as well as income of husband is considered in determining ability to pay alimony. *Weiner v. Weiner*, 219 Ga. 44, 131 S.E.2d 561 (1963).

Portion of proceeds from future sale of nonmarital property as alimony was not error. — Award of alimony to the wife in the form of a portion of the proceeds of a future sale was proper as the award was clearly made for the wife's maintenance and support; the trial court determined that the wife's earning capacity was diminished due to an unspecified disability, pursuant to O.C.G.A. § 19-6-5, and it appeared that in practicality, the marital home was the only non-liquid asset from which an award of alimony could be made. *Smelser v. Smelser*, 280 Ga. 92, 623 S.E.2d 480 (2005).

Evidence of husband's debts is relevant in determining his financial status; evidence of a wife's debts is also relevant to a proper determination of alimony. *Kosikowski v. Kosikowski*, 240 Ga. 381, 240 S.E.2d 846 (1977).

Reasonable allowance under all circumstances is proper even though husband has no property or employment. *Mulcay v. Mulcay*, 223 Ga. 309, 154 S.E.2d 607 (1967).

Jury is authorized to consider wife's separate estate. This has reference to the estate's size and amount at the time of the dissolution of the marriage. *Howard v. Howard*, 228 Ga. 760, 187 S.E.2d 868 (1972).

Separate estate and earning capacity of

the wife should be considered by the jury in determining alimony. *Moon v. Moon*, 237 Ga. 635, 229 S.E.2d 440 (1976).

Source of wife's estate is not relevant to any issue which the jury must decide. *Howard v. Howard*, 228 Ga. 760, 187 S.E.2d 868 (1972).

Jury may also take account of spouse's sacrifice of earning potential. — If, to please the husband, the wife devotes her energy and time to the home and family, thereby sacrificing her public earning potential, the jury should be able to take these factors into consideration in awarding alimony to her. *Moon v. Moon*, 237 Ga. 635, 229 S.E.2d 440 (1976).

Wife's manner of living, her material resources, and her income, if any, are factors jury may consider in determining what amount may be necessary for the support and maintenance of the wife. *Kosikowski v. Kosikowski*, 240 Ga. 381, 240 S.E.2d 846 (1977).

Given that the financial statements of both parties and the transcript of the final hearing established that the trial court considered the length of the marriage, the wife's absence from the labor market while giving birth to and raising six children, and the disadvantages associated with the wife's late arrival into employment outside the home, the trial court did not abuse the court's discretion in awarding the wife 12 years of alimony. *Rieffel v. Rieffel*, 281 Ga. 891, 644 S.E.2d 140 (2007).

Jury may take into account wife's former position in community as the wife of the defendant husband, her manner of living, her material resources and her income, if any. *Moon v. Moon*, 237 Ga. 635, 229 S.E.2d 440 (1976).

Jury may consider social standing and luxuries of life which spouse had been enjoying and would have continued to enjoy had there been no separation. *Bodrey v. Bodrey*, 246 Ga. 122, 269 S.E.2d 14 (1980).

In determining amount of alimony, jury may also consider such factors as age and health of the parties involved. *Worrell v. Worrell*, 242 Ga. 44, 247 S.E.2d 847 (1978).

Age, health, mental resources, and other factors considered. — On the

husband's ability to pay, the jury may take into consideration his age, the condition of his health, his material resources, his present income, and any previous allowance voluntarily made by the husband for the support of the wife. *Fried v. Fried*, 211 Ga. 149, 84 S.E.2d 576 (1954).

In determining what amount may be necessary for the support and maintenance of the wife, the jury may take into consideration the wife's age, the condition of her health, her former position in the community as the wife of the defendant and her manner of living, her material resources, and her income, if any. *Fried v. Fried*, 211 Ga. 149, 84 S.E.2d 576 (1954).

Obligation by one spouse concerning child may be relevant in deciding alimony. *Kosikowski v. Kosikowski*, 240 Ga. 381, 240 S.E.2d 846 (1977).

Questions of innocence or guilt are irrelevant in fixing amount of alimony. Such matters are proper considerations in deciding whether to grant or deny alimony, but not in fixing alimony's amount. *Hall v. Hall*, 220 Ga. 677, 141 S.E.2d 400 (1965).

Jury is not authorized to consider the conduct or misconduct of either party in a suit for alimony as to the question of the amount of alimony. *McCurry v. McCurry*, 223 Ga. 334, 155 S.E.2d 378 (1967).

Lump sum alimony amount excessive when no evidence of spouse's present or future ability to pay. — Judgment for alimony in a lump sum for the benefit of the wife, which, from all the evidence, the husband could not presently pay, and under all reasonable inferences authorized by the evidence could not be paid in the future from his anticipated income was without evidence to support it, excessive and contrary to law. *Weatherford v. Weatherford*, 204 Ga. 553, 50 S.E.2d 323 (1948).

Military retirement pay as subject to alimony. — Subjecting the appellee's military pension to distribution as alimony did not conflict with the mandate of U.S. Supreme Court decision protecting military retirement benefits from distribution as community property in a divorce action since Georgia law protects the ex-spouse by awarding alimony based on need and does not grant absolute right to

one-half of such pension. *Stumpf v. Stumpf*, 249 Ga. 759, 294 S.E.2d 488 (1982).

Jury can hear evidence concerning all of the appellee's assets, including the appellee's military retirement pay, as relevant to an award of alimony, and the trial court erred when the court entered an order keeping evidence of such retirement pay from the jury. *Stumpf v. Stumpf*, 249 Ga. 759, 294 S.E.2d 488 (1982).

Contingent fee agreements are too remote, speculative, and uncertain to be considered marital assets in making an equitable division of property. *Goldstein v. Goldstein*, 262 Ga. 136, 414 S.E.2d 474 (1992).

Wife's caring for dependent child is relevant in estimating income available from her separate estate. — Wife's manner of living, her material resources, and her income, if any, are factors the jury may take into consideration in determining what amount may be necessary for her support and maintenance, thus wife's fulfilling of her maternal obligations to a dependent adult son is relevant to her manner of living and pertains directly to estimating any income she might have available from her separate estate. *McDonald v. McDonald*, 248 Ga. 702, 285 S.E.2d 711 (1982).

Burden of showing alimony obligation. — When the settlement agreement in a divorce provided that the husband would pay the wife \$200 per month alimony for six years, and would thereafter pay \$100 in alimony "permanently," and the wife subsequently remarried, the word "permanently" as used in this agreement was ambiguous and therefore insufficient to meet the exception to O.C.G.A. § 19-6-5 that when "otherwise provided" an alimony obligation does not terminate upon remarriage (obligation created prior to decision in *Daopoulos v. Daopoulos*, 257 Ga. 71, 354 S.E.2d 828 (1987)). *Edwards v. Benefield*, 260 Ga. 236, 392 S.E.2d 1 (1990).

Retirement benefits considered. — Trial court did not err in considering a husband's future retirement benefits under the Railroad Retirement Act of 1974, 45 U.S.C. § 231 et seq., as income to the husband for purposes of determining an

Factors to be Considered (Cont'd)

adequate alimony award pursuant to O.C.G.A. § 19-6-5; there was no violation of the Supremacy Clause of U.S. Const. art. VI, cl. 2, as there was no conflict with federal law by the state court's consideration of the benefits in a family law context. *Lanier v. Lanier*, 278 Ga. 881, 608 S.E.2d 213 (2005).

Denial of alimony upheld. — Wife failed to establish that a trial court manifestly abused the trial court's discretion in denying the wife's claim for alimony based on her allegations that the husband abandoned the family; failed to support the couple's minor child; and caused the marital house to go into foreclosure as there was also evidence before the trial court that the wife initiated the parties' separation; that the wife was gainfully employed and had been so throughout most of the marriage; that the wife failed to cooperate with the husband in taking steps to alleviate the family's financial problems; that the wife had mismanaged marital funds and run up extravagant bills; that the wife failed to take advantage of low-cost health insurance coverage for the couple's minor child provided by the husband's employer; and that the wife unilaterally sold or otherwise disposed of the husband's share of the couple's personal property. *Jackson v. Jackson*, 282 Ga. 459, 651 S.E.2d 92 (2007).

Award of lump-sum alimony upheld on appeal. — Trial court did not abuse the court's discretion by failing to consider the factors set forth under O.C.G.A. § 19-6-5 because a review of the bench trial transcript showed that, prior to entering a lump-sum alimony in one spouse's favor, the trial court considered extensive testimony regarding all of the relevant factors set forth in § 19-6-5(a), including both parties' employment, assets, debts, income streams, and potential for future earnings; moreover, despite the other spouse's contrary claim, the award was not entered in order to prevent the other spouse from discharging the award in bankruptcy. *Wood v. Wood*, 283 Ga. 8, 655 S.E.2d 611 (2008).

Award of alimony appropriate based on consideration of factors. — Alimony award of \$1,000 in a divorce

action was appropriate because the trial court properly considered, under O.C.G.A. § 19-6-5(a), each parties' gross income and living conditions, the duration of the marriage, and the age and physical conditions of the parties. *Arkwright v. Arkwright*, 284 Ga. 545, 668 S.E.2d 709 (2008).

Lump sum alimony award to a wife of monthly payments of \$5,000 for the first year, \$4,000 for the following two years, and \$3,000 for the final year was proper because there was evidence supporting the trial court's finding that the wife was capable of updating skills and reentering the work force, and the trial court's consideration of the parties' respective financial resources. *Patel v. Patel*, 285 Ga. 391, 677 S.E.2d 114 (2009).

Trial court did not abuse the court's discretion in setting alimony at \$1,250 per month, pursuant to O.C.G.A. §§ 19-6-1(c) and 19-6-5(a), because the trial court properly considered, inter alia, the value of the husband's pension, the overwhelming marital debt, the husband's contribution of inherited assets to the marriage, and the wife's recent promotion, accompanied by a raise in salary and benefits. *Hammond v. Hammond*, 290 Ga. 518, 722 S.E.2d 729 (2012).

Award of alimony erroneous because record completely devoid of any evidence of spouse's ability to pay. — Trial court's award of lump sum alimony in the amount of \$36,500 was erroneous because although the spouse's need for resources to meet reasonable housing desires and expected medical bills justified an award of alimony, the record was completely devoid of any evidence of the other spouse's ability to pay the lump sum alimony award; the paying spouse's separate estate consisted solely of an asset that could not be transferred or otherwise converted into cash, and a \$500 a week income. *Coker v. Coker*, 286 Ga. 20, 685 S.E.2d 70 (2009).

Court free to consider parties entire relationship including cohabitation period. — Alimony award was not improper because, inter alia, under the catchall provision of O.C.G.A. § 19-6-5(a)(8), the trial court was free to consider the parties' entire relationship,

including periods of premarital cohabitation, in determining alimony. *Sprouse v. Sprouse*, 285 Ga. 468, 678 S.E.2d 328 (2009).

Effect of Remarriage

Right to receive alimony ceases upon remarriage. *Woodward v. Woodward*, 245 Ga. 550, 266 S.E.2d 170 (1980).

Summary judgment was properly granted to a former husband in his declaratory judgment action, seeking a determination that his obligation to make "periodic alimony" payments to his former wife pursuant to the parties' divorce settlement agreement ceased upon the wife's remarriage pursuant to O.C.G.A. § 19-6-5(b) as the settlement agreement was clear and unambiguous in its designation of certain payments as a form of periodic alimony rather than as equitable distribution; contract interpretation principles under O.C.G.A. §§ 13-2-2(4) and 13-2-3 supported that interpretation of the agreement. *Crosby v. Lebert*, 285 Ga. 297, 676 S.E.2d 192 (2009).

Statute dealt with remarriage and did not apply to husband's obligations under contract between the parties, made the judgment of the court in a divorce decree, which constituted a part of the "property settlement" between the parties. *Vereen v. Arp*, 237 Ga. 241, 227 S.E.2d 331 (1976); *Hollandsworth v. Hollandsworth*, 242 Ga. 790, 251 S.E.2d 532 (1979).

The 1966 amendment to former Code 1933, § 30-209 refers only to "permanent alimony" and did not apply to "property settlement," and would not, therefore, be applicable to the provisions of a contract making property divisions. *Shepherd v. Shepherd*, 223 Ga. 609, 157 S.E.2d 268 (1967).

Provision in statute for termination of alimony on remarriage was not applicable to property settlement. *Newell v. Newell*, 237 Ga. 708, 229 S.E.2d 449 (1976).

Alimony in lump sum is in nature of property settlement, whether designated as such or as alimony. *Newell v. Newell*, 237 Ga. 708, 229 S.E.2d 449 (1976); *Hamilton v. Finch*, 238 Ga. 78, 230 S.E.2d 881 (1976); *Elliott v. Elliott*, 243

Ga. 160, 253 S.E.2d 88 (1979).

Lump sum award for alimony is not divested by remarriage when the jury has not specified otherwise. *Davis v. Welch*, 220 Ga. 515, 140 S.E.2d 199 (1965).

Statute releasing a husband from his obligation to pay permanent alimony has reference only to installment payments in the future and not to a lump sum obligation. *Eastland v. Candler*, 226 Ga. 588, 176 S.E.2d 89 (1970).

Remarriage prior to awarding of alimony bars payment of lump sum and periodic payments of alimony. *Coleman v. Coleman*, 240 Ga. 417, 240 S.E.2d 870 (1977).

Any lump sum or periodic alimony is barred by remarriage if the former wife remarries prior to the entry of the final judgment. *Kristensen v. Kristensen*, 240 Ga. 670, 242 S.E.2d 132 (1978).

Settlement agreement of parties, incorporated into divorce decree, is property settlement agreement. *Elliott v. Elliott*, 243 Ga. 160, 253 S.E.2d 88 (1979).

It was not necessary for agreement incorporated into decree to provide expressly that alimony shall cease upon remarriage because the statute expressly provided that such obligations cease upon remarriage unless otherwise provided. *Burns v. Rivers*, 244 Ga. 631, 261 S.E.2d 581 (1979).

O.C.G.A. § 19-6-5 basically applies to unperformed obligations to make installment payments of alimony. *Moore v. Moore*, 249 Ga. 27, 287 S.E.2d 185 (1982).

O.C.G.A. § 19-6-5 does not apply to unperformed obligations to effectuate property settlements. *Moore v. Moore*, 249 Ga. 27, 287 S.E.2d 185 (1982).

Installment payments under lump sum agreement incorporated in decree are due even after remarriage. *Hamilton v. Finch*, 238 Ga. 78, 230 S.E.2d 881 (1976).

Periodic payments to be made until sum certain has been paid is property settlement, and remarriage will not terminate the husband's responsibility to continue making the payments. *Wimpey v. Pope*, 246 Ga. 545, 272 S.E.2d 278 (1980).

Effect of Remarriage (Cont'd)

When installments relate to real property, the installments are items of property settlement, not terminable upon wife's remarriage. *Solomon v. Solomon*, 241 Ga. 188, 244 S.E.2d 2 (1978).

Payment of mortgage. — When the agreement between the parties does not provide for any alimony payments for the support of the wife, but is more in the nature of a property settlement, and the agreement sub judice provides for a sum certain by providing that the monthly payments "shall continue until the mortgage is full paid," the obligation to make the mortgage payments is a lump sum settlement to be paid in installments and is not permanent alimony. *Bennett v. Bennett*, 236 Ga. 764, 225 S.E.2d 264 (1976).

Section not applicable when evidence shows intent that payments continue despite remarriage. — When it appeared from the agreement itself that the parties contemplated payments made would coincide with the period of time when the children were to be supported and would survive the wife's remarriage, even though the payments were in the nature of alimony to the wife, under the facts the parties themselves provided otherwise to allow the payments to continue, and the provisions of the statute which would automatically terminate the payments upon the wife's remarriage did not apply. *Wiley v. Wiley*, 243 Ga. 271, 253 S.E.2d 750 (1979).

Express inclusion of gross amount is indicative of intent that recipient receive it without termination in the event of remarriage, etc., whereas the contrary intent is indicated when no gross amount is given. *Nash v. Nash*, 244 Ga. 749, 262 S.E.2d 64 (1979).

Provision that alimony not cease upon remarriage authorized. — Trial court was authorized to provide in a final divorce decree that alimony obligations would not cease upon wife's remarriage. *Allen v. Allen*, 265 Ga. 53, 452 S.E.2d 767 (1995).

Jury verdict different from decree. — Even though the jury's verdict did not specify that the husband's alimony obligations terminated upon the wife's remar-

riage, inclusion of such provision in the final decree was not erroneous under O.C.G.A. § 19-6-5. *Metzler v. Metzler*, 267 Ga. 892, 485 S.E.2d 459 (1997).

Court construes alimony obligation. — In deciding whether the alimony obligation terminated upon the former spouse's remarriage, the trial court must construe the alimony obligation to determine whether the parties have "provided otherwise" to avoid termination of alimony on remarriage. *Fisher v. Fredrickson*, 262 Ga. 229, 416 S.E.2d 512 (1992), overruled on other grounds, *Andrews v. Whitaker*, 265 Ga. 76, 433 S.E.2d 735 (1995).

Alimony obligation did not survive the wife's remarriage when the settlement agreement did not contain language from which it could be concluded that the alimony obligation would continue following the wife's remarriage, nor language creating an ambiguity regarding the issue. *Crosby v. Tomlinson*, 263 Ga. 522, 436 S.E.2d 8 (1993).

Resulting trust is not alimony, and right to claim the trust is not barred by remarriage of one of the parties. *Price v. Price*, 243 Ga. 4, 252 S.E.2d 402 (1979).

Father's duty to provide support and maintenance for minor children does not cease with wife's remarriage. *Wimpey v. Pope*, 246 Ga. 545, 272 S.E.2d 278 (1980).

Defendant's payments on mobile home which are in nature of support for children are not "periodic alimony." *Wimpey v. Pope*, 246 Ga. 545, 272 S.E.2d 278 (1980).

Attorney's fees are part of temporary alimony, and remarriage does not preclude such award. *Kristensen v. Kristensen*, 240 Ga. 670, 242 S.E.2d 132 (1978).

Effect of remarriage on I.R.S. presumption of alimony's deductibility. — In Georgia, the remarriage of a former wife operates to deprive a divorced husband of the I.R.S.'s presumption of tax deductible alimony status for lump-sum payments unless the divorce decree specifically provides for the continuation of alimony. *Strealdorf v. Commissioner*, 726 F.2d 1521 (11th Cir. 1984).

Property set aside as wife's separate property remains such, notwithstanding parties' remarriage to each other. — Property which, on granting of divorce, was set aside to wife and became her sole and separate property remains her separate estate, notwithstanding divorced parties are subsequently remarried to each other. *Moore v. Moore*, 249 Ga. 27, 287 S.E.2d 185 (1982).

Burden of showing alimony obligation after remarriage. — In order for a

court to hold that an instrument "provides otherwise" than the general rule that remarriage terminates permanent alimony obligations within the meaning of subsection (b) of O.C.G.A. § 19-6-5, it must expressly refer to remarriage of the recipient and specify that event shall not terminate the permanent alimony obligations created thereby and be clear and unequivocal. *Daopoulos v. Daopoulos*, 257 Ga. 71, 354 S.E.2d 828 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, §§ 683 et seq., 700.

C.J.S. — 27A C.J.S., Divorce, §§ 345, 353 et seq., 372, 378 et seq., 399, 400.

ALR. — Earning capacity or prospective earnings of husband as basis of alimony, 6 ALR 192; 139 ALR 207.

Alimony as affected by remarriage, 30 ALR 79; 64 ALR 1269; 112 ALR 246; 48 ALR2d 270.

Ability or inability to pay alimony as affected by ownership of exempt property or funds, 131 ALR 224.

Propriety of direction that specific property of husband be transferred to wife as alimony, or in lieu of, or in addition to, alimony, 133 ALR 860.

Propriety and effect of anticipatory provision in decree for alimony in respect of remarriage or other change of circumstances, 155 ALR 609.

Change in financial condition or needs of husband or wife as ground for modification of decree for alimony or maintenance, 18 ALR2d 10.

Remarriage of wife as affecting husband's obligation under separation agreement to support her or to make other money payments to her, 48 ALR2d 318; 45 ALR3d 1033.

Construction and effect of clause in divorce decree providing for payment of former wife's future medical expenses, 71 ALR2d 1236.

Propriety of reference in connection with fixing amount of alimony, 85 ALR2d 801.

Excessiveness of amount of money awarded as permanent alimony where divorce is or has been granted, 1 ALR3d 6.

Adequacy of amount of money awarded as permanent alimony where divorce is or has been granted, 1 ALR3d 123.

Spouse's acceptance of payments under alimony or property settlement or child support provisions of divorce judgment as precluding appeal therefrom, 29 ALR3d 1184.

Annulment of later marriage as reviving prior husband's obligations under alimony decree or separation agreement, 45 ALR3d 1033.

Divorce or separation: consideration of tax liability or consequences in determining alimony or property settlement provisions, 51 ALR3d 461.

Effect of remarriage of spouses to each other on permanent alimony provisions in final divorce decree, 52 ALR3d 1334.

Divorce: provision in decree that one party obtain or maintain life insurance for benefit of other party or child, 59 ALR3d 9.

Evaluation of interest in law firm or medical partnership for purposes of division of property in divorce proceedings, 74 ALR3d 621.

Provision in divorce decree requiring husband to pay certain percentage of future salary increases as additional alimony or child support, 75 ALR3d 493.

Propriety in divorce proceedings of awarding rehabilitative alimony, 97 ALR3d 740.

Spouse's professional degree or license as marital property for purposes of alimony, support, or property settlement, 4 ALR4th 1294.

Validity and enforceability of escalation clause in divorce decree relating to alimony and child support, 19 ALR4th 830.

Divorce and separation: appreciation in value of separate property during marriage without contribution by either spouse as separate or communal property, 24 ALR4th 453.

Excessiveness or adequacy of amount of money awarded as permanent alimony following divorce, 28 ALR4th 786.

Spouse's right to discovery of closely held corporation records during divorce proceeding, 38 ALR4th 145.

Divorce: excessiveness or adequacy of combined property division and spousal support awards—modern cases, 55 ALR4th 14.

Divorce: excessiveness or adequacy of trial court's property award—modern cases, 56 ALR4th 12.

Divorce and separation: attributing undisclosed income to parent or spouse for purposes of making child or spousal support award, 70 ALR4th 173.

Consideration of obligated spouse's earnings from overtime or "second job" held in addition to regular full-time employment in fixing alimony or child support awards, 17 ALR5th 143.

Divorce and separation: attorney's contingent fee contracts as marital property subject to distribution, 44 ALR5th 671.

Alimony as affected by recipient spouse's remarriage in absence of controlling specific statute, 47 ALR5th 129.

Excessiveness or inadequacy of lump-sum alimony award, 49 ALR5th 441.

Consideration of obligor's personal-injury recovery or settlement in fixing alimony or child support, 59 ALR5th 489.

Effect of same-sex relationship on right to spousal support, 73 ALR5th 599.

19-6-6. Liability after grant of alimony.

(a) When permanent alimony is granted, the party liable for alimony shall cease to be liable for any debt or contract of the former spouse of the liable party.

(b) Upon the grant of permanent alimony, the property of the liable party set apart for the support of the former spouse shall not be subject to the liable party's debts or contracts as long as the former spouse of the liable party shall live. (Orig. Code 1863, § 1697; Code 1868, § 1740; Code 1873, § 1750; Code 1882, § 1750; Civil Code 1895, § 2470; Civil Code 1910, § 2989; Code 1933, § 30-216; Ga. L. 1979, p. 466, § 20.)

RESEARCH REFERENCES

ALR. — Garnishment or attachment of property to enforce order or decree for alimony or allowance in suit for divorce or separation, 56 ALR 841.

Right of wife or child by virtue of right

to support to maintain action to set aside conveyance by husband or parent as fraudulent, without reducing claim to judgment, 164 ALR 524.

19-6-7. Interest in deceased party's estate after grant of permanent alimony.

After permanent alimony is granted, upon the death of the party liable for the alimony the other party shall not be entitled to any further interest in the estate of the deceased party by virtue of the marriage contract between the parties; however, such permanent provision shall be continued to the other party or a portion of the deceased party's

estate equivalent to the permanent provision shall be set apart to the other party. (Orig. Code 1863, § 1699; Code 1868, § 1742; Code 1873, § 1752; Code 1882, § 1752; Civil Code 1895, § 2472; Civil Code 1910, § 2991; Code 1933, § 30-218; Ga. L. 1979, p. 466, § 21.)

Law reviews. — For comment criticizing *Berry v. Berry*, 208 Ga. 285, 66 S.E.2d 336 (1951), holding death of husband ter-

minates duty to pay alimony, see 14 Ga. B.J. 240 (1951).

JUDICIAL DECISIONS

Separation agreement not addressing alimony. — Since the separation agreement entered into between the deceased and his common-law wife did not address the issue of alimony, O.C.G.A. § 19-6-7 does not apply; the agreement contained mutual promises regarding visitation, child support, and the division of the real and personal property of the parties, yet did not specifically address any matters regarding alimony or spousal maintenance. *Beals v. Beals*, 203 Ga. App. 81, 416 S.E.2d 301, cert. denied, 203 Ga. App. 905, 416 S.E.2d 301 (1992).

Regular periodical payments of alimony are terminated upon husband's death, in the absence, at least, of some stipulation in the order which would require payments after the husband's death. *Berry v. Berry*, 208 Ga. 285, 66 S.E.2d 336 (1951), for comment, see 14 Ga. B.J. 240 (1951).

When alimony is awarded solely to the wife by a decree of court, and the decree does not specifically provide that the alimony payments shall continue after the death of the husband, the wife's claim for alimony is terminated upon the husband's death. *Ramsay v. Sims*, 209 Ga. 228, 71 S.E.2d 639 (1952), overruled on other grounds, *Dolvin v. Dolvin*, 248 Ga. 439, 284 S.E.2d 254 (1981).

Obligation to pay alimony terminates upon the death of the obligor, absent, of course, a clear express agreement to the contrary. *Dolvin v. Dolvin*, 248 Ga. 439, 284 S.E.2d 254 (1981).

Valid contracts settling property enforceable after death of party. — Valid and enforceable contract may be made by a husband and wife, when they are living in a bona fide state of separation, settling all issues as to alimony for

the wife, and providing for the support of minor children. When such a contract is made, providing for the settlement of questions pertaining to the joint property, and provision is made for the support of minor children, it is a general rule that such contracts are valid and enforceable after the death of the husband. *Ramsay v. Sims*, 209 Ga. 228, 71 S.E.2d 639 (1952), overruled on other grounds, *Dolvin v. Dolvin*, 248 Ga. 439, 284 S.E.2d 254 (1981).

Doctrine of virtual or equitable legitimation. — When decedent's actions indicated that he was in the process of taking all the necessary steps to ensure that the child whom he and the appellant cohabitant had conceived would be born into a legitimate family environment, and everything necessary for his divorce from his estranged wife was complete except for the final decree, and there was clear and convincing evidence that decedent intended for his unborn child to be born into a legitimate family environment, his unexpected death will not defeat the claim of the child, who may inherit under the doctrine of virtual legitimation. *Simpson v. King*, 259 Ga. 420, 383 S.E.2d 120 (1989).

Allowance of permanent alimony bars wife of her rights to year's support from her husband's estate. *Stewart v. Stewart*, 43 Ga. 294 (1871); *Harris v. Davis*, 115 Ga. 950, 42 S.E. 266 (1902); *Hall v. First Nat'l Bank*, 89 Ga. App. 853, 81 S.E.2d 522, cert. denied, 348 U.S. 896, 75 S. Ct. 215, 99 L. Ed. 704 (1954).

If permanent alimony is either granted by judgment of a court, or the alimony suit is settled by contract between the parties, whereby she accepts money or property in settlement of the claim for permanent alimony, and such contract is not annulled

by subsequent cohabitation and reconciliation, it bars her of her right of year's support from her husband's estate, and she ceases to have any further interest in his estate in her right as wife. *McKie v. McKie*, 213 Ga. 582, 100 S.E.2d 580 (1957).

Effect of settlement contract executed in lieu of alimony. — When there was a valid contract between husband and wife, "in settlement of all claims for alimony, attorney's fees, and support of herself, which have accrued or may accrue afterwards," and when it was stipulated in the same contract that the wife released the husband from "any and all obligations to make further provision for her support," the wife had no further interest in

the husband's estate for year's support. *Gore v. Plair*, 173 Ga. 88, 159 S.E. 698 (1931).

Claim sustainable under oral agreement. — O.C.G.A. §§ 19-6-7 and 19-6-8 did not apply to bar surviving husband's claim of year's support against wife's estate because they do not encompass oral agreements that fail to provide or otherwise address alimony or support issues. *Bird v. Bishop*, 207 Ga. App. 11, 427 S.E.2d 301 (1993).

Cited in *Hayes v. Hayes*, 248 Ga. 526, 283 S.E.2d 875 (1981); *Dolvin v. Dolvin*, 248 Ga. 439, 284 S.E.2d 254 (1981); *Wilson v. Willard*, 183 Ga. App. 204, 358 S.E.2d 859 (1987); *Head v. Head*, 234 Ga. App. 469, 507 S.E.2d 214 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, § 697.

C.J.S. — 27A C.J.S., Divorce, §§ 373 et seq., 414.

ALR. — Death of husband as affecting alimony, 18 ALR 1040; 39 ALR2d 1406.

Right of wife after husband's death to enforce provision of separation agreement

for continuance of payments for her support as affected by intervening divorce decree, 147 ALR 708.

Husband's death as affecting periodic payment provision of separation agreement, 5 ALR4th 1153.

Death of obligor spouse as affecting alimony, 79 ALR4th 10.

19-6-8. Voluntary separation, abandonment, or driving off of spouse — Agreement for support as bar to alimony.

In cases of voluntary separation or in cases where one spouse, against the will of that spouse, is abandoned or driven off by the other spouse, a party voluntarily, by contract or other written agreement made with his spouse, may make an adequate provision for the support and maintenance of such spouse, consistent with the means of the party and the former circumstances of the spouse. Such an agreement shall be a bar to the right of the spouse to permanent alimony. (Orig. Code 1863, § 1694; Code 1868, § 1737; Code 1873, § 1745; Code 1882, § 1745; Civil Code 1895, § 2465; Civil Code 1910, § 2984; Code 1933, § 30-211; Ga. L. 1979, p. 466, § 16.)

Law reviews. — For article, "Conflict of Laws Between Community Property and Common Law States in Division of Marital-Property on Divorce," see 12 *Mercer L. Rev.* 287 (1961).

For note, "The Impact of the Revolution in Georgia's Divorce Law on Antenuptial Agreements," see 11 *Ga. L. Rev.* 406 (1977).

JUDICIAL DECISIONS

Applicability of section. — Statute had no application to cases after parties' agreement was made court's judgment of permanent alimony. *Stanton v. Stanton*, 223 Ga. 664, 157 S.E.2d 453 (1967).

Provisions of statute must not be confused with temporary alimony settlements. *Finch v. Finch*, 213 Ga. 199, 97 S.E.2d 576 (1957).

Voluntary deed as bar to permanent alimony is limited to two instances, voluntary separation or when the wife, against her will, is abandoned or driven off by the husband, and it contemplates the release of the husband from the wife's claims for permanent alimony. *Stanton v. Stanton*, 223 Ga. 664, 157 S.E.2d 453 (1967).

Action by wife based solely upon contract for support is not action for alimony or an "alimony case" within the constitutional provision relating to jurisdiction of the Supreme Court. *Hayes v. Hayes*, 191 Ga. 237, 11 S.E.2d 764 (1940).

Agreement for separate support allowance to wife. — Valid agreement may be made between husband and wife, contemplating immediate separation, for a separate allowance to the wife for her support. *Green v. Starling*, 203 Ga. 10, 45 S.E.2d 188 (1947).

Support contract valid whether made after separation or immediately before. — Contract providing for the wife's support which is made after a separation has taken place, or immediately before a separation which has already been determined upon, is valid and enforceable. *Richards v. Richards*, 85 Ga. App. 605, 69 S.E.2d 911 (1952).

Separation agreement void when provisions tend to promote dissolution of marriage. — Agreement pleaded by husband as a bar to the right of wife to be awarded alimony, containing provision that either party "may at any time bring his or her action for divorce, and the same will not be contested, provided the proceeding is based upon some other lawful ground than that which will involve the character or chastity of either party of this agreement," rendered the agreement void as tending to promote a dissolution of the

marriage relation, and constituted no bar to the claim of the wife for alimony in a divorce proceeding subsequently instituted by the husband. *Law v. Law*, 186 Ga. 113, 197 S.E. 272 (1938).

Estoppel when one accepts benefits under separation agreement. — When one accepts benefits under separation agreement, one is estopped to set aside divorce decree which gave rise to the agreement. *Sikes v. Sikes*, 231 Ga. 105, 200 S.E.2d 259 (1973).

Effect of voluntary cohabitation upon support agreement. — Upon subsequent voluntary cohabitation, a separation support agreement shall be annulled and set aside. *Powell v. Powell*, 196 Ga. 694, 27 S.E.2d 393 (1943).

Return of property received under agreement. — It is not necessary for wife to return property received under agreement in order for the subsequent voluntary cohabitation to render the agreement a nullity. The husband effectually gave his consent to annulling the agreement by resuming the marital status. *Powell v. Powell*, 196 Ga. 694, 27 S.E.2d 393 (1943).

Contract for installment payments enforceable by executor. — When the husband promises to pay a lump sum for the wife's support, payable in installments, and the wife dies before all the installments are paid, her executor may sue for the unpaid installments as they severally mature. *Melton v. Hubbard*, 135 Ga. 128, 68 S.E. 1101 (1910).

Decree should accurately reflect a settlement reached by the parties; therefore, the trial court cannot be allowed to make substantive additions in voluntary agreements made before the court. *Robinson v. Robinson*, 261 Ga. 330, 404 S.E.2d 435 (1991).

Claim sustainable under oral agreement. — O.C.G.A. §§ 19-6-7 and 19-6-8 did not apply to bar surviving husband's claim of year's support against wife's estate because they do not encompass oral agreements that fail to provide or otherwise address alimony or support issues. *Bird v. Bishop*, 207 Ga. App. 11, 427 S.E.2d 301 (1993).

Cited in *Gore v. Plair*, 173 Ga. 88, 159 S.E. 698 (1931); *Craig v. Craig*, 53 Ga.

App. 632, 186 S.E. 755 (1936); *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937); *Evans v. Evans*, 191 Ga. 752, 14 S.E.2d 95 (1941); *Wren v. Wren*, 199 Ga. 851, 36 S.E.2d 77 (1945); *Ridgeway v.*

Ridgeway, 224 Ga. 310, 161 S.E.2d 866 (1968); *Anderson v. Anderson*, 237 Ga. 886, 230 S.E.2d 272 (1976); *Worthington v. Worthington*, 250 Ga. 730, 301 S.E.2d 44 (1983).

RESEARCH REFERENCES

C.J.S. — 27B C.J.S., Divorce, § 391 et seq.

ALR. — What amounts to a “final division and distribution” of estate within statute allowing such in lieu of alimony, 1 ALR 1106.

Validity of separation agreement as affected by fraud, coercion, unfairness, or mistake, 5 ALR 823.

Rights and remedies as between husband and wife in respect of separation agreement invalid as contrary to public policy, 109 ALR 1174.

Validity of provision of separation

agreement for cessation or diminution of payments for wife’s support upon specified event, 4 ALR2d 732.

Parol evidence to show duration of written contract for support or maintenance, 14 ALR2d 897.

Construction and effect of provision in separation agreement that wife is to have portion of “income,” “total income,” “net income,” and the like, 79 ALR2d 609.

Divorce: power of court to modify decree for alimony or support of spouse which was based on agreement of parties, 61 ALR3d 520.

19-6-9. Voluntary separation, abandonment, or driving off of spouse — Equity may compel support.

Absent the making of a voluntary contract or other agreement, as provided in Code Section 19-6-8, and on the application of a party, the court, exercising its equitable powers, may compel the spouse of the party to make provision for the support of the party and such minor children as may be in the custody of the party. (Orig. Code 1863, § 1695; Code 1868, § 1738; Code 1873, § 1746; Code 1882, § 1746; Civil Code 1895, § 2466; Civil Code 1910, § 2985; Code 1933, § 30-212; Ga. L. 1979, p. 466, § 17.)

JUDICIAL DECISIONS

Statute was constitutional and any modification or repeal must necessarily be made by the General Assembly of Georgia and not by the court. *Murphy v. Murphy*, 232 Ga. 352, 206 S.E.2d 458 (1974), cert. denied, 421 U.S. 929, 95 S. Ct. 1656, 44 L. Ed. 2d 87 (1975).

Statute plainly provides for alimony which may be sought in the wife’s suit for divorce, her suit for alimony alone, or in a suit by the husband for divorce. The wife’s right cannot be defeated by a failure of the husband to obtain a divorce. *Ridgeway v. Ridgeway*, 224 Ga. 310, 161 S.E.2d 866 (1968).

Right to sue for alimony without suing for divorce. — Wife has right to sue her husband for alimony, after voluntary separation, without suing for divorce, and without the necessity of showing a legal residence as required in a suit for divorce. *Craig v. Craig*, 53 Ga. App. 632, 186 S.E. 755 (1936).

Court may render judgment affecting property to enforce alimony claims. — Under additional powers given by the statutes, having incidental equity jurisdiction over the res of property within its territory, a court may render a valid judgment in rem with respect to such

property when necessary to enforce the wife's claim to permanent alimony. *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937).

Personal jurisdiction over nonresident in former spouse's action to terminate alimony. — Action of nonresident wife in bringing suit in Georgia to domesticate foreign divorce decree does not constitute the "transaction of business" so as to permit Georgia courts to

assert in personam jurisdiction over her in husband's subsequent actions to terminate alimony. *Stone v. Stone*, 254 Ga. 519, 330 S.E.2d 887 (1985).

Cited in *Evans v. Evans*, 191 Ga. 752, 14 S.E.2d 95 (1941); *Kirchman v. Kirchman*, 212 Ga. 488, 93 S.E.2d 685 (1956); *Murphey v. Murphey*, 215 Ga. 19, 108 S.E.2d 872 (1959); *Mullinax v. Mullinax*, 234 Ga. 553, 216 S.E.2d 802 (1975).

RESEARCH REFERENCES

ALR. — Garnishment or attachment of property to enforce order or decree for alimony or allowance in suit for divorce or separation, 56 ALR 841.

Divorced wife's failure to comply with order or decree as affecting her right to enforce provision for alimony, 88 ALR 199.

Decree for alimony rendered in another state or foreign country as subject to enforcement by equitable remedies or by contempt proceedings, 97 ALR 1197; 18 ALR2d 862.

Jurisdiction of equity courts in the United States, without the aid of statute expressly conferring it, to entertain independent suit for alimony or separate maintenance without divorce or judicial separation, 141 ALR 399.

Court's establishment of trust to secure alimony or child support in divorce proceedings, 3 ALR3d 1170.

Power of court which denied divorce, legal separation, or annulment, to award custody or make provisions for support of child, 7 ALR3d 1096.

Father's liability for support of child furnished after divorce decree which awarded custody to mother but made no provision for support, 91 ALR3d 530.

Validity and enforceability of escalation clause in divorce decree relating to alimony and child support, 19 ALR4th 830.

Separation agreements: enforceability of provision affecting property rights upon death of one party prior to final judgment of divorce, 67 ALR4th 237.

Divorce: court's authority to institute or increase spousal support award after discharge of prior property award in bankruptcy, 87 ALR4th 353.

19-6-10. Voluntary separation, abandonment, or driving off of spouse — Petition for alimony or child support when no divorce pending — Notice; hearing; order and enforcement; equitable remedies; decree in equity; effect of filing for divorce.

When spouses are living separately or in a bona fide state of separation and there is no action for divorce pending, either party, on the party's own behalf or on the behalf of the minor children in the party's custody, if any, may institute a proceeding by petition, setting forth fully the party's case. Upon three days' notice to the other party, the judge may hear the same and may grant such order as he might grant were it based on a pending petition for divorce, to be enforced in the same manner, together with any other remedy applicable in equity, such as appointing a receiver and the like. Should the petition proceed to a hearing before a jury, the jury may render a verdict which shall

provide the factual basis for equitable relief as in Code Section 19-6-9. However, such proceeding shall be held in abeyance when a petition for divorce is filed bona fide by either party and the judge presiding has made his order on the motion for alimony. When so made, the order shall be a substitute for the aforesaid decree in equity as long as the petition is pending and is not finally disposed of on the merits. (Ga. L. 1870, p. 413, § 4; Code 1873, § 1747; Code 1882, § 1747; Civil Code 1895, § 2467; Civil Code 1910, § 2986; Code 1933, § 30-213; Ga. L. 1979, p. 466, § 18.)

Law reviews. — For note discussing Georgia's child support laws, their prob-

lems, and some proposed solutions, see 11 Ga. L. Rev. 387 (1977).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

VOLUNTARY SEPARATION

DETERMINING ALIMONY AND CHILD SUPPORT

General Consideration

Constitutionality. — Act of October 28, 1870, from which Ga. L. 1870, p. 413, was taken, was not unconstitutional as referring to more than one subject matter, or as containing matter different from that expressed in its title. An examination of the Act will show that alimony and custody of children was the only subject matter referred to therein. *Halleman v. Halleman*, 65 Ga. 476 (1880).

Intention of legislature was to deny alimony actions when divorce was pending in this state, but not to deny the right to maintain such action when a divorce action was pending in another state. *Ward v. Ward*, 223 Ga. 868, 159 S.E.2d 81 (1968).

It was clearly the legislative intention that questions of alimony shall be determined in a divorce action, if one was pending; and that an application for permanent alimony could be filed only in those instances when no divorce action was pending. *Ward v. Ward*, 223 Ga. 868, 159 S.E.2d 81 (1968).

Action for permanent alimony and action for divorce have different purposes but both grow out of the marriage relationship, and relate to the same subject matter. *Ward v. Ward*, 223 Ga. 868, 159 S.E.2d 81 (1968).

Former Code 1933, § 30-213 (see now O.C.G.A. § 19-6-10) was to be construed and applied in connection with former Code 1933, §§ 30-202, 30-203, 30-204, and 30-205 (see now O.C.G.A. § 19-6-3), which authorized the judge to grant temporary alimony in actions for divorce or actions for permanent alimony where the parties are living in a bona fide state of separation. When so considered and applied, former Code 1933, § 30-213 (see O.C.G.A. § 19-6-10) authorized the judge, on application of the wife upon three days' notice to the husband, to grant alimony. *Evans v. Evans*, 191 Ga. 752, 14 S.E.2d 95 (1941).

Former Code 1933, § 30-213 (see now O.C.G.A. § 19-6-10) should be construed and applied in connection with former Code 1933, §§ 30-211 and 30-212 (see now O.C.G.A. §§ 19-6-8 and 19-6-9), which authorize a husband by deed to make provision for his wife in lieu of alimony, but on failure to make such provision voluntarily he may be compelled to do so in equity. *Evans v. Evans*, 191 Ga. 752, 14 S.E.2d 95 (1941).

Statute plainly provided for alimony which may be sought in action for alimony alone. The wife's right cannot be defeated by a failure of the husband to obtain a divorce. *Ridgeway v. Ridgeway*, 224 Ga. 310, 161 S.E.2d 866 (1968).

Statute did not operate to deny maintenance of alimony action when divorce was pending in another state at the time the proceeding for alimony was filed in this state. *Hicks v. Hicks*, 226 Ga. 798, 177 S.E.2d 690 (1970).

Statute, insofar as the statute required personal service upon the other party, applied only when no divorce was pending at the time such action for alimony was filed and when an original action for alimony was filed and when the original action for alimony and separate maintenance was brought by the wife against the husband while the parties are living separate and apart. *Walker v. Walker*, 228 Ga. 615, 187 S.E.2d 289 (1972).

Court cannot award alimony if proceedings were not under former Code 1933, § 30-202 (see now O.C.G.A. § 19-6-3) for temporary alimony pending divorce under former Code 1933, § 30-213 (see now O.C.G.A. § 19-6-10) for alimony if no action for divorce was pending, these being the only two instances when a court can award alimony. *Henderson v. Henderson*, 86 Ga. App. 812, 72 S.E.2d 731 (1952).

Cause of separation was immaterial in a suit under this statute. *Glass v. Wynn*, 76 Ga. 319 (1886).

That cause of separation is immaterial does not establish inviolable rule that the mere fact of separation (not mutually voluntary) will give to the wife the right of alimony. *Coley v. Coley*, 128 Ga. 654, 58 S.E. 205 (1907); *Sikes v. Sikes*, 143 Ga. 314, 85 S.E. 193 (1915).

Wife cannot maintain proceeding under statute against husband who was minor, without a guardian ad litem. *Huley v. Huley*, 154 Ga. 321, 114 S.E. 184 (1922).

Joinder of parties. — In a proceeding for alimony, injunction and receiver and other necessary relief may be granted, and to this end all necessary parties may be joined as defendants with the husband. *Price v. Price*, 90 Ga. 244, 15 S.E. 774 (1892); *Kirchman v. Kirchman*, 212 Ga. 488, 93 S.E.2d 685 (1956).

General provisions regarding service of process did not apply to proceeding for alimony. In such cases there

are special statutory methods of service, and in them there are no provisions for service upon the opposite party by leaving a copy at that person's place of residence or most notorious place of abode. In these instances, personal service was necessary. *Strickland v. Willingham*, 49 Ga. App. 355, 175 S.E. 605 (1934).

Notice required by statute must be served upon defendant personally, and not upon defendant's counsel, and the service must be personal, and made by the sheriff or a deputy in order to confer upon the court jurisdiction of the defendant and the subject-matter. *Stallings v. Stallings*, 127 Ga. 464, 56 S.E. 469 (1907); *Chapman v. Chapman*, 157 Ga. 330, 121 S.E. 328 (1924).

Leaving notice at defendant's most notorious place of abode is insufficient to give the court jurisdiction. *Baldwin v. Baldwin*, 116 Ga. 471, 42 S.E. 727 (1902).

Cited in *Clark v. Clark*, 78 Ga. 79 (1886); *Giradot v. Giradot*, 170 Ga. 905, 154 S.E. 352 (1930); *Carroll v. Carroll*, 173 Ga. 310, 160 S.E. 342 (1931); *Kennedy v. Kennedy*, 182 Ga. 586, 186 S.E. 553 (1936); *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937); *McCallie v. McCallie*, 192 Ga. 699, 16 S.E.2d 562 (1941); *Williams v. Williams*, 194 Ga. 332, 21 S.E.2d 229 (1942); *Allen v. Allen*, 194 Ga. 591, 22 S.E.2d 136 (1942); *Fortson v. Fortson*, 195 Ga. 750, 25 S.E.2d 518 (1943); *Lawrence v. Lawrence*, 196 Ga. 204, 26 S.E.2d 283 (1943); *Cox v. Cox*, 197 Ga. 260, 29 S.E.2d 83 (1944); *Acree v. Acree*, 201 Ga. 359, 40 S.E.2d 54 (1946); *Dempsey v. Dempsey*, 203 Ga. 225, 46 S.E.2d 156 (1948); *Moore v. Moore*, 205 Ga. 355, 53 S.E.2d 343 (1949); *Gaither v. Gaither*, 205 Ga. 572, 54 S.E.2d 600 (1949); *Murphey v. Murphey*, 215 Ga. 19, 108 S.E.2d 872 (1959); *Kennison v. Lee*, 217 Ga. 155, 121 S.E.2d 821 (1961); *Allen v. Allen*, 227 Ga. 845, 183 S.E.2d 356 (1971).

Voluntary Separation

Wife has right to sue for alimony, after voluntary separation, without suing for divorce, and without the necessity of showing a legal residence as required in a suit for divorce. *Craig v.*

Voluntary Separation (Cont'd)

Craig, 53 Ga. App. 632, 186 S.E. 755 (1936).

By the terms of the statute, provision was made for the grant of alimony when the husband and wife shall be living separate, or shall be bona fide in a state of separation, and there shall be no action for divorce pending. *Shepherd v. Shepherd*, 236 Ga. 425, 223 S.E.2d 818 (1976).

Action for separate maintenance was separate from divorce action. — Although an action for separate maintenance and an action for divorce both grow out of the marriage relationship and relate to the same subject matter, they have different purposes and raise different questions. An action for separate maintenance is authorized when spouses are living separately or in a bona fide state of separation and there is no action for divorce pending, pursuant to O.C.G.A. § 19-6-10. *Pampattiwar v. Hinson*, 326 Ga. App. 163, 756 S.E.2d 246 (2014).

Agreement to live apart constitutes voluntary separation. — When a husband and wife agreed that she should live at her sister's (he living at a different place), and that he would support her, it amounted to a voluntary separation, and a petition for alimony could be brought. *Hawes v. Hawes*, 66 Ga. 142 (1880).

Spouse need not show grounds for divorce if bona fide voluntary separation shown. — If a wife brings an action for temporary and permanent alimony without a prayer for divorce, under former Code 1933, § 30-213 (see now O.C.G.A. § 19-6-10), and the undisputed evidence shows not only a bona fide state of separation, but that the original separation arose by mutual agreement of the parties, it was unnecessary for the wife to show cruel treatment or some other legal ground for a divorce, or that her husband had "abandoned" her or "driven her from the home," as provided by former Code 1933, §§ 30-204 and 30-210 (see now O.C.G.A. § 19-6-4), or that acts of the husband and not of herself caused the separation, in order to authorize the judge to exercise the judge's discretion and allow temporary alimony. *Fulenwider v. Fulenwider*, 188 Ga. 856, 5 S.E.2d 20 (1939).

Determining Alimony and Child Support

In actions for alimony without divorce, judges are empowered to determine care and custody of minor children pending the litigation, and judges are empowered to provide for their permanent custody thereafter. *Kniepkamp v. Richards*, 192 Ga. 509, 16 S.E.2d 24 (1941).

Alimony granted shall be suspended "when a petition for divorce is filed bona fide by either party and the judge presiding has made his order on the motion for alimony." *Shepard v. Shepard*, 236 Ga. 425, 223 S.E.2d 818 (1976).

Grant of alimony when the husband and wife shall be living separate, or shall be bona fide in a state of separation, and there shall be no action for divorce pending shall be suspended when a petition for divorce shall be filed bona fide by either party, and the judge presiding shall have made the judge's order on the motion for alimony. *Tobin v. Tobin*, 93 Ga. App. 568, 92 S.E.2d 304 (1956).

Separate maintenance orders superseded by divorce decree. — Trial court's order setting aside prior separate maintenance orders on the basis of the husband's concession as to cohabitation with the wife was superfluous since the orders that were entered in connection with the prior separate maintenance action were superseded by a final divorce decree. *Southworth v. Southworth*, 265 Ga. 671, 461 S.E.2d 215 (1995).

Custody award not necessarily superseded by divorce action. — When permanent child custody has been awarded to a party in a separate maintenance proceeding, the other party is not necessarily entitled to obtain a change of custody in a subsequent divorce action because the Child Custody Intrastate Jurisdiction Act, O.C.G.A. Art. 2, Ch. 9, T. 19, acts as a constraint. *Thompson v. Thompson*, 241 Ga. App. 616, 526 S.E.2d 576 (1999).

Prior maintenance award superseded by permanent alimony award in divorce action. — When, in a divorce case, the trial court adjudicates the issue of permanent alimony, a prior maintenance award is entirely superseded.

Browne v. Browne, 242 Ga. 107, 249 S.E.2d 594 (1978).

When a petition for divorce is filed after a separate maintenance order has been entered, an order for alimony entered in the divorce case shall be a substitute for the separate maintenance order. *Browne v. Browne*, 242 Ga. 107, 249 S.E.2d 594 (1978).

When divorce decree silent as to alimony. — When such alimony as provided for by statute had been granted the wife, and subsequently a total divorce granted the husband, but the divorce decree was silent as to alimony, the divorce decree did not have the effect of rendering the alimony decree *functus officio*. *Tobin v. Tobin*, 93 Ga. App. 568, 92 S.E.2d 304 (1956); *Shepard v. Shepard*, 236 Ga. 425, 223 S.E.2d 818 (1976).

Subsequent divorce without alimony order not defense to liability for permanent alimony previously ordered. — When a final decree of permanent alimony has been entered, to which no exception was taken, it is no defense to the husband's liability therefor that subsequently to that judgment one of the parties obtained a total divorce, in the decree for which no reference was made to alimony. *Tobin v. Tobin*, 93 Ga. App. 568, 92 S.E.2d 304 (1956).

Lump sum award part of separate estate. — Lump sum alimony or property division made in a separate maintenance action becomes part of the separate estate of the party to whom it is awarded; only a periodic alimony award is affected by the subsequent award of alimony in a divorce case. *Goodman v. Goodman*, 253 Ga. 281, 319 S.E.2d 455 (1984).

Assets acquired after separate-maintenance judgment not subject to equitable division. — Employer and employee contributions to the husband's deferred-compensation accounts, stock-option plans, and other assets acquired after a 1980 separate-maintenance judgment were not marital property subject to equitable division, regardless of whether they were categorized as newly acquired assets or as appreciation of previously awarded assets. *Goodman v. Goodman*, 257 Ga. 63, 355 S.E.2d 62 (1987).

Previous award of alimony, whether temporary or permanent, is not abated by mere filing of divorce action by the wife. *Roberts v. Roberts*, 212 Ga. 770, 95 S.E.2d 689 (1956).

Dismissal of permanent alimony action does not bar wife's right to past due temporary alimony. — Dismissal of the action for alimony does not terminate the right of the wife to enforce the installments of temporary alimony which became due before such dismissal. *Williams v. Williams*, 194 Ga. 332, 21 S.E.2d 229 (1942).

Previous award of right to temporary alimony terminates on dismissal of action. — When a wife's petition for permanent and temporary alimony was dismissed for want of prosecution, a previous award of temporary alimony to the wife, based upon such petition, terminates with such dismissal. *Williams v. Williams*, 194 Ga. 332, 21 S.E.2d 229 (1942).

Until there is proceeding by petition, judge has no jurisdiction to grant alimony under this statute. That statute contemplated a suit with process duly issued. *Wilson v. Wilson*, 170 Ga. 340, 153 S.E. 9, later appeal, 170 Ga. 341, 153 S.E. 10 (1930).

Consolidation of husband's divorce action with wife's alimony action, did not eliminate separate suit under former Code 1933, § 30-213 (see now O.C.G.A. § 19-6-10) and become merely a suit for divorce or divorce and alimony under former Code 1933, §§ 30-204 and 30-210 (see now O.C.G.A. § 19-6-4) since the granting of a divorce was necessary to sustain a verdict for alimony. *Craddock v. Foster*, 205 Ga. 534, 54 S.E.2d 406 (1949).

Prior decree refusing divorce no bar. — Verdict and decree against the wife in the suit for divorce was no bar to the allowance of alimony to her in a subsequent proceeding brought under the statute. *King v. King*, 151 Ga. 361, 106 S.E. 906 (1921); *Brisendine v. Brisendine*, 152 Ga. 745, 111 S.E. 22 (1922).

Action could proceed for alimony alone when prayer for divorce stricken. — In an action in which the petitioner prayed for divorce, equitable relief, temporary and permanent alimony, and when in the course of the proceeding

Determining Alimony and Child Support (Cont'd)

the prayer for divorce was stricken, the petition as amended could proceed as to alimony. *Estes v. Estes*, 192 Ga. 94, 14 S.E.2d 681 (1941).

When action for permanent alimony has been dismissed for want of prosecution, no further relief can be granted thereon. A petition "supplementary" to and expressly made a part of the first petition will not authorize a grant of permanent alimony or additional temporary alimony to the wife. *Williams v. Williams*, 194 Ga. 322, 21 S.E.2d 229 (1942).

Error to fail to instruct on what constitutes cruel treatment justifying separation and alimony. — Trial court erred in failing to instruct the jury as to

what would constitute such cruel treatment as would justify the wife in leaving her husband's home and thereby bring about a state of separation so as to entitle her to permanent alimony. *Atha v. Atha*, 210 Ga. 540, 81 S.E.2d 454 (1954).

After a suit was brought for permanent alimony, based on a bona fide state of separation under former Code 1933, §§ 30-2504, 30-210, and 30-213 (see now O.C.G.A. §§ 19-6-4 and 19-6-10), and the wife complained that she was compelled to leave her husband's home on account of cruel treatment, the most important part of the court's instructions must necessarily relate to the character of the acts and the conduct on the part of the husband which the jury would be authorized to find amounted to cruel treatment. *Atha v. Atha*, 210 Ga. 540, 81 S.E.2d 454 (1954).

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, §§ 633, 924.

Am. Jur. Pleading and Practice Forms. — 19 Am. Jur. Pleading and Practice Forms, Parent and Child, § 83.

C.J.S. — 27A C.J.S., Divorce, § 614.

ALR. — Jurisdiction of court of state of which neither party is a resident over suit between husband and wife for alimony or division of property rights without divorce, 74 ALR 1242.

Earning capacity or prospective earnings of husband as basis for alimony, 139 ALR 207.

Jurisdiction of equity courts in the United States, without the aid of statute expressly conferring it, to entertain independent suit for alimony or separate maintenance without divorce or judicial separation, 141 ALR 399.

Defenses available to husband in civil suit by wife for support, 10 ALR2d 466; 36 ALR4th 502.

Allowance of alimony in lump sum in action for separate maintenance without divorce, 61 ALR2d 946.

Adjudication of property rights of spouses in action for separate maintenance, support, or alimony without divorce, 74 ALR2d 316.

Power of court which denied divorce, legal separation, or annulment, to award custody or make provisions for support of child, 7 ALR3d 1096.

Excessiveness or adequacy of amount of money awarded as separate maintenance, alimony, or support for spouse without absolute divorce, 26 ALR4th 1190.

Reconciliation as affecting decree for limited divorce separation, alimony, separate maintenance, or spousal support, 36 ALR4th 502.

Divorce: excessiveness or adequacy of combined property division and spousal support awards—modern cases, 55 ALR4th 14.

19-6-11. Voluntary separation, abandonment, or driving off of spouse — Petition for alimony or child support when no divorce pending — Appeals.

A judgment of the superior court in a case brought under Code Section 19-6-10 shall be appealable on the same terms as are prescribed in divorce cases. (Ga. L. 1870, p. 413, § 5; Code 1873, § 1748; Code

1882, § 1748; Civil Code 1895, § 2468; Civil Code 1910, § 2987; Code 1933, § 30-214; Ga. L. 1946, p. 726, § 1.)

JUDICIAL DECISIONS

Appeals in temporary alimony cases generally should not be taken unless the trial court committed grievous error or a gross abuse of discretion. *Wilbanks v. Wilbanks*, 238 Ga. 660, 234 S.E.2d 915 (1977).

Cited in *Walker v. Walker*, 178 Ga. 663, 173 S.E. 828 (1934); *Grimmett v. Barnwell*, 184 Ga. 461, 192 S.E. 191 (1937); *Langston v. Langston*, 189 Ga. 120, 5 S.E.2d 336 (1939).

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, § 750.

C.J.S. — 27B C.J.S., Divorce, § 488.

ALR. — Remarriage as affecting right to appeal from divorce decree, 29 ALR3d 1167.

Spouse's acceptance of payments under alimony or property settlement or child support provisions of divorce judgment as precluding appeal therefrom, 29 ALR3d 1184.

19-6-12. Voluntary separation, abandonment, or driving off of spouse — Effect of subsequent cohabitation between spouses on permanent alimony.

The subsequent voluntary cohabitation of spouses, where there has been no total divorce between them, shall annul and set aside all provision made either by deed or decree for permanent alimony; provided, however, that the rights of children under any deed of separation or voluntary provision or decree for alimony shall not be affected by such subsequent voluntary cohabitation of the spouses. (Orig. Code 1863, § 1698; Code 1868, § 1741; Code 1873, § 1751; Code 1882, § 1751; Civil Code 1895, § 2471; Civil Code 1910, § 2990; Code 1933, § 30-217.)

JUDICIAL DECISIONS

Statute applies when two events occur: when parties (1) while married to each other, (2) voluntarily cohabit with each other. *Travis v. Travis*, 227 Ga. 406, 181 S.E.2d 61 (1971).

When section not applicable. — O.C.G.A. § 19-6-12 is not applicable to cohabitation of a former husband and wife. *Upton v. Duck*, 249 Ga. 267, 290 S.E.2d 92 (1982).

Voluntary cohabitation subsequent to entry of separate maintenance judgment. — Court rejected the contention that, under O.C.G.A. § 19-6-12, the

voluntary cohabitation of spouses, not divorced, subsequent to entry of a separate maintenance judgment, annuls and sets aside all provisions made by the deed or decree in the separate maintenance action (except as to the rights of any children). *Goodman v. Goodman*, 254 Ga. 703, 334 S.E.2d 179 (1985).

Statute is not applicable to situations involving total divorce and remarriage of the same parties. *Travis v. Travis*, 227 Ga. 406, 181 S.E.2d 61 (1971).

O.C.G.A. § 19-6-12 operates so as to annul provisions for permanent alimony

only if there has been subsequent voluntary cohabitation of husband and wife during their first marriage. It does not annul permanent alimony provisions if parties obtain divorce and subsequently remarry and cohabit with each other. *Moore v. Moore*, 249 Ga. 27, 287 S.E.2d 185 (1982).

Property set aside as wife's separate property remains such. — Property which, on granting of divorce, was set aside to wife and became her sole and separate property remains her separate estate, notwithstanding divorced parties are subsequently remarried to each other. *Moore v. Moore*, 249 Ga. 27, 287 S.E.2d 185 (1982).

Statute was applicable to temporary alimony, and the order for temporary alimony should be revoked on motion and proof of subsequent cohabitation. *Weeks v. Weeks*, 160 Ga. 369, 127 S.E. 772 (1925).

Subsequent voluntary cohabitation will render void a judgment for temporary alimony and attorney's fees for representing the wife in the alimony proceedings. *Mosely v. Mosely*, 181 Ga. 543, 182 S.E. 849 (1935).

"Cohabitation" means dwelling or being together as man and wife. *Colvin v. Colvin*, 211 Ga. 592, 87 S.E.2d 390 (1955).

Voluntary cohabitation without living in common place of abode. — If there was reconciliation in good faith upon the part of the husband and wife, and it was their intention to cohabit as husband and wife, and acting upon that reconciliation and intention, they resumed their marital status and lived together as husband and wife, there was cohabitation within the meaning of the statute. *Colvin v. Colvin*, 211 Ga. 592, 87 S.E.2d 390 (1955).

"Deed" includes all contracts or agreements whereby wife (now spouse) has bona fide released her husband from her claims against him for permanent alimony which she acquired by virtue of the marriage relation. *Powell v. Powell*, 196 Ga. 694, 27 S.E.2d 393 (1943).

Upon subsequent voluntary cohabitation of the husband and wife all provisions made for permanent alimony, whether by deed as used in the strict sense of a land

conveyance, or in its broader sense of any written instrument under seal, simple contract, or decree of court, shall be annulled and set aside. *Powell v. Powell*, 196 Ga. 694, 27 S.E.2d 393 (1943).

Effect of subsequent voluntary cohabitation on permanent alimony. — Subsequent voluntary cohabitation annuls and sets aside all provisions made for permanent alimony for the wife (now either spouse). *Brown v. Brown*, 210 Ga. 233, 78 S.E.2d 516 (1953).

When estranged spouses reconcile and voluntarily resume cohabitation, they have restored their original marital status as fully as if the separation had not occurred, and with it they assume all the duties, obligations, and liabilities imposed by law incidental to the relation including the husband's obligation to support and maintain his wife. *Powell v. Powell*, 196 Ga. 694, 27 S.E.2d 393 (1943).

Voluntary cohabitation insufficient to annul earlier property settlement. — Voluntary cohabitation was insufficient to annul an earlier separation agreement since there was no evidence showing that such settlement was in the nature of alimony, and the separation agreement itself foreclosed any award of alimony to the parties; O.C.G.A. § 19-6-12 provided authority to set aside a provision made in a separation agreement for permanent alimony alone upon cohabitation after the execution of the agreement and before total divorce. *Adcock v. Adcock*, 259 Ga. App. 514, 577 S.E.2d 842 (2003).

Good faith required for cohabitation to annul separation agreement. — To annul separation agreement, cohabitation relied upon must have been entered into in good faith and not as a scheme merely to avoid payment of alimony. *Hill v. Guest*, 216 Ga. 679, 119 S.E.2d 19 (1961).

Effect of cohabitation upon award of attorney's fees. — Cohabitation will annul decree, not only as to alimony, but also as to attorney's fees. In this respect there is no difference between permanent and temporary alimony and incidental allowance of attorney's fees. *Hamby v. Pye*, 195 Ga. 366, 24 S.E.2d 201 (1943).

Property need not be returned for cohabitation to render agreement void. — It is not necessary to return

property received under agreement for voluntary cohabitation to render it null. The husband effectually gave his consent to annulling the agreement by resuming the marital status. *Powell v. Powell*, 196 Ga. 694, 27 S.E.2d 393 (1943).

Deed made in consideration of wife's agreement to resume marital relations was not rendered void by the subsequent cohabitation of the husband and wife, under the provisions of the statute. *Lemon v. Lemon*, 141 Ga. 448, 81 S.E. 118 (1914); *Young v. Young*, 150 Ga. 515, 104 S.E. 149 (1920); *McClain v. McClain*, 237 Ga. 80, 227 S.E.2d 5 (1976).

Cases when spouses adjust alimony, without resuming marital relation, do not fall within the statute since those cases do not involve the same principle of public policy. *Hamby v. Pye*, 195 Ga. 366, 24 S.E.2d 201 (1943).

Illicit relation between former spouses after divorce will not invalidate decree for alimony. *Hamby v. Pye*, 195 Ga. 366, 24 S.E.2d 201 (1943).

Transfer of property not annulled when not alimony. — Since there was no evidence appearing in the record that husband transferred the residence as alimony, the parties' subsequent reconciliation would not annul the conveyance. *McKissick v. McKissick*, 244 Ga. 425, 260 S.E.2d 334 (1979).

When the husband and wife entered into a separation agreement that created a trust for the minor children of the parties without any right to revoke retained, this created an executory trust irrevocable without the beneficiaries' consent, and the subsequent cohabitation of husband and wife cannot affect the rights of the children. *Watkins v. Watkins*, 64 Ga. App. 344, 13 S.E.2d 100 (1941).

Effect of subsequent cohabitation of spouses upon rights of children. — Subsequent cohabitation of spouses does not affect rights of children under any deed of separation or voluntary provisions for alimony. *Kiser v. Kiser*, 214 Ga. 402, 105 S.E.2d 220 (1958).

Deed cannot be canceled as a conveyance for support of the children, even though the alleged subsequent cohabitation of the grantor and grantee annulled and set aside the deed as to the alimony

arrangement for the wife. *Kiser v. Kiser*, 214 Ga. 402, 105 S.E.2d 220 (1958).

Remainder interest vested in children not affected by reconciliation. — When a man who has separated from his wife executes a deed conveying land to her for her life, with remainder over to their children, in consideration of the wife's agreement to make no further claim for alimony, and such deed is duly recorded, the remainder estate is vested, and the rights of the children as remaindermen are not affected by subsequent resumption of the marital relations between the husband and the wife. Nor is such remainder affected by subsequent possession of the land by the husband for a number of years exceeding the statutory prescriptive period. *Clary v. Thornton*, 177 Ga. 833, 171 S.E. 704 (1933).

Proceeding to set aside alimony judgment after cohabitation resumed. — Proceeding to avoid and set aside a verdict and decree for permanent alimony upon the ground that the married pair have resumed cohabitation and are not living in a state of bona fide separation is properly instituted by a petition addressed to the superior court in which such verdict and decree was rendered. *Henderson v. Henderson*, 170 Ga. 457, 153 S.E. 182 (1930).

Separate maintenance orders superseded by divorce decree. — Trial court's order setting aside prior separate maintenance orders on the basis of husband's concession as to cohabitation with wife was superfluous since the orders that were entered in connection with the prior separate maintenance action were superseded by a final divorce decree. *Southworth v. Southworth*, 265 Ga. 671, 461 S.E.2d 215 (1995).

Cited in *Mosely v. Mosely*, 181 Ga. 543, 182 S.E. 849 (1935); *Thomas v. Smith*, 185 Ga. 243, 194 S.E. 502 (1937); *Smith v. Smith*, 187 Ga. 743, 2 S.E.2d 417 (1939); *Eskew v. Eskew*, 192 Ga. 104, 14 S.E.2d 750 (1941); *Moss v. Moss*, 200 Ga. 8, 36 S.E.2d 431 (1945); *Levine v. Levine*, 204 Ga. 313, 49 S.E.2d 814 (1948); *Wright v. Wright*, 205 Ga. 524, 54 S.E.2d 596 (1949); *Hall v. First Nat'l Bank*, 89 Ga. App. 853, 81 S.E.2d 522 (1954); *Mylius v. Mylius*, 91 Ga. App. 1, 84 S.E.2d 679 (1954); *Kiser v.*

Georgia Power Co., 126 Ga. App. 551, 191 S.E.2d 311 (1972).

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, § 705.

C.J.S. — 27A C.J.S., Divorce, § 481.

ALR. — Effect of remarriage of spouses

to each other on permanent alimony provisions in final divorce decree, 52 ALR3d 1334.

19-6-13. Liability of parents for necessities furnished to children pending voluntary provision, order, or decree.

Until otherwise provided voluntarily or by decree or order of a court, each party shall be liable to third persons for the board and support and for all necessities furnished to or for the benefit of the parties' children. (Orig. Code 1863, § 1696; Code 1868, § 1739; Code 1873, § 1749; Code 1882, § 1749; Civil Code 1895, § 2469; Civil Code 1910, § 2988; Code 1933, § 30-215; Ga. L. 1979, p. 466, § 19.)

Law reviews. — For note, "Determining Eligibility for Year's Support in Georgia: The Tension Between Status and De-

pendence Requirements," see 22 Ga. L. Rev. 1167 (1988).

JUDICIAL DECISIONS

Purpose and intent of statute was to relieve father (now both spouses) of common-law liability to support minor child or children, and substitute therefor a liability by virtue of a court decree. *Thomas v. Holt*, 209 Ga. 133, 70 S.E.2d 595 (1952); *Booker v. Booker*, 219 Ga. 358, 133 S.E.2d 353 (1963); *Clark v. Clark*, 228 Ga. 838, 188 S.E.2d 487 (1972).

What are "necessaries" is question for determination of jury according to the circumstances and condition of life of the children. *Madden v. Keith*, 146 Ga. App. 13, 245 S.E.2d 350 (1978).

Necessary hospital and medical services and ordinary funeral expenses are "necessaries" for which the child's parent is liable, in the absence of any special contract by which those services are furnished on the account of another. *Blue Ridge Park Nurseries v. Owen*, 41 Ga. App. 98, 152 S.E. 485 (1930).

Measure of award for period prior to paternity adjudication. — When the court denied a request by the mother of a child for an award of back support from the father for those periods during the

child's life, before paternity was established, when she had not been receiving public assistance benefits, the amount of the back support to which she was entitled was not to be measured by the father's ability to pay during the periods in question, but by the expenses actually incurred by the mother on the child's behalf. *Weaver v. Chester*, 195 Ga. App. 471, 393 S.E.2d 715 (1990).

Husband's responsibility for children's support did not extend to awarding title to property. He was not required to settle an estate upon them. *Clark v. Clark*, 228 Ga. 838, 188 S.E.2d 487 (1972).

Creditor has no lien. — One furnishing the wife with necessities as set out in statute stood on the same plane as any other creditor of the husband, and had no lien which he can assert on property of the husband sold to a bona fide purchaser for value before his claim has been reduced to judgment. *Lamar v. Jennings*, 69 Ga. 392 (1882).

Alleging cause of action. — Allegation that a husband and father failed to supply his wife and daughter with neces-

saries, and that they were furnished by the plaintiff at the request of the wife and mother, set forth a cause of action under the statute. *Humphreys v. Bush*, 118 Ga. 628, 45 S.E. 911 (1903).

Cited in *Levine v. Seley*, 217 Ga. 384, 123 S.E.2d 1 (1961); *Barnett v. Barnett*, 231 Ga. 808, 204 S.E.2d 168 (1974).

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, §§ 609, 610, 613.
C.J.S. — 27C C.J.S., Divorce, § 614.
ALR. — Civil liability of father for necessities furnished to child taken from home by mother, 32 ALR 1466.
Nature of care contemplated by statute

imposing general duty to care for indigent relatives, 92 ALR2d 348.
Propriety of decree in proceeding between divorced parents to determine mother’s duty to pay support for children in custody of father, 98 ALR3d 1146.

19-6-14. Child support and custody pending final divorce; effect on liability to third persons for necessities.

Pending a final judgment in an action for divorce, the judge presiding may grant as alimony a sum sufficient for the support of the children of the parties. The judge may also hear and determine who shall be entitled to the care and custody of the children until the final judgment in the case. If a sum is awarded for the support of the children, the party who is required to pay the support shall not be liable to third persons for necessities furnished to the children. (Ga. L. 1870, p. 413, § 1; Code 1873, § 1741; Code 1882, § 1741; Civil Code 1895, § 2461; Civil Code 1910, § 2980; Code 1933, § 30-206; Ga. L. 1979, p. 466, § 11.)

Law reviews. — For article, “Tax Aspects of Divorce and Separation and the Innocent Spouse Rules,” see 3 Ga. St. U.L. Rev. 201 (1987).

For note discussing Georgia’s child support laws, their problems, and some proposed solutions, see 11 Ga. L. Rev. 387 (1977).

JUDICIAL DECISIONS

Statute was constitutional and any modification or repeal must necessarily be made by the General Assembly of Georgia and not by the court. *Murphy v. Murphy*, 232 Ga. 352, 206 S.E.2d 458 (1974), cert. denied, 421 U.S. 929, 95 S. Ct. 1656, 44 L. Ed. 2d 87 (1975).
Former Code 1933, § 30-202 et seq. (see now O.C.G.A. §§ 19-6-3 and 19-6-14) construed together, authorized applications for temporary alimony, when a suit for divorce was pending, and such a petition did not require a

new process returnable to any other term of court. *Luke v. Luke*, 154 Ga. 800, 115 S.E. 666 (1923).
Section does not preclude order nisi. — There was nothing in the statute that required ruling that judge could not grant order nisi when the petition was presented to the judge and was duly filed on the following day. *Sellers v. Sellers*, 175 Ga. 47, 164 S.E. 769 (1932).
Superior courts of this state have subject matter jurisdiction over issues of child custody. *Foltz v. Foltz*, 238 Ga.

193, 232 S.E.2d 66 (1977).

Child custody determined by judge.

— Judges of superior courts are empowered to determine who shall be entitled to care and custody of the minor children pending the litigation. *Kniepkamp v. Richards*, 192 Ga. 509, 16 S.E.2d 24 (1941).

Judge has proper jurisdiction to award temporary custody although defendant resides in different county.

— Under proper construction of order of the court at interlocutory hearing, awarding custody of children to wife, such disposition was temporary and not permanent, and judge at chambers, and in a county other than that in which the defendant resides, has jurisdiction in an action for divorce and custody of children, when proper notice has been given to the defendant, to award custody of the children pending the litigation. *Moody v. Moody*, 193 Ga. 699, 19 S.E.2d 504 (1942).

Court not bound by previous judgment in habeas corpus. — Judge, in determining custody of children, is not bound by previous judgment in habeas corpus between the same parties. *Zachry v. Zachry*, 140 Ga. 479, 79 S.E. 115 (1913).

Discretion given trial judge in temporary award of custody pending divorce is broad as long as the case is in the bosom of the court and no permanent custody has been granted as in the final divorce. Therefore, the trial judge may, on the judge's own motion, change the custody of the children even in a hearing set to hear contempt. *Mathews v. Mathews*, 230 Ga. 779, 199 S.E.2d 179 (1973).

Court's award of custody not disturbed unless discretion abused. — Award of temporary alimony, attorney's fees, and custody of the children, although made on conflicting evidence, will not be disturbed if it does not appear that the discretion of the trial court was abused. *Moody v. Moody*, 193 Ga. 699, 19 S.E.2d 504 (1942).

Duration of trial judge jurisdiction over child custody matters. — Trial judge can exercise power regarding custody only during period divorce is pending. When the case is terminated without a divorce being granted to either of the parties, the court cannot exercise this

power. This power is one incident to the divorce proceeding. *Brinson v. Jenkins*, 207 Ga. 218, 60 S.E.2d 440 (1950).

Enforcement of temporary child support and custody order through contempt proceedings. — Temporary order regarding child support and custody binding parties pending decision is enforceable through contempt proceedings pending review of the divorce judgment in this court. *Walker v. Walker*, 239 Ga. 175, 236 S.E.2d 263 (1977).

Until final decree is entered, judge may modify orders and transfer possession of children from the persons to whom custody was originally granted and commit them into the care of other and different parties. *Graham v. Graham*, 219 Ga. 193, 132 S.E.2d 66 (1963).

Judgment denying temporary alimony is appealable and error may be assigned on temporary custody order included in the same order, without reference to the appealability of the custody order standing alone. *Gray v. Gray*, 226 Ga. 767, 177 S.E.2d 575 (1970).

Children need not be brought personally into court. — It is not necessary, at an interlocutory hearing in an action for divorce, to entitle the court to award the custody of children of the parties, that such children be brought personally into court. *Moody v. Moody*, 193 Ga. 699, 19 S.E.2d 504 (1942).

When judge places children in possession of third parties, such parties are not parties to divorce, but are mere temporary custodians of the children, agents of the court, appointed for the convenience of the judge to aid the judge in seeing that the children are adequately cared for until the judge's further order. The revocation of such an order by one subsequently entered, while the divorce case is still pending, cannot be made the subject of an appeal by the parties to whom the children were temporarily entrusted. *Graham v. Graham*, 219 Ga. 193, 132 S.E.2d 66 (1963).

Final award of custody can ordinarily be made only after divorce has been granted. *Brinson v. Jenkins*, 207 Ga. 218, 60 S.E.2d 440 (1950).

When settlement between parties not bar to support under section. — Settlement entered into between husband

and wife whereby the husband was released from all future claims for temporary and permanent alimony, but making no provisions for a minor child, will not operate as a bar to an action for support of such minor child. *Johnson v. Johnson*, 131 Ga. 606, 62 S.E. 1044 (1908); *Norrell v. Norrell*, 138 Ga. 64, 74 S.E. 757 (1912).

Rules of evidence need not be strictly enforced in temporary alimony, child support, and custody hearings. *Wilbanks v. Wilbanks*, 238 Ga. 660, 234 S.E.2d 915 (1977).

Cited in *Ray v. Ray*, 109 Ga. 465, 34 S.E. 562 (1899); *Waycaster v. Waycaster*, 150 Ga. 75, 102 S.E. 353 (1920); *Dalton v. Dalton*, 170 Ga. 502, 153 S.E. 22 (1930); *Rozetta v. Banks*, 183 Ga. 701, 189 S.E. 513 (1937); *Adams v. Adams*, 191 Ga. 537, 13 S.E.2d 173 (1941); *Loggins v. Loggins*, 191 Ga. 779, 14 S.E.2d 91 (1941); *Fortson v. Fortson*, 195 Ga. 750, 25 S.E.2d 518 (1943); *Fortson v. Fortson*, 200 Ga. 116, 35 S.E.2d 896 (1945); *Hodges v. Hodges*, 77 Ga. App. 86, 47 S.E.2d 823 (1948); *Murray*

v. Murray, 206 Ga. 702, 58 S.E.2d 420 (1950); *Burton v. Furcron*, 207 Ga. 637, 63 S.E.2d 650 (1951); *Murphey v. Murphey*, 215 Ga. 19, 108 S.E.2d 872 (1959); *Bartlett v. Bartlett*, 99 Ga. App. 770, 109 S.E.2d 821 (1959); *Hume v. Smith*, 101 Ga. App. 452, 114 S.E.2d 151 (1960); *Kennison v. Lee*, 217 Ga. 155, 121 S.E.2d 821 (1961); *Hewlett v. Hewlett*, 220 Ga. 656, 140 S.E.2d 898 (1965); *Minchew v. Minchew*, 222 Ga. 593, 151 S.E.2d 144 (1966); *Foster v. Foster*, 230 Ga. 658, 198 S.E.2d 881 (1973); *Mullinax v. Mullinax*, 234 Ga. 553, 216 S.E.2d 802 (1975); *Wilbanks v. Wilbanks*, 238 Ga. 660, 234 S.E.2d 915 (1977); *Walker v. Walker*, 239 Ga. 175, 236 S.E.2d 263 (1977); *Ford v. Ford*, 243 Ga. 763, 256 S.E.2d 446 (1979); *Dolvin v. Dolvin*, 248 Ga. 439, 284 S.E.2d 254 (1981); *Baca v. Baca*, 256 Ga. App. 514, 568 S.E.2d 746 (2002); *Long v. Long*, 303 Ga. App. 215, 692 S.E.2d 811 (2010); *Segars v. State*, 309 Ga. App. 732, 710 S.E.2d 916 (2011).

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, §§ 587, 609, 610, 613, 924.

C.J.S. — 27C C.J.S., Divorce, § 614.

ALR. — Validity of agreement by parent to surrender custody of child in consideration of promise to leave property to child, 15 ALR 223.

Attempt to bastardize child as affecting right to custody of the child, 37 ALR 531.

Jurisdiction of court in divorce suit to award custody of child as affected by orders in, or pendency of, proceedings in habeas corpus for custody of child, 110 ALR 745.

Right of wife in divorce suit to recover for expenses incurred in support of child during period of separation prior to commencement of suit, 113 ALR 1103.

Education as element in allowance for benefit of child in decree of divorce or separation, 133 ALR 902; 56 ALR2d 1207.

Induction into military service of one to whom custody of children has been awarded in divorce suit, 151 ALR 1498; 155 ALR 1477; 156 ALR 1476; 157 ALR 1472; 158 ALR 1489; 158 ALR 1490.

Extraterritorial effect of provision in decree of divorce as to custody of child, 160 ALR 400.

Jurisdiction of trial or appellate court in respect of custody of children pending appeal from order or decree in divorce suit, 163 ALR 1319.

Jurisdiction to award custody of child having legal domicile in another state, 4 ALR2d 7.

Nonresidence as affecting one's right to custody of child, 15 ALR2d 432.

Father's duty under divorce or separation decree to support child as affected by latter's induction into military service, 20 ALR2d 1414.

Marriage of minor child as terminating support provisions in divorce or similar decree, 58 ALR2d 355.

"Split," "divided," or "alternate" custody of children, 92 ALR2d 695.

Court's establishment of trust to secure alimony or child support in divorce proceedings, 3 ALR3d 1170.

Power of court which denied divorce, legal separation, or annulment, to award custody or make provisions for support of child, 7 ALR3d 1096.

Award of custody of child to parent against whom divorce is decreed, 23 ALR3d 6.

Award of custody of child where contest is between child's father and grandparent, 25 ALR3d 7.

Award of custody of child where contest is between child's mother and grandparent, 29 ALR3d 366.

Spouse's acceptance of payments under alimony or property settlement or child support provisions of divorce judgment as precluding appeal therefrom, 29 ALR3d 1184.

Propriety of decree in proceeding between divorced parents to determine mother's duty to pay support for children in custody of father, 98 ALR3d 1146.

Parent's physical disability or handicap as factor in custody award or proceedings, 3 ALR4th 1044.

Race as factor in custody award or proceedings, 10 ALR4th 796.

Necessity of requiring presence in court of both parties in proceedings relating to

custody or visitation of children, 15 ALR4th 864.

Religion as factor in child custody and visitation cases, 22 ALR4th 971.

Excessiveness or adequacy of money awarded as child support, 27 ALR4th 864.

Court-authorized permanent or temporary removal of child by parent to foreign country, 30 ALR4th 548.

Right to credit on child support payments for social security of other government dependency payments made for benefit of child, 34 ALR5th 447.

Appealability of interlocutory or pendente lite order for temporary child custody, 82 ALR5th 389.

Right to credit on child support arrearages for time parties resided together after separation or divorce, 104 ALR5th 605.

Right to credit against child support arrearages for time child spent in custody of noncustodial parent, other than for visitation or under court order, without custodial parent's approval, 108 ALR5th 359.

19-6-15. Child support in final verdict or decree; guidelines for determining amount of award; continuation of duty to provide support; duration of support.

(a) **Definitions.** As used in this Code section, the term:

(1) Reserved.

(2) "Adjusted income" means the determination of a parent's monthly income, calculated by deducting from that parent's monthly gross income one-half of the amount of any applicable self-employment taxes being paid by the parent, any preexisting order for current child support which is being paid by the parent, and any theoretical child support order for other qualified children, if allowed by the court. For further reference see paragraph (5) of subsection (f) of this Code section.

(3) "Basic child support obligation" means the monthly amount of support displayed on the child support obligation table which corresponds to the combined adjusted income and the number of children for whom child support is being determined.

(4) "Child" means child or children.

(5) Reserved.

(6) "Child support obligation table" means the chart in subsection (o) of this Code section.

(6.1) "Child support services" means the agency within the Department of Human Services which provides and administers child support services.

(7) "Combined adjusted income" means the amount of adjusted income of the custodial parent added to the amount of adjusted income of the noncustodial parent.

(8) "Court" means a judge of any court of record or an administrative law judge of the Office of State Administrative Hearings.

(9) "Custodial parent" means the parent with whom the child resides more than 50 percent of the time. Where a custodial parent has not been designated or where a child resides with both parents an equal amount of time, the court shall designate the custodial parent as the parent with the lesser support obligation and the other parent as the noncustodial parent. Where the child resides equally with both parents and neither parent can be determined as owing a greater amount than the other, the court shall determine which parent to designate as the custodial parent for the purpose of this Code section.

(10) "Deviation" means an increase or decrease from the presumptive amount of child support if the presumed order is rebutted by evidence and the required findings of fact are made by the court pursuant to subsection (i) of this Code section.

(11) "Final child support order" means the presumptive amount of child support adjusted by any deviations.

(12) "Gross income" means all income to be included in the calculation of child support as set forth in subsection (f) of this Code section.

(13) "Health insurance" means any general health or medical policy. For further reference see paragraph (2) of subsection (h) of this Code section.

(14) "Noncustodial parent" means the parent with whom the child resides less than 50 percent of the time or the parent who has the greater payment obligation for child support. Where the child resides equally with both parents and neither parent can be determined as owing a lesser amount than the other, the court shall determine which parent to designate as the noncustodial parent for the purpose of this Code section.

(15) "Nonparent custodian" means an individual who has been granted legal custody of a child, or an individual who has a legal right to seek, modify, or enforce a child support order.

(16) "Parent" means a person who owes a child a duty of support pursuant to Code Section 19-7-2.

(17) "Parenting time deviation" means a deviation allowed for the noncustodial parent based upon the noncustodial parent's court ordered visitation with the child. For further reference see subsections (g) and (i) of this Code section.

(18) "Preexisting order" means:

(A) An order in another case that requires a parent to make child support payments for another child, which child support the parent is actually paying, as evidenced by documentation as provided in division (f)(5)(B)(iii) of this Code section; and

(B) That the date and time of filing with the clerk of court of the initial order for each such other case is earlier than the date and time of filing with the clerk of court of the initial order in the case immediately before the court, regardless of the age of any child in any of the cases.

(19) "Presumptive amount of child support" means the basic child support obligation including health insurance and work related child care costs.

(20) "Qualified child" or "qualified children" means any child:

(A) For whom the parent is legally responsible and in whose home the child resides;

(B) That the parent is actually supporting;

(C) Who is not subject to a preexisting order; and

(D) Who is not before the court to set, modify, or enforce support in the case immediately under consideration.

Qualified children shall not include stepchildren or other minors in the home that the parent has no legal obligation to support.

(21) "Split parenting" can occur in a child support case only if there are two or more children of the same parents, where one parent is the custodial parent for at least one child of the parents, and the other parent is the custodial parent for at least one other child of the parents. In a split parenting case, each parent is the custodial parent of any child spending more than 50 percent of the time with that parent and is the noncustodial parent of any child spending more than 50 percent of the time with the other parent. A split parenting situation shall have two custodial parents and two noncustodial parents, but no child shall have more than one custodial parent or noncustodial parent.

(22) "Theoretical child support order" means a hypothetical child support order for qualified children calculated as set forth in subparagraph (f)(5)(C) of this Code section which allows the court to

determine the amount of child support as if a child support order existed.

(23) “Uninsured health care expenses” means a child’s uninsured medical expenses including, but not limited to, health insurance copayments, deductibles, and such other costs as are reasonably necessary for orthodontia, dental treatment, asthma treatments, physical therapy, vision care, and any acute or chronic medical or health problem or mental health illness, including counseling and other medical or mental health expenses, that are not covered by insurance. For further reference see paragraph (3) of subsection (h) of this Code section.

(24) “Work related child care costs” means expenses for the care of the child for whom support is being determined which are due to employment of either parent. In an appropriate case, the court may consider the child care costs associated with a parent’s job search or the training or education of a parent necessary to obtain a job or enhance earning potential, not to exceed a reasonable time as determined by the court, if the parent proves by a preponderance of the evidence that the job search, job training, or education will benefit the child being supported. The term shall be projected for the next consecutive 12 months and averaged to obtain a monthly amount. For further reference see paragraph (1) of subsection (h) of this Code section.

(25) “Worksheet” or “child support worksheet” means the document used to record information necessary to determine and calculate monthly child support. For further reference see subsection (m) of this Code section.

(b) **Process of calculating child support.** Pursuant to this Code section, the determination of monthly child support shall be calculated as follows:

(1) Determine the monthly gross income of both the custodial parent and the noncustodial parent. Gross income may include imputed income, if applicable. The determination of monthly gross income shall be entered on the Child Support Schedule A — Gross Income;

(2) Adjust each parent’s monthly gross income by deducting the following from the parents’ monthly gross income and entering it on the Child Support Schedule B — Adjusted Income if any of the following apply:

- (A) One-half of the amount of self-employment taxes;
- (B) Preexisting orders; and

(C) Theoretical child support order for qualified children, if allowed by the court;

(3) Add each parent's adjusted income together;

(4) Locate the basic child support obligation by referring to the child support obligation table. Using the figure closest to the amount of the combined adjusted income, locate the amount of the basic child support obligation. If the combined adjusted income falls between the amounts shown in the table, then the basic child support obligation shall be based on the income bracket most closely matched to the combined adjusted income. The basic child support obligation amount stated in subsection (o) of this Code section shall be rebuttably presumed to be the appropriate amount of child support to be provided by the custodial parent and the noncustodial parent prior to consideration of health insurance, work related child care costs, and deviations;

(5) Calculate the pro rata share of the basic child support obligation for the custodial parent and the noncustodial parent by dividing the combined adjusted income into each parent's adjusted income to arrive at each parent's pro rata percentage of the basic child support obligation;

(6) Find the adjusted child support obligation amount by adding the additional expenses of the costs of health insurance and work related child care costs, prorating such expenses in accordance with each parent's pro rata share of the obligation and adding such expenses to the pro rata share of the basic child support obligation. The monthly cost of health insurance premiums and work related child care costs shall be entered on the Child Support Schedule D — Additional Expenses. The pro rata share of the monthly basic child support obligation and the pro rata share of the combined additional expenses shall be added together to create the monthly adjusted child support obligation;

(7) Determine the amount of child support for the custodial parent and the noncustodial parent resulting in a monthly sum certain payment due to the custodial parent by assigning or deducting credit for actual payments for health insurance and work related child care costs from the basic child support obligation;

(8) In accordance with subsection (i) of this Code section, deviations subtracted from or added to the presumptive amount of child support shall be applied, if applicable, and if supported by the required findings of fact and application of the best interest of the child standard. The proposed deviations shall be entered on the Child Support Schedule E — Deviations. In the court's or the jury's discretion, deviations may include, but shall not be limited to, the following:

- (A) High income;
- (B) Low income;
- (C) Other health related insurance;
- (D) Life insurance;
- (E) Child and dependent care tax credit;
- (F) Travel expenses;
- (G) Alimony;
- (H) Mortgage;
- (I) Permanency plan or foster care plan;
- (J) Extraordinary expenses;
- (K) Parenting time; and
- (L) Nonspecific deviations;

(9) Any benefits which the child receives under Title II of the federal Social Security Act shall be applied against the final child support order. The final child support amount for each parent shall be entered on the child support worksheet, together with the information from each of the utilized schedules;

(10) The parents shall allocate the uninsured health care expenses which shall be based on the pro rata responsibility of the parents or as otherwise ordered by the court. Each parent's pro rata responsibility for uninsured health care expenses shall be entered on the child support worksheet; and

(11) In a split parenting case, there shall be a separate calculation and final child support order for each parent.

(c) Applicability and required findings.

(1) The child support guidelines contained in this Code section are a minimum basis for determining the amount of child support and shall apply as a rebuttable presumption in all legal proceedings involving the child support responsibility of a parent. This Code section shall be used when the court enters a temporary or permanent child support order in a contested or noncontested hearing or order in a civil action filed pursuant to Code Section 19-13-4. The rebuttable presumptive amount of child support provided by this Code section may be increased or decreased according to the best interest of the child for whom support is being considered, the circumstances of the parties, the grounds for deviation set forth in subsection (i) of this Code section, and to achieve the state policy of affording to children of unmarried parents, to the extent possible, the

same economic standard of living enjoyed by children living in intact families consisting of parents with similar financial means.

(2) The provisions of this Code section shall not apply with respect to any divorce case in which there are no minor children, except to the limited extent authorized by subsection (e) of this Code section. In the final judgment or decree in a divorce case in which there are minor children, or in other cases which are governed by the provisions of this Code section, the court shall:

(A) Specify in what sum certain amount and from which parent the child is entitled to permanent support as determined by use of the worksheet;

(B) Specify as required by Code Section 19-5-12 in what manner, how often, to whom, and until when the support shall be paid;

(C) Include a written finding of the parent's gross income as determined by the court or the jury;

(D) Determine whether health insurance for the child involved is reasonably available at a reasonable cost to either parent. If the health insurance is reasonably available at a reasonable cost to the parent, then the court shall order that the child be covered under such health insurance;

(E) Include written findings of fact as to whether one or more of the deviations allowed under this Code section are applicable, and if one or more such deviations are applicable as determined by the court or the jury, the written findings of fact shall further set forth:

(i) The reasons the court or the jury deviated from the presumptive amount of child support;

(ii) The amount of child support that would have been required under this Code section if the presumptive amount of child support had not been rebutted; and

(iii) A finding that states how the court's or the jury's application of the child support guidelines would be unjust or inappropriate considering the relative ability of each parent to provide support and how the best interest of the child who is subject to the child support determination is served by deviation from the presumptive amount of child support;

(F) Specify the amount of the noncustodial parent's parenting time as set forth in the order of visitation;

(G) Include a written finding regarding the use of benefits received under Title II of the federal Social Security Act in the calculation of the amount of child support; and

(H) Specify the percentage of uninsured health care expenses for which each parent shall be responsible.

(3) When child support is ordered, the party who is required to pay the child support shall not be liable to third persons for necessities furnished to the child embraced in the judgment or decree.

(4) In all cases, the parties shall submit to the court their worksheets and schedules and the presence or absence of other factors to be considered by the court pursuant to the provisions of this Code section.

(5) In any case in which the gross income of the custodial parent and the noncustodial parent is determined by a jury, the court shall charge the provisions of this Code section applicable to the determination of gross income. The jury shall be required to return a special interrogatory determining gross income. The court shall determine adjusted income, health insurance costs, and work related child care costs. Based upon the jury's verdict as to gross income, the court shall determine the presumptive amount of child support in accordance with the provisions of this Code section. The court shall inform the jury of the presumptive amount of child support and the identity of the custodial and noncustodial parents. In the final instructions to the jury, the court shall charge the provisions of this Code section applicable to the determination of deviations and the jury shall be required to return a special interrogatory as to deviations and the final award of child support. The court shall include its findings and the jury's verdict on the child support worksheet in accordance with this Code section and Code Section 19-5-12.

(6) Nothing contained within this Code section shall prevent the parties from entering into an enforceable agreement contrary to the presumptive amount of child support which may be made the order of the court pursuant to review by the court of the adequacy of the child support amounts negotiated by the parties, including the provision for medical expenses and health insurance; provided, however, that if the agreement negotiated by the parties does not comply with the provisions contained in this Code section and does not contain findings of fact as required to support a deviation, the court shall reject such agreement.

(7) In any case filed pursuant to Chapter 11 of this title, relating to the "Child Support Recovery Act," the "Uniform Reciprocal Enforcement of Support Act," or the "Uniform Interstate Family Support Act," the court shall make all determinations of fact, including gross income and deviations, and a jury shall not hear any issue related to such cases.

(d) **Nature of guidelines; court's discretion.** In the event of a hearing or trial on the issue of child support, the guidelines enumerated

in this Code section are intended by the General Assembly to be guidelines only and any court so applying these guidelines shall not abrogate its responsibility in making the final determination of child support based on the evidence presented to it at the time of the hearing or trial.

(e) **Duration of child support responsibility.** The duty to provide support for a minor child shall continue until the child reaches the age of majority, dies, marries, or becomes emancipated, whichever first occurs; provided, however, that, in any temporary, final, or modified order for child support with respect to any proceeding for divorce, separate maintenance, legitimacy, or paternity entered on or after July 1, 1992, the court, in the exercise of sound discretion, may direct either or both parents to provide financial assistance to a child who has not previously married or become emancipated, who is enrolled in and attending a secondary school, and who has attained the age of majority before completing his or her secondary school education, provided that such financial assistance shall not be required after a child attains 20 years of age. The provisions for child support provided in this subsection may be enforced by either parent, by any nonparent custodian, by a guardian appointed to receive child support for the child for whose benefit the child support is ordered, or by the child for whose benefit the child support is ordered.

(f) **Gross income.**

(1) **Inclusion to gross income.**

(A) **Attributable income.** Gross income of each parent shall be determined in the process of setting the presumptive amount of child support and shall include all income from any source, before deductions for taxes and other deductions such as preexisting orders for child support and credits for other qualified children, whether earned or unearned, and includes, but is not limited to, the following:

- (i) Salaries;
- (ii) Commissions, fees, and tips;
- (iii) Income from self-employment;
- (iv) Bonuses;
- (v) Overtime payments;
- (vi) Severance pay;
- (vii) Recurring income from pensions or retirement plans including, but not limited to, United States Department of Veterans Affairs, Railroad Retirement Board, Keoghs, and individual retirement accounts;

- (viii) Interest income;
- (ix) Dividend income;
- (x) Trust income;
- (xi) Income from annuities;
- (xii) Capital gains;

(xiii) Disability or retirement benefits that are received from the Social Security Administration pursuant to Title II of the federal Social Security Act;

(xiv) Disability benefits that are received pursuant to the federal Veterans' Benefits Act of 2010, 38 U.S.C. Section 101, et seq.;

(xv) Workers' compensation benefits, whether temporary or permanent;

(xvi) Unemployment insurance benefits;

(xvii) Judgments recovered for personal injuries and awards from other civil actions;

(xviii) Gifts that consist of cash or other liquid instruments, or which can be converted to cash;

(xix) Prizes;

(xx) Lottery winnings;

(xxi) Alimony or maintenance received from persons other than parties to the proceeding before the court;

(xxii) Assets which are used for the support of the family; and

(xxiii) Other income.

(B) **Self-employment income.** Income from self-employment includes income from, but not limited to, business operations, work as an independent contractor or consultant, sales of goods or services, and rental properties, less ordinary and reasonable expenses necessary to produce such income. Income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership, limited liability company, or closely held corporation is defined as gross receipts minus ordinary and reasonable expenses required for self-employment or business operations. Ordinary and reasonable expenses of self-employment or business operations necessary to produce income do not include:

- (i) Excessive promotional, travel, vehicle, or personal living expenses, depreciation on equipment, or costs of operation of home offices; or

(ii) Amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses, investment tax credits, or any other business expenses determined by the court or the jury to be inappropriate for determining gross income.

In general, income and expenses from self-employment or operation of a business should be carefully reviewed by the court or the jury to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. Generally, this amount will differ from a determination of business income for tax purposes.

(C) **Fringe benefits.** Fringe benefits for inclusion as income or “in kind” remuneration received by a parent in the course of employment, or operation of a trade or business, shall be counted as income if the benefits significantly reduce personal living expenses. Such fringe benefits might include, but are not limited to, use of a company car, housing, or room and board. Fringe benefits shall not include employee benefits that are typically added to the salary, wage, or other compensation that a parent may receive as a standard added benefit, including, but not limited to, employer paid portions of health insurance premiums or employer contributions to a retirement or pension plan.

(D) **Variable income.** Variable income such as commissions, bonuses, overtime pay, military bonuses, and dividends shall be averaged by the court or the jury over a reasonable period of time consistent with the circumstances of the case and added to a parent’s fixed salary or wages to determine gross income. When income is received on an irregular, nonrecurring, or one-time basis, the court or the jury may, but is not required to, average or prorate the income over a reasonable specified period of time or require the parent to pay as a one-time support amount a percentage of his or her nonrecurring income, taking into consideration the percentage of recurring income of that parent.

(E) **Military compensation and allowances.** Income for a parent who is an active duty member of the regular or reserve component of the United States armed forces, the United States Coast Guard, the merchant marine of the United States, the commissioned corps of the Public Health Service or the National Oceanic and Atmospheric Administration, the National Guard, or the Air National Guard shall include:

- (i) Base pay;
- (ii) Drill pay;
- (iii) Basic allowance for subsistence, whether paid directly to the parent or received in-kind; and

(iv) Basic allowance for housing, whether paid directly to the parent or received in-kind, determined at the parent's pay grade at the without dependent rate, but shall include only so much of the allowance that is not attributable to area variable housing costs.

Except as determined by the court or jury, special pay or incentive pay, allowances for clothing or family separation, and reimbursed expenses related to the parent's assignment to a high cost of living location shall not be considered income for the purpose of determining gross income.

(2) Exclusions from gross income. Excluded from gross income are the following:

(A) Child support payments received by either parent for the benefit of a child of another relationship;

(B) Benefits received from means-tested public assistance programs such as, but not limited to:

(i) PeachCare for Kids Program, Temporary Assistance for Needy Families Program, or similar programs in other states or territories under Title IV-A of the federal Social Security Act;

(ii) Food stamps or the value of food assistance provided by way of electronic benefits transfer procedures by the Department of Human Services;

(iii) Supplemental security income received under Title XVI of the federal Social Security Act;

(iv) Benefits received under Section 402(d) of the federal Social Security Act for disabled adult children of deceased disabled workers; and

(v) Low-income heating and energy assistance program payments;

(C) Foster care payments paid by the Department of Human Services or a licensed child placing agency for providing foster care to a foster child in the custody of the Department of Human Services; and

(D) A nonparent custodian's gross income.

(3) Social Security benefits.

(A) Benefits received under Title II of the federal Social Security Act by a child on the obligor's account shall be counted as child support payments and shall be applied against the final child support order to be paid by the obligor for the child.

(B) After calculating the obligor's monthly gross income, including the countable social security benefits as specified in division (1)(A)(xiii) of this subsection, and after calculating the amount of child support, if the presumptive amount of child support, as increased or decreased by deviations, is greater than the social security benefits paid on behalf of the child on the obligor's account, the obligor shall be required to pay the amount exceeding the social security benefit as part of the final child support order in the case.

(C) After calculating the obligor's monthly gross income, including the countable social security benefits as specified in division (1)(A)(xiii) of this subsection, and after calculating the amount of child support, if the presumptive amount of child support, as increased or decreased by deviations, is equal to or less than the social security benefits paid to the nonparent custodian or custodial parent on behalf of the child on the obligor's account, the child support responsibility of that parent shall have been met and no further child support shall be paid.

(D) Any benefit amounts under Title II of the federal Social Security Act as determined by the Social Security Administration sent to the nonparent custodian or custodial parent by the Social Security Administration for the child's benefit which are greater than the final child support order shall be retained by the nonparent custodian or custodial parent for the child's benefit and shall not be used as a reason for decreasing the final child support order or reducing arrearages.

(4) Reliable evidence of income.

(A) **Imputed income.** When establishing the amount of child support, if a parent fails to produce reliable evidence of income, such as tax returns for prior years, check stubs, or other information for determining current ability to pay child support or ability to pay child support in prior years, and the court or the jury has no other reliable evidence of the parent's income or income potential, gross income for the current year shall be determined by imputing gross income based on a 40 hour workweek at minimum wage.

(B) **Modification.** When cases with established orders are reviewed for modification and a parent fails to produce reliable evidence of income, such as tax returns for prior years, check stubs, or other information for determining current ability to pay child support or ability to pay child support in prior years, and the court or jury has no other reliable evidence of such parent's income or income potential, the court or jury may increase the child support of the parent failing or refusing to produce evidence of income by an increment of at least 10 percent per year of such parent's gross

income for each year since the final child support order was entered or last modified and shall calculate the basic child support obligation using the increased amount as such parent's gross income.

(C) **Rehearing.** If income is imputed pursuant to subparagraph (A) of this paragraph, the party believing the income of the other party is higher than the amount imputed may provide within 90 days, upon motion to the court, evidence necessary to determine the appropriate amount of child support based upon reliable evidence. A hearing shall be scheduled after the motion is filed. The court may increase, decrease, or leave unchanged the amount of current child support from the date of filing of either parent's initial filing or motion for reconsideration. While the motion for reconsideration is pending, the obligor shall be responsible for the amount of child support originally ordered. Arrearages entered in the original child support order based upon imputed income shall not be forgiven. When there is reliable evidence to support a motion for reconsideration of the amount of income imputed, the party seeking reconsideration shall not be required to prove the existence of grounds for modification of an order pursuant to subsection (k) of this Code section.

(D) **Willful or voluntary unemployment or underemployment.** In determining whether a parent is willfully or voluntarily unemployed or underemployed, the court or the jury shall ascertain the reasons for the parent's occupational choices and assess the reasonableness of these choices in light of the parent's responsibility to support his or her child and whether such choices benefit the child. A determination of willful or voluntary unemployment or underemployment shall not be limited to occupational choices motivated only by an intent to avoid or reduce the payment of child support but can be based on any intentional choice or act that affects a parent's income. In determining willful or voluntary unemployment or underemployment, the court may examine whether there is a substantial likelihood that the parent could, with reasonable effort, apply his or her education, skills, or training to produce income. Specific factors for the court to consider when determining willful or voluntary unemployment or underemployment include, but are not limited to:

- (i) The parent's past and present employment;
- (ii) The parent's education and training;
- (iii) Whether unemployment or underemployment for the purpose of pursuing additional training or education is reasonable in light of the parent's responsibility to support his or her child and, to this end, whether the training or education may ultimately

benefit the child in the case immediately under consideration by increasing the parent's level of support for that child in the future;

(iv) A parent's ownership of valuable assets and resources, such as an expensive home or automobile, that appear inappropriate or unreasonable for the income claimed by the parent;

(v) The parent's own health and ability to work outside the home; and

(vi) The parent's role as caretaker of a child of that parent, a disabled or seriously ill child of that parent, or a disabled or seriously ill adult child of that parent, or any other disabled or seriously ill relative for whom that parent has assumed the role of caretaker, which eliminates or substantially reduces the parent's ability to work outside the home, and the need of that parent to continue in the role of caretaker in the future. When considering the income potential of a parent whose work experience is limited due to the caretaker role of that parent, the court shall consider the following factors:

(I) Whether the parent acted in the role of full-time caretaker immediately prior to separation by the married parties or prior to the divorce or annulment of the marriage or dissolution of another relationship in which the parent was a full-time caretaker;

(II) The length of time the parent staying at home has remained out of the work force for this purpose;

(III) The parent's education, training, and ability to work; and

(IV) Whether the parent is caring for a child who is four years of age or younger. If the court or the jury determines that a parent is willfully or voluntarily unemployed or underemployed, child support shall be calculated based on a determination of earning capacity, as evidenced by educational level or previous work experience. In the absence of any other reliable evidence, income may be imputed to the parent pursuant to a determination that gross income for the current year is based on a 40 hour workweek at minimum wage.

A determination of willful and voluntary unemployment or underemployment shall not be made when an individual is activated from the National Guard or other armed forces unit or enlists or is drafted for full-time service in the armed forces of the United States.

(5) **Adjustments to gross income.**

(A) **Self-employment.** One-half of the self-employment and Medicare taxes shall be calculated as follows:

(i) Six and two-tenths percent of self-employment income up to the maximum amount to which federal old age, survivors, and disability insurance (OASDI) applies; plus

(ii) One and forty-five one-hundredths of a percent of self-employment income for Medicare

and this amount shall be deducted from a self-employed parent's monthly gross income.

(B) **Preexisting orders.** An adjustment to the parent's monthly gross income shall be made on the Child Support Schedule B — Adjusted Income for current preexisting orders for a period of not less than 12 months immediately prior to the date of the hearing or such period that an order has been in effect if less than 12 months prior to the date of the hearing before the court to set, modify, or enforce child support.

(i) In calculating the adjustment for preexisting orders, the court shall include only those preexisting orders meeting the criteria set forth in subparagraph (a)(18)(B);

(ii) The priority for preexisting orders shall be determined by the date and time of filing with the clerk of court of the initial order in each case. Subsequent modifications of the initial support order shall not affect the priority position established by the date and time of the initial order. In any modification proceeding, the court rendering the decision shall make a specific finding of the date, and time if known, of the initial order of the case;

(iii) Adjustments shall be allowed for current preexisting support only to the extent that the payments are actually being paid as evidenced by documentation including, but not limited to, payment history from a court clerk, the child support services' computer data base, the child support payment history, or canceled checks or other written proof of payments paid directly to the other parent. The maximum credit allowed for a preexisting order is an average of the amount of current support actually paid under the preexisting order over the past 12 months prior to the hearing date;

(iv) All preexisting orders shall be entered on the Child Support Schedule B — Adjusted Income for the purpose of calculating the total amount of the credit to be included on the child support worksheet; and

(v) Payments being made by a parent on any arrearages shall not be considered payments on preexisting orders or subsequent orders and shall not be used as a basis for reducing gross income.

(C) **Theoretical child support orders.** In addition to the adjustments to monthly gross income for self-employment taxes provided in subparagraph (A) of this paragraph and for preexisting orders provided in subparagraph (B) of this paragraph, credits for either parent's other qualified child living in the parent's home for whom the parent owes a legal duty of support may be considered by the court for the purpose of reducing the parent's gross income. To consider a parent's other qualified children for determining the theoretical child support order, a parent shall present documentary evidence of the parent-child relationship to the court. Adjustments to income pursuant to this subparagraph may be considered in such circumstances in which the failure to consider a qualified child would cause substantial hardship to the parent; provided, however, that such consideration of an adjustment shall be based upon the best interest of the child for whom child support is being awarded. If the court, in its discretion, decides to apply the qualified child adjustment, the basic child support obligation of the parent for the number of other qualified children living with such parent shall be determined based upon that parent's monthly gross income. Except for self-employment taxes paid, no other amounts shall be subtracted from the parent's monthly gross income when calculating a theoretical child support order under this subparagraph. The basic child support obligation for such parent shall be multiplied by 75 percent and the resulting amount shall be subtracted from such parent's monthly gross income and entered on the Child Support Schedule B — Adjusted Income.

(D) **Multiple family situations.** In multiple family situations, the priority of adjustments to a parent's monthly gross income shall be calculated in the following order:

(i) Preexisting orders according to the date and time of the initial order as set forth in subparagraph (B) of this paragraph; and

(ii) Application of any credit for a parent's other qualified children using the procedure set forth in subparagraph (C) of this paragraph.

(g) **Parenting time deviation.** The court or the jury may deviate from the presumptive amount of child support as set forth in subparagraph (i)(2)(K) of this Code section.

(h) **Adjusted support obligation.** The child support obligation table does not include the cost of the parent's work related child care

costs, health insurance premiums, or uninsured health care expenses. The additional expenses for the child's health insurance premiums and work related child care costs shall be included in the calculations to determine child support. A nonparent custodian's expenses for work related child care costs and health insurance premiums shall be taken into account when establishing a final child support order.

(1) Work related child care costs.

(A) Work related child care costs necessary for the parent's employment, education, or vocational training that are determined by the court to be appropriate, and that are appropriate to the parents' financial abilities and to the lifestyle of the child if the parents and child were living together, shall be averaged for a monthly amount and entered on the child support worksheet in the column of the parent initially paying the expense. Work related child care costs of a nonparent custodian shall be considered when determining the amount of this expense.

(B) If a child care subsidy is being provided pursuant to a means-tested public assistance program, only the amount of the child care expense actually paid by either parent or a nonparent custodian shall be included in the calculation.

(C) If either parent is the provider of child care services to the child for whom support is being determined, the value of those services shall not be an adjustment to the basic child support obligation when calculating the support award.

(D) If child care is provided without charge to the parent, the value of these services shall not be an adjustment to the basic child support obligation. If child care is or will be provided by a person who is paid for his or her services, proof of actual cost or payment shall be shown to the court before the court includes such payment in its consideration.

(E) The amount of work related child care costs shall be determined and added as an adjustment to the basic child support obligation as "additional expenses" whether paid directly by the parent or through a payroll deduction.

(F) The total amount of work related child care costs shall be divided between the parents pro rata to determine the presumptive amount of child support and shall be included in the worksheet and written order of the court.

(2) Cost of health insurance premiums.

(A)(i) The amount that is, or will be, paid by a parent for health insurance for the child for whom support is being determined

shall be an adjustment to the basic child support obligation and prorated between the parents based upon their respective incomes. Payments made by a parent's employer for health insurance and not deducted from the parent's wages shall not be included. When a child for whom support is being determined is covered by a family policy, only the health insurance premium actually attributable to that child shall be added.

(ii) The amount of the cost for the child's health insurance premium shall be determined and added as an adjustment to the basic child support obligation as "additional expenses" whether paid directly by the parent or through a payroll deduction.

(iii) The total amount of the cost for the child's health insurance premium shall be divided between the parents pro rata to determine the total presumptive amount of child support and shall be included in the Child Support Schedule D — Additional Expenses and written order of the court together with the amount of the basic child support obligation.

(B)(i) If either parent has health insurance reasonably available at reasonable cost that provides for the health care needs of the child, then an amount to cover the cost of the premium shall be added as an adjustment to the basic child support obligation. A health insurance premium paid by a nonparent custodian shall be included when determining the amount of health insurance expense. In determining the amount to be added to the order for the health insurance cost, only the amount of the health insurance cost attributable to the child who is the subject of the order shall be included.

(ii) If coverage is applicable to other persons and the amount of the health insurance premium attributable to the child who is the subject of the current action for support is not verifiable, the total cost to the parent paying the premium shall be prorated by the number of persons covered so that only the cost attributable to the child who is the subject of the order under consideration is included. The amount of health insurance premium shall be determined by dividing the total amount of the insurance premium by the number of persons covered by the insurance policy and multiplying the resulting amount by the number of children covered by the insurance policy. The monthly cost of health insurance premium shall be entered on the Child Support Schedule D — Additional Expenses in the column of the parent paying the premium.

(iii) Eligibility for or enrollment of the child in Medicaid or PeachCare for Kids Program shall not satisfy the requirement

that the final child support order provide for the child's health care needs. Health coverage through PeachCare for Kids Program and Medicaid shall not prevent a court from ordering either or both parents to obtain other health insurance.

(3) Uninsured health care expenses.

(A) The child's uninsured health care expenses shall be the financial responsibility of both parents. The final child support order shall include provisions for payment of the uninsured health care expenses; provided, however, that the uninsured health care expenses shall not be used for the purpose of calculating the amount of child support. The parents shall divide the uninsured health care expenses pro rata, unless otherwise specifically ordered by the court.

(B) If a parent fails to pay his or her pro rata share of the child's uninsured health care expenses, as specified in the final child support order, within a reasonable time after receipt of evidence documenting the uninsured portion of the expense:

(i) The other parent or the nonparent custodian may enforce payment of the expense by any means permitted by law; or

(ii) Child support services shall pursue enforcement of payment of such unpaid expenses only if the unpaid expenses have been reduced to a judgment in a sum certain amount.

(i) Grounds for deviation.

(1) General principles.

(A) The amount of child support established by this Code section and the presumptive amount of child support are rebuttable and the court or the jury may deviate from the presumptive amount of child support in compliance with this subsection. In deviating from the presumptive amount of child support, primary consideration shall be given to the best interest of the child for whom support under this Code section is being determined. A nonparent custodian's expenses may be the basis for a deviation.

(B) When ordering a deviation from the presumptive amount of child support, the court or the jury shall consider all available income of the parents and shall make written findings or special interrogatory findings that an amount of child support other than the amount calculated is reasonably necessary to provide for the needs of the child for whom child support is being determined and the order or special interrogatory shall state:

(i) The reasons for the deviation from the presumptive amount of child support;

(ii) The amount of child support that would have been required under this Code section if the presumptive amount of child support had not been rebutted; and

(iii) How, in its determination:

(I) Application of the presumptive amount of child support would be unjust or inappropriate; and

(II) The best interest of the child for whom support is being determined will be served by deviation from the presumptive amount of child support.

(C) No deviation in the presumptive amount of child support shall be made which seriously impairs the ability of the custodial parent to maintain minimally adequate housing, food, and clothing for the child being supported by the order and to provide other basic necessities, as determined by the court or the jury.

(D) If the circumstances which supported the deviation cease to exist, the final child support order may be modified as set forth in subsection (k) of this Code section to eliminate the deviation.

(2) Specific deviations.

(A) **High income.** For purposes of this subparagraph, parents are considered to be high-income parents if their combined adjusted income exceeds \$30,000.00 per month. For high-income parents, the court shall set the basic child support obligation at the highest amount allowed by the child support obligation table but the court or the jury may consider upward deviation to attain an appropriate award of child support for high-income parents which is consistent with the best interest of the child.

(B) Low income.

(i) If the noncustodial parent can provide evidence sufficient to demonstrate no earning capacity or that his or her pro rata share of the presumptive amount of child support would create an extreme economic hardship for such parent, the court may consider a low-income deviation.

(ii) A noncustodial parent whose sole source of income is supplemental security income received under Title XVI of the federal Social Security Act shall be considered to have no earning capacity.

(iii) The court or the jury shall examine all attributable and excluded sources of income, assets, and benefits available to the noncustodial parent and may consider all reasonable expenses of the noncustodial parent, ensuring that such expenses are actu-

ally paid by the noncustodial parent and are clearly justified expenses.

(iv) In considering a request for a low-income deviation, the court or the jury shall then weigh the income and all attributable and excluded sources of income, assets, and benefits and all reasonable expenses of each parent, the relative hardship that a reduction in the amount of child support paid to the custodial parent would have on the custodial parent's household, the needs of each parent, the needs of the child for whom child support is being determined, and the ability of the noncustodial parent to pay child support.

(v) Following a review of the noncustodial parent's gross income and expenses, and taking into account each parent's basic child support obligation adjusted by health insurance and work related child care costs and the relative hardships on the parents and the child, the court or the jury, upon request by either party or upon the court's initiative, may consider a downward deviation to attain an appropriate award of child support which is consistent with the best interest of the child.

(vi) For the purpose of calculating a low-income deviation, the noncustodial parent's minimum child support for one child shall be not less than \$100.00 per month, and such amount shall be increased by at least \$50.00 for each additional child for the same case for which child support is being ordered.

(vii) A low-income deviation granted pursuant to this subparagraph shall apply only to the current child support amount and shall not prohibit an additional amount being ordered to reduce a noncustodial parent's arrears.

(viii) If a low-income deviation is granted pursuant to this subparagraph, such deviation shall not prohibit the court or jury from granting an increase or decrease to the presumptive amount of child support by the use of any other specific or nonspecific deviation.

(C) **Other health related insurance.** If the court or the jury finds that either parent has vision or dental insurance available at a reasonable cost for the child, the court may deviate from the presumptive amount of child support for the cost of such insurance.

(D) **Life insurance.** In accordance with Code Section 19-6-34, if the court or the jury finds that either parent has purchased life insurance on the life of either parent or the lives of both parents for the benefit of the child, the court may deviate from the presumptive amount of child support for the cost of such insurance by either adding or subtracting the amount of the premium.

(E) **Child and dependent care tax credit.** If the court or the jury finds that one of the parents is entitled to the Child and Dependent Care Tax Credit, the court or the jury may deviate from the presumptive amount of child support in consideration of such credit.

(F) **Travel expenses.** If court ordered visitation related travel expenses are substantial due to the distance between the parents, the court may order the allocation of such costs or the jury may by a finding in its special interrogatory allocate such costs by deviation from the presumptive amount of child support, taking into consideration the circumstances of the respective parents as well as which parent moved and the reason for such move.

(G) **Alimony.** Actual payments of alimony shall not be considered as a deduction from gross income but may be considered as a deviation from the presumptive amount of child support. If the court or the jury considers the actual payment of alimony, the court shall make a written finding of such consideration or the jury, in its special interrogatory, shall make a written finding of such consideration as a basis for deviation from the presumptive amount of child support.

(H) **Mortgage.** If the noncustodial parent is providing shelter, such as paying the mortgage of the home, or has provided a home at no cost to the custodial parent in which the child resides, the court or the jury may allocate such costs or an amount equivalent to such costs by deviation from the presumptive amount of child support, taking into consideration the circumstances of the respective parents and the best interest of the child.

(I) **Permanency plan or foster care plan.** In cases where the child is in the legal custody of the Department of Human Services, the child protection or foster care agency of another state or territory, or any other child-caring entity, public or private, the court or the jury may consider a deviation from the presumptive amount of child support if the deviation will assist in accomplishing a permanency plan or foster care plan for the child that has a goal of returning the child to the parent or parents and the parent's need to establish an adequate household or to otherwise adequately prepare herself or himself for the return of the child clearly justifies a deviation for this purpose.

(J) **Extraordinary expenses.** The child support obligation table includes average child rearing expenditures for families given the parents' combined adjusted income and number of children. Extraordinary expenses are in excess of average amounts estimated in the child support obligation table and are highly variable

among families. Extraordinary expenses shall be considered on a case-by-case basis in the calculation of support and may form the basis for deviation from the presumptive amount of child support so that the actual amount of the expense is considered in the calculation of the final child support order for only those families actually incurring the expense. Extraordinary expenses shall be prorated between the parents by assigning or deducting credit for actual payments for extraordinary expenses.

(i) **Extraordinary educational expenses.** Extraordinary educational expenses may be a basis for deviation from the presumptive amount of child support. Extraordinary educational expenses include, but are not limited to, tuition, room and board, lab fees, books, fees, and other reasonable and necessary expenses associated with special needs education or private elementary and secondary schooling that are appropriate to the parent's financial abilities and to the lifestyle of the child if the parents and the child were living together.

(I) In determining the amount of deviation for extraordinary educational expenses, scholarships, grants, stipends, and other cost-reducing programs received by or on behalf of the child shall be considered; and

(II) If a deviation is allowed for extraordinary educational expenses, a monthly average of the extraordinary educational expenses shall be based on evidence of prior or anticipated expenses and entered on the Child Support Schedule E — Deviations.

(ii) **Special expenses incurred for child rearing.** Special expenses incurred for child rearing, including, but not limited to, quantifiable expense variations related to the food, clothing, and hygiene costs of children at different age levels, may be a basis for a deviation from the presumptive amount of child support. Such expenses include, but are not limited to, summer camp; music or art lessons; travel; school sponsored extracurricular activities, such as band, clubs, and athletics; and other activities intended to enhance the athletic, social, or cultural development of a child but not otherwise required to be used in calculating the presumptive amount of child support as are health insurance premiums and work related child care costs. A portion of the basic child support obligation is intended to cover average amounts of special expenses incurred in the rearing of a child. In order to determine if a deviation for special expenses is warranted, the court or the jury shall consider the full amount of the special expenses as described in this division; and when these special expenses exceed 7 percent of the basic child support

obligation, then the additional amount of special expenses shall be considered as a deviation to cover the full amount of the special expenses.

(iii) **Extraordinary medical expenses.** In instances of extreme economic hardship involving extraordinary medical expenses not covered by insurance, the court or the jury may consider a deviation from the presumptive amount of child support for extraordinary medical expenses. Such expenses may include, but are not limited to, extraordinary medical expenses of the child or a parent of the child; provided, however, that any such deviation:

(I) Shall not act to leave a child unsupported; and

(II) May be ordered for a specific period of time measured in months.

When extraordinary medical expenses are claimed, the court or the jury shall consider the resources available for meeting such needs, including sources available from agencies and other adults.

(K) Parenting time.

(i) The child support obligation table is based upon expenditures for a child in intact households. The court may order or the jury may find by special interrogatory a deviation from the presumptive amount of child support when special circumstances make the presumptive amount of child support excessive or inadequate due to extended parenting time as set forth in the order of visitation or when the child resides with both parents equally.

(ii) If the court or the jury determines that a parenting time deviation is applicable, then such deviation shall be included with all other deviations and be treated as a deduction.

(iii) In accordance with subsection (d) of Code Section 19-11-8, if any action or claim for parenting time or a parenting time deviation is brought under this subparagraph, it shall be an action or claim solely between the custodial parent and the noncustodial parent, and not any third parties, including child support services.

(3) **Nonspecific deviations.** Deviations from the presumptive amount of child support may be appropriate for reasons in addition to those established under this subsection when the court or the jury finds it is in the best interest of the child.

(j) Involuntary loss of income.

(1) In the event a parent suffers an involuntary termination of employment, has an extended involuntary loss of average weekly hours, is involved in an organized strike, incurs a loss of health, or similar involuntary adversity resulting in a loss of income of 25 percent or more, then the portion of child support attributable to lost income shall not accrue from the date of the service of the petition for modification, provided that service is made on the other parent. It shall not be considered an involuntary termination of employment if the parent has left the employer without good cause in connection with the parent's most recent work.

(2) In the event a modification action is filed pursuant to this subsection, the court shall make every effort to expedite hearing such action.

(3) The court may, at its discretion, phase in the new child support award over a period of up to one year with the phasing in being largely evenly distributed with at least an initial immediate adjustment of not less than 25 percent of the difference and at least one intermediate adjustment prior to the final adjustment at the end of the phase-in period.

(k) Modification.

(1) Except as provided in paragraph (2) of this subsection, a parent shall not have the right to petition for modification of the child support award regardless of the length of time since the establishment of the child support award unless there is a substantial change in either parent's income and financial status or the needs of the child.

(2) No petition to modify child support may be filed by either parent within a period of two years from the date of the final order on a previous petition to modify by the same parent except where:

(A) A noncustodial parent has failed to exercise the court ordered visitation;

(B) A noncustodial parent has exercised a greater amount of visitation than was provided in the court order; or

(C) The motion to modify is based upon an involuntary loss of income as set forth in subsection (j) of this Code section.

(3)(A) If there is a difference of at least 15 percent but less than 30 percent between a new award and a Georgia child support order entered prior to January 1, 2007, the court may, at its discretion, phase in the new child support award over a period of up to one year with the phasing in being largely evenly distributed with at

least an initial immediate adjustment of not less than 25 percent of the difference and at least one intermediate adjustment prior to the final adjustment at the end of the phase-in period.

(B) If there is a difference of 30 percent or more between a new award and a Georgia child support order entered prior to January 1, 2007, the court may, at its discretion, phase in the new child support award over a period of up to two years with the phasing in being largely evenly distributed with at least an initial immediate adjustment of not less than 25 percent of the difference and at least one intermediate adjustment prior to the final adjustment at the end of the phase-in period.

(C) All child support service's case reviews and modifications shall proceed and be governed by Code Section 19-11-12. Subsequent changes to the child support obligation table shall be a reason to request a review for modification from child support services to the extent that such changes are consistent with the requirements of Code Section 19-11-12.

(4) A petition for modification shall be filed under the same rules of procedure applicable to divorce proceedings. The court may allow, upon motion, the temporary modification of a child support order pending the final trial on the petition. An order granting temporary modification shall be subject to revision by the court at any time before the final trial. A jury may be demanded on a petition for modification but the jury shall only be responsible for determining a parent's gross income and any deviations. In the hearing upon a petition for modification, testimony may be given and evidence introduced relative to the change of circumstances, income and financial status of either parent, or in the needs of the child. After hearing both parties and the evidence, the court may modify and revise the previous judgment, in accordance with the changed circumstances, income and financial status of either parent, or in the needs of the child, if such change or changes are satisfactorily proven so as to warrant the modification and revision and such modification and revisions are in the child's best interest. The court shall enter a written order specifying the basis for the modification, if any, and shall include all of the information set forth in paragraph (2) of subsection (c) of this Code section.

(5) In proceedings for the modification of a child support award pursuant to the provisions of this Code section, the court may award attorney's fees, costs, and expenses of litigation to the prevailing party as the interests of justice may require. Where a custodial parent prevails in an upward modification of child support based upon the noncustodial parent's failure to be available and willing to exercise court ordered visitation, reasonable and necessary attorney's

fees and expenses of litigation shall be awarded to the custodial parent.

(l) **Split parenting.** In cases of split parenting, a worksheet shall be prepared separately for the child for whom the father is the custodial parent and for the child for whom the mother is the custodial parent, and that worksheet shall be filed with the clerk of court. For each split parenting custodial situation, the court shall determine:

- (1) Which parent is the obligor;
- (2) The presumptive amount of child support;
- (3) The actual award of child support, if different from the presumptive amount of child support;
- (4) How and when the sum certain amount of child support owed shall be paid; and
- (5) Any other child support responsibilities for each parent.

(m) **Worksheets.**

(1) Schedules and worksheets shall be prepared by the parties for purposes of calculating the amount of child support. In child support services cases in which neither parent prepared a worksheet, the court may rely on the worksheet prepared by child support services as a basis for its order. Information from the schedules shall be entered on the child support worksheet. The child support worksheet and, if there are any deviations, Schedule E shall be attached to the final court order or judgment; provided, however, that any order entered pursuant to Code Section 19-13-4 shall not be required to have such worksheet and schedule attached thereto.

(2) The child support worksheet and schedules shall be promulgated by the Georgia Child Support Commission.

(n) **Child support obligation table.** The child support obligation table shall be proposed by the Georgia Child Support Commission and shall be as codified in subsection (o) of this Code section.

(o) **Georgia Schedule of Basic Child Support Obligations.**

Georgia Schedule of Basic Child Support Obligations						
Combined Adjusted Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
\$ 800.00	\$ 197.00	\$ 283.00	\$ 330.00	\$ 367.00	\$ 404.00	\$ 440.00
850.00	208.00	298.00	347.00	387.00	425.00	463.00
900.00	218.00	313.00	364.00	406.00	447.00	486.00
950.00	229.00	328.00	381.00	425.00	468.00	509.00

Georgia Schedule of Basic Child Support Obligations						
Combined Adjusted Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
1,000.00	239.00	343.00	398.00	444.00	489.00	532.00
1,050.00	250.00	357.00	415.00	463.00	510.00	554.00
1,100.00	260.00	372.00	432.00	482.00	530.00	577.00
1,150.00	270.00	387.00	449.00	501.00	551.00	600.00
1,200.00	280.00	401.00	466.00	520.00	572.00	622.00
1,250.00	291.00	416.00	483.00	539.00	593.00	645.00
1,300.00	301.00	431.00	500.00	558.00	614.00	668.00
1,350.00	311.00	445.00	517.00	577.00	634.00	690.00
1,400.00	321.00	459.00	533.00	594.00	654.00	711.00
1,450.00	331.00	473.00	549.00	612.00	673.00	733.00
1,500.00	340.00	487.00	565.00	630.00	693.00	754.00
1,550.00	350.00	500.00	581.00	647.00	712.00	775.00
1,600.00	360.00	514.00	597.00	665.00	732.00	796.00
1,650.00	369.00	528.00	612.00	683.00	751.00	817.00
1,700.00	379.00	542.00	628.00	701.00	771.00	838.00
1,750.00	389.00	555.00	644.00	718.00	790.00	860.00
1,800.00	398.00	569.00	660.00	736.00	809.00	881.00
1,850.00	408.00	583.00	676.00	754.00	829.00	902.00
1,900.00	418.00	596.00	692.00	771.00	848.00	923.00
1,950.00	427.00	610.00	708.00	789.00	868.00	944.00
2,000.00	437.00	624.00	723.00	807.00	887.00	965.00
2,050.00	446.00	637.00	739.00	824.00	906.00	986.00
2,100.00	455.00	650.00	754.00	840.00	924.00	1,006.00
2,150.00	465.00	663.00	769.00	857.00	943.00	1,026.00
2,200.00	474.00	676.00	783.00	873.00	961.00	1,045.00
2,250.00	483.00	688.00	798.00	890.00	979.00	1,065.00
2,300.00	492.00	701.00	813.00	907.00	997.00	1,085.00
2,350.00	501.00	714.00	828.00	923.00	1,016.00	1,105.00
2,400.00	510.00	727.00	843.00	940.00	1,034.00	1,125.00
2,450.00	519.00	740.00	858.00	956.00	1,052.00	1,145.00
2,500.00	528.00	752.00	873.00	973.00	1,070.00	1,165.00
2,550.00	537.00	765.00	888.00	990.00	1,089.00	1,184.00
2,600.00	547.00	778.00	902.00	1,006.00	1,107.00	1,204.00
2,650.00	556.00	791.00	917.00	1,023.00	1,125.00	1,224.00
2,700.00	565.00	804.00	932.00	1,039.00	1,143.00	1,244.00

Georgia Schedule of Basic Child Support Obligations						
Combined Adjusted Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
2,750.00	574.00	816.00	947.00	1,056.00	1,162.00	1,264.00
2,800.00	583.00	829.00	962.00	1,073.00	1,180.00	1,284.00
2,850.00	592.00	842.00	977.00	1,089.00	1,198.00	1,303.00
2,900.00	601.00	855.00	992.00	1,106.00	1,216.00	1,323.00
2,950.00	611.00	868.00	1,006.00	1,122.00	1,234.00	1,343.00
3,000.00	620.00	881.00	1,021.00	1,139.00	1,253.00	1,363.00
3,050.00	629.00	893.00	1,036.00	1,155.00	1,271.00	1,383.00
3,100.00	638.00	906.00	1,051.00	1,172.00	1,289.00	1,402.00
3,150.00	647.00	919.00	1,066.00	1,188.00	1,307.00	1,422.00
3,200.00	655.00	930.00	1,079.00	1,203.00	1,323.00	1,440.00
3,250.00	663.00	941.00	1,092.00	1,217.00	1,339.00	1,457.00
3,300.00	671.00	952.00	1,104.00	1,231.00	1,355.00	1,474.00
3,350.00	679.00	963.00	1,117.00	1,246.00	1,370.00	1,491.00
3,400.00	687.00	974.00	1,130.00	1,260.00	1,386.00	1,508.00
3,450.00	694.00	985.00	1,143.00	1,274.00	1,402.00	1,525.00
3,500.00	702.00	996.00	1,155.00	1,288.00	1,417.00	1,542.00
3,550.00	710.00	1,008.00	1,168.00	1,303.00	1,433.00	1,559.00
3,600.00	718.00	1,019.00	1,181.00	1,317.00	1,448.00	1,576.00
3,650.00	726.00	1,030.00	1,194.00	1,331.00	1,464.00	1,593.00
3,700.00	734.00	1,041.00	1,207.00	1,345.00	1,480.00	1,610.00
3,750.00	741.00	1,051.00	1,219.00	1,359.00	1,495.00	1,627.00
3,800.00	749.00	1,062.00	1,231.00	1,373.00	1,510.00	1,643.00
3,850.00	756.00	1,072.00	1,243.00	1,386.00	1,525.00	1,659.00
3,900.00	764.00	1,083.00	1,255.00	1,400.00	1,540.00	1,675.00
3,950.00	771.00	1,093.00	1,267.00	1,413.00	1,555.00	1,691.00
4,000.00	779.00	1,104.00	1,280.00	1,427.00	1,569.00	1,707.00
4,050.00	786.00	1,114.00	1,292.00	1,440.00	1,584.00	1,724.00
4,100.00	794.00	1,125.00	1,304.00	1,454.00	1,599.00	1,740.00
4,150.00	801.00	1,135.00	1,316.00	1,467.00	1,614.00	1,756.00
4,200.00	809.00	1,146.00	1,328.00	1,481.00	1,629.00	1,772.00
4,250.00	816.00	1,156.00	1,340.00	1,494.00	1,643.00	1,788.00
4,300.00	824.00	1,167.00	1,352.00	1,508.00	1,658.00	1,804.00
4,350.00	831.00	1,177.00	1,364.00	1,521.00	1,673.00	1,820.00
4,400.00	839.00	1,188.00	1,376.00	1,534.00	1,688.00	1,836.00
4,450.00	846.00	1,198.00	1,388.00	1,548.00	1,703.00	1,853.00

Georgia Schedule of Basic Child Support Obligations						
Combined Adjusted Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
4,500.00	853.00	1,209.00	1,400.00	1,561.00	1,718.00	1,869.00
4,550.00	861.00	1,219.00	1,412.00	1,575.00	1,732.00	1,885.00
4,600.00	868.00	1,230.00	1,425.00	1,588.00	1,747.00	1,901.00
4,650.00	876.00	1,240.00	1,437.00	1,602.00	1,762.00	1,917.00
4,700.00	883.00	1,251.00	1,449.00	1,615.00	1,777.00	1,933.00
4,750.00	891.00	1,261.00	1,461.00	1,629.00	1,792.00	1,949.00
4,800.00	898.00	1,271.00	1,473.00	1,642.00	1,807.00	1,966.00
4,850.00	906.00	1,282.00	1,485.00	1,656.00	1,821.00	1,982.00
4,900.00	911.00	1,289.00	1,493.00	1,664.00	1,831.00	1,992.00
4,950.00	914.00	1,293.00	1,496.00	1,668.00	1,835.00	1,997.00
5,000.00	917.00	1,297.00	1,500.00	1,672.00	1,839.00	2,001.00
5,050.00	921.00	1,300.00	1,503.00	1,676.00	1,844.00	2,006.00
5,100.00	924.00	1,304.00	1,507.00	1,680.00	1,848.00	2,011.00
5,150.00	927.00	1,308.00	1,510.00	1,684.00	1,852.00	2,015.00
5,200.00	930.00	1,312.00	1,514.00	1,688.00	1,857.00	2,020.00
5,250.00	934.00	1,316.00	1,517.00	1,692.00	1,861.00	2,025.00
5,300.00	937.00	1,320.00	1,521.00	1,696.00	1,865.00	2,029.00
5,350.00	940.00	1,323.00	1,524.00	1,700.00	1,870.00	2,034.00
5,400.00	943.00	1,327.00	1,528.00	1,704.00	1,874.00	2,039.00
5,450.00	947.00	1,331.00	1,531.00	1,708.00	1,878.00	2,044.00
5,500.00	950.00	1,335.00	1,535.00	1,711.00	1,883.00	2,048.00
5,550.00	953.00	1,339.00	1,538.00	1,715.00	1,887.00	2,053.00
5,600.00	956.00	1,342.00	1,542.00	1,719.00	1,891.00	2,058.00
5,650.00	960.00	1,347.00	1,546.00	1,724.00	1,896.00	2,063.00
5,700.00	964.00	1,352.00	1,552.00	1,731.00	1,904.00	2,071.00
5,750.00	968.00	1,357.00	1,558.00	1,737.00	1,911.00	2,079.00
5,800.00	971.00	1,363.00	1,564.00	1,744.00	1,918.00	2,087.00
5,850.00	975.00	1,368.00	1,570.00	1,750.00	1,925.00	2,094.00
5,900.00	979.00	1,373.00	1,575.00	1,757.00	1,932.00	2,102.00
5,950.00	983.00	1,379.00	1,581.00	1,763.00	1,939.00	2,110.00
6,000.00	987.00	1,384.00	1,587.00	1,770.00	1,947.00	2,118.00
6,050.00	991.00	1,389.00	1,593.00	1,776.00	1,954.00	2,126.00
6,100.00	995.00	1,394.00	1,599.00	1,783.00	1,961.00	2,133.00
6,150.00	999.00	1,400.00	1,605.00	1,789.00	1,968.00	2,141.00
6,200.00	1,003.00	1,405.00	1,610.00	1,796.00	1,975.00	2,149.00

Georgia Schedule of Basic Child Support Obligations						
Combined Adjusted Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
6,250.00	1,007.00	1,410.00	1,616.00	1,802.00	1,982.00	2,157.00
6,300.00	1,011.00	1,416.00	1,622.00	1,809.00	1,989.00	2,164.00
6,350.00	1,015.00	1,421.00	1,628.00	1,815.00	1,996.00	2,172.00
6,400.00	1,018.00	1,426.00	1,633.00	1,821.00	2,003.00	2,180.00
6,450.00	1,023.00	1,432.00	1,639.00	1,828.00	2,011.00	2,188.00
6,500.00	1,027.00	1,437.00	1,646.00	1,835.00	2,018.00	2,196.00
6,550.00	1,031.00	1,442.00	1,652.00	1,841.00	2,026.00	2,204.00
6,600.00	1,035.00	1,448.00	1,658.00	1,848.00	2,033.00	2,212.00
6,650.00	1,039.00	1,453.00	1,664.00	1,855.00	2,040.00	2,220.00
6,700.00	1,043.00	1,459.00	1,670.00	1,862.00	2,048.00	2,228.00
6,750.00	1,047.00	1,464.00	1,676.00	1,869.00	2,055.00	2,236.00
6,800.00	1,051.00	1,470.00	1,682.00	1,875.00	2,063.00	2,244.00
6,850.00	1,055.00	1,475.00	1,688.00	1,882.00	2,070.00	2,252.00
6,900.00	1,059.00	1,480.00	1,694.00	1,889.00	2,078.00	2,260.00
6,950.00	1,063.00	1,486.00	1,700.00	1,896.00	2,085.00	2,269.00
7,000.00	1,067.00	1,491.00	1,706.00	1,902.00	2,092.00	2,277.00
7,050.00	1,071.00	1,497.00	1,712.00	1,909.00	2,100.00	2,285.00
7,100.00	1,075.00	1,502.00	1,718.00	1,916.00	2,107.00	2,293.00
7,150.00	1,079.00	1,508.00	1,724.00	1,923.00	2,115.00	2,301.00
7,200.00	1,083.00	1,513.00	1,730.00	1,929.00	2,122.00	2,309.00
7,250.00	1,087.00	1,518.00	1,736.00	1,936.00	2,130.00	2,317.00
7,300.00	1,092.00	1,524.00	1,742.00	1,943.00	2,137.00	2,325.00
7,350.00	1,096.00	1,529.00	1,748.00	1,950.00	2,144.00	2,333.00
7,400.00	1,100.00	1,535.00	1,755.00	1,956.00	2,152.00	2,341.00
7,450.00	1,104.00	1,540.00	1,761.00	1,963.00	2,159.00	2,349.00
7,500.00	1,108.00	1,546.00	1,767.00	1,970.00	2,167.00	2,357.00
7,550.00	1,112.00	1,552.00	1,773.00	1,977.00	2,175.00	2,366.00
7,600.00	1,116.00	1,556.00	1,778.00	1,983.00	2,181.00	2,373.00
7,650.00	1,117.00	1,557.00	1,779.00	1,984.00	2,182.00	2,375.00
7,700.00	1,118.00	1,559.00	1,781.00	1,986.00	2,184.00	2,376.00
7,750.00	1,119.00	1,560.00	1,782.00	1,987.00	2,186.00	2,378.00
7,800.00	1,120.00	1,562.00	1,784.00	1,989.00	2,188.00	2,380.00
7,850.00	1,122.00	1,563.00	1,785.00	1,990.00	2,189.00	2,382.00
7,900.00	1,123.00	1,565.00	1,786.00	1,992.00	2,191.00	2,384.00
7,950.00	1,124.00	1,566.00	1,788.00	1,993.00	2,193.00	2,386.00

Georgia Schedule of Basic Child Support Obligations						
Combined Adjusted Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
8,000.00	1,125.00	1,567.00	1,789.00	1,995.00	2,194.00	2,387.00
8,050.00	1,127.00	1,569.00	1,790.00	1,996.00	2,196.00	2,389.00
8,100.00	1,128.00	1,570.00	1,792.00	1,998.00	2,198.00	2,391.00
8,150.00	1,129.00	1,572.00	1,793.00	1,999.00	2,199.00	2,393.00
8,200.00	1,130.00	1,573.00	1,795.00	2,001.00	2,201.00	2,395.00
8,250.00	1,131.00	1,575.00	1,796.00	2,003.00	2,203.00	2,397.00
8,300.00	1,133.00	1,576.00	1,797.00	2,004.00	2,204.00	2,398.00
8,350.00	1,134.00	1,578.00	1,799.00	2,006.00	2,206.00	2,400.00
8,400.00	1,135.00	1,579.00	1,800.00	2,007.00	2,208.00	2,402.00
8,450.00	1,136.00	1,580.00	1,802.00	2,009.00	2,210.00	2,404.00
8,500.00	1,138.00	1,582.00	1,803.00	2,010.00	2,211.00	2,406.00
8,550.00	1,139.00	1,583.00	1,804.00	2,012.00	2,213.00	2,408.00
8,600.00	1,140.00	1,585.00	1,806.00	2,013.00	2,215.00	2,410.00
8,650.00	1,141.00	1,586.00	1,807.00	2,015.00	2,216.00	2,411.00
8,700.00	1,142.00	1,588.00	1,808.00	2,016.00	2,218.00	2,413.00
8,750.00	1,144.00	1,589.00	1,810.00	2,018.00	2,220.00	2,415.00
8,800.00	1,145.00	1,591.00	1,811.00	2,019.00	2,221.00	2,417.00
8,850.00	1,146.00	1,592.00	1,813.00	2,021.00	2,223.00	2,419.00
8,900.00	1,147.00	1,593.00	1,814.00	2,023.00	2,225.00	2,421.00
8,950.00	1,149.00	1,595.00	1,815.00	2,024.00	2,226.00	2,422.00
9,000.00	1,150.00	1,596.00	1,817.00	2,026.00	2,228.00	2,424.00
9,050.00	1,153.00	1,601.00	1,822.00	2,032.00	2,235.00	2,431.00
9,100.00	1,159.00	1,609.00	1,831.00	2,042.00	2,246.00	2,443.00
9,150.00	1,164.00	1,617.00	1,840.00	2,052.00	2,257.00	2,455.00
9,200.00	1,170.00	1,624.00	1,849.00	2,062.00	2,268.00	2,467.00
9,250.00	1,175.00	1,632.00	1,858.00	2,071.00	2,279.00	2,479.00
9,300.00	1,181.00	1,640.00	1,867.00	2,081.00	2,290.00	2,491.00
9,350.00	1,187.00	1,648.00	1,876.00	2,091.00	2,301.00	2,503.00
9,400.00	1,192.00	1,656.00	1,885.00	2,101.00	2,311.00	2,515.00
9,450.00	1,198.00	1,663.00	1,894.00	2,111.00	2,322.00	2,527.00
9,500.00	1,203.00	1,671.00	1,902.00	2,121.00	2,333.00	2,539.00
9,550.00	1,209.00	1,679.00	1,911.00	2,131.00	2,344.00	2,551.00
9,600.00	1,214.00	1,687.00	1,920.00	2,141.00	2,355.00	2,563.00
9,650.00	1,220.00	1,694.00	1,929.00	2,151.00	2,366.00	2,574.00
9,700.00	1,226.00	1,702.00	1,938.00	2,161.00	2,377.00	2,586.00

Georgia Schedule of Basic Child Support Obligations						
Combined Adjusted Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
9,750.00	1,231.00	1,710.00	1,947.00	2,171.00	2,388.00	2,598.00
9,800.00	1,237.00	1,718.00	1,956.00	2,181.00	2,399.00	2,610.00
9,850.00	1,242.00	1,725.00	1,965.00	2,191.00	2,410.00	2,622.00
9,900.00	1,248.00	1,733.00	1,974.00	2,201.00	2,421.00	2,634.00
9,950.00	1,253.00	1,741.00	1,983.00	2,211.00	2,432.00	2,646.00
10,000.00	1,259.00	1,749.00	1,992.00	2,221.00	2,443.00	2,658.00
10,050.00	1,264.00	1,757.00	2,001.00	2,231.00	2,454.00	2,670.00
10,100.00	1,270.00	1,764.00	2,010.00	2,241.00	2,465.00	2,682.00
10,150.00	1,276.00	1,772.00	2,019.00	2,251.00	2,476.00	2,694.00
10,200.00	1,281.00	1,780.00	2,028.00	2,261.00	2,487.00	2,706.00
10,250.00	1,287.00	1,788.00	2,036.00	2,271.00	2,498.00	2,718.00
10,300.00	1,292.00	1,795.00	2,045.00	2,281.00	2,509.00	2,729.00
10,350.00	1,298.00	1,803.00	2,054.00	2,291.00	2,520.00	2,741.00
10,400.00	1,303.00	1,811.00	2,063.00	2,301.00	2,531.00	2,753.00
10,450.00	1,309.00	1,819.00	2,072.00	2,311.00	2,542.00	2,765.00
10,500.00	1,313.00	1,825.00	2,079.00	2,318.00	2,550.00	2,774.00
10,550.00	1,317.00	1,830.00	2,085.00	2,325.00	2,557.00	2,782.00
10,600.00	1,321.00	1,835.00	2,091.00	2,331.00	2,564.00	2,790.00
10,650.00	1,325.00	1,841.00	2,096.00	2,338.00	2,571.00	2,798.00
10,700.00	1,329.00	1,846.00	2,102.00	2,344.00	2,578.00	2,805.00
10,750.00	1,332.00	1,851.00	2,108.00	2,351.00	2,586.00	2,813.00
10,800.00	1,336.00	1,856.00	2,114.00	2,357.00	2,593.00	2,821.00
10,850.00	1,340.00	1,862.00	2,120.00	2,364.00	2,600.00	2,829.00
10,900.00	1,344.00	1,867.00	2,126.00	2,370.00	2,607.00	2,836.00
10,950.00	1,348.00	1,872.00	2,131.00	2,377.00	2,614.00	2,844.00
11,000.00	1,351.00	1,877.00	2,137.00	2,383.00	2,621.00	2,852.00
11,050.00	1,355.00	1,883.00	2,143.00	2,390.00	2,628.00	2,860.00
11,100.00	1,359.00	1,888.00	2,149.00	2,396.00	2,636.00	2,868.00
11,150.00	1,363.00	1,893.00	2,155.00	2,403.00	2,643.00	2,875.00
11,200.00	1,367.00	1,898.00	2,161.00	2,409.00	2,650.00	2,883.00
11,250.00	1,371.00	1,904.00	2,166.00	2,415.00	2,657.00	2,891.00
11,300.00	1,374.00	1,909.00	2,172.00	2,422.00	2,664.00	2,899.00
11,350.00	1,378.00	1,914.00	2,178.00	2,428.00	2,671.00	2,906.00
11,400.00	1,382.00	1,919.00	2,184.00	2,435.00	2,678.00	2,914.00
11,450.00	1,386.00	1,925.00	2,190.00	2,441.00	2,686.00	2,922.00

Georgia Schedule of Basic Child Support Obligations						
Combined Adjusted Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
11,500.00	1,390.00	1,930.00	2,195.00	2,448.00	2,693.00	2,930.00
11,550.00	1,394.00	1,935.00	2,201.00	2,454.00	2,700.00	2,938.00
11,600.00	1,397.00	1,940.00	2,207.00	2,461.00	2,707.00	2,945.00
11,650.00	1,401.00	1,946.00	2,213.00	2,467.00	2,714.00	2,953.00
11,700.00	1,405.00	1,951.00	2,219.00	2,474.00	2,721.00	2,961.00
11,750.00	1,409.00	1,956.00	2,225.00	2,480.00	2,728.00	2,969.00
11,800.00	1,413.00	1,961.00	2,230.00	2,487.00	2,736.00	2,976.00
11,850.00	1,417.00	1,967.00	2,236.00	2,493.00	2,743.00	2,984.00
11,900.00	1,420.00	1,972.00	2,242.00	2,500.00	2,750.00	2,992.00
11,950.00	1,424.00	1,977.00	2,248.00	2,506.00	2,757.00	3,000.00
12,000.00	1,428.00	1,982.00	2,254.00	2,513.00	2,764.00	3,007.00
12,050.00	1,432.00	1,988.00	2,260.00	2,519.00	2,771.00	3,015.00
12,100.00	1,436.00	1,993.00	2,265.00	2,526.00	2,779.00	3,023.00
12,150.00	1,439.00	1,998.00	2,271.00	2,532.00	2,786.00	3,031.00
12,200.00	1,443.00	2,003.00	2,277.00	2,539.00	2,793.00	3,039.00
12,250.00	1,447.00	2,009.00	2,283.00	2,545.00	2,800.00	3,046.00
12,300.00	1,451.00	2,014.00	2,289.00	2,552.00	2,807.00	3,054.00
12,350.00	1,455.00	2,019.00	2,295.00	2,558.00	2,814.00	3,062.00
12,400.00	1,459.00	2,024.00	2,300.00	2,565.00	2,821.00	3,070.00
12,450.00	1,462.00	2,030.00	2,306.00	2,571.00	2,829.00	3,077.00
12,500.00	1,466.00	2,035.00	2,312.00	2,578.00	2,836.00	3,085.00
12,550.00	1,470.00	2,040.00	2,318.00	2,584.00	2,843.00	3,093.00
12,600.00	1,474.00	2,045.00	2,324.00	2,591.00	2,850.00	3,101.00
12,650.00	1,477.00	2,050.00	2,329.00	2,597.00	2,857.00	3,108.00
12,700.00	1,481.00	2,055.00	2,335.00	2,603.00	2,863.00	3,115.00
12,750.00	1,484.00	2,060.00	2,340.00	2,609.00	2,870.00	3,123.00
12,800.00	1,487.00	2,064.00	2,345.00	2,615.00	2,877.00	3,130.00
12,850.00	1,491.00	2,069.00	2,351.00	2,621.00	2,883.00	3,137.00
12,900.00	1,494.00	2,074.00	2,356.00	2,627.00	2,890.00	3,144.00
12,950.00	1,497.00	2,078.00	2,361.00	2,633.00	2,896.00	3,151.00
13,000.00	1,501.00	2,083.00	2,367.00	2,639.00	2,903.00	3,158.00
13,050.00	1,504.00	2,087.00	2,372.00	2,645.00	2,909.00	3,165.00
13,100.00	1,507.00	2,092.00	2,377.00	2,651.00	2,916.00	3,172.00
13,150.00	1,510.00	2,097.00	2,383.00	2,657.00	2,922.00	3,180.00
13,200.00	1,514.00	2,101.00	2,388.00	2,663.00	2,929.00	3,187.00

Georgia Schedule of Basic Child Support Obligations						
Combined Adjusted Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
13,250.00	1,517.00	2,106.00	2,393.00	2,668.00	2,935.00	3,193.00
13,300.00	1,520.00	2,110.00	2,398.00	2,674.00	2,941.00	3,200.00
13,350.00	1,523.00	2,114.00	2,403.00	2,679.00	2,947.00	3,206.00
13,400.00	1,526.00	2,118.00	2,408.00	2,685.00	2,953.00	3,213.00
13,450.00	1,529.00	2,123.00	2,413.00	2,690.00	2,959.00	3,220.00
13,500.00	1,532.00	2,127.00	2,418.00	2,696.00	2,965.00	3,226.00
13,550.00	1,535.00	2,131.00	2,423.00	2,701.00	2,971.00	3,233.00
13,600.00	1,538.00	2,136.00	2,428.00	2,707.00	2,977.00	3,239.00
13,650.00	1,541.00	2,140.00	2,432.00	2,712.00	2,983.00	3,246.00
13,700.00	1,544.00	2,144.00	2,437.00	2,718.00	2,989.00	3,253.00
13,750.00	1,547.00	2,148.00	2,442.00	2,723.00	2,996.00	3,259.00
13,800.00	1,550.00	2,153.00	2,447.00	2,729.00	3,002.00	3,266.00
13,850.00	1,553.00	2,157.00	2,452.00	2,734.00	3,008.00	3,272.00
13,900.00	1,556.00	2,161.00	2,457.00	2,740.00	3,014.00	3,279.00
13,950.00	1,559.00	2,166.00	2,462.00	2,745.00	3,020.00	3,285.00
14,000.00	1,562.00	2,170.00	2,467.00	2,751.00	3,026.00	3,292.00
14,050.00	1,565.00	2,174.00	2,472.00	2,756.00	3,032.00	3,299.00
14,100.00	1,568.00	2,178.00	2,477.00	2,762.00	3,038.00	3,305.00
14,150.00	1,571.00	2,183.00	2,482.00	2,767.00	3,044.00	3,312.00
14,200.00	1,574.00	2,187.00	2,487.00	2,773.00	3,050.00	3,318.00
14,250.00	1,577.00	2,191.00	2,492.00	2,778.00	3,056.00	3,325.00
14,300.00	1,581.00	2,195.00	2,497.00	2,784.00	3,062.00	3,332.00
14,350.00	1,584.00	2,200.00	2,502.00	2,789.00	3,068.00	3,338.00
14,400.00	1,587.00	2,204.00	2,506.00	2,795.00	3,074.00	3,345.00
14,450.00	1,590.00	2,208.00	2,511.00	2,800.00	3,080.00	3,351.00
14,500.00	1,593.00	2,213.00	2,516.00	2,806.00	3,086.00	3,358.00
14,550.00	1,596.00	2,217.00	2,521.00	2,811.00	3,092.00	3,365.00
14,600.00	1,599.00	2,221.00	2,526.00	2,817.00	3,098.00	3,371.00
14,650.00	1,602.00	2,225.00	2,531.00	2,822.00	3,104.00	3,378.00
14,700.00	1,605.00	2,230.00	2,536.00	2,828.00	3,111.00	3,384.00
14,750.00	1,608.00	2,234.00	2,541.00	2,833.00	3,117.00	3,391.00
14,800.00	1,611.00	2,238.00	2,546.00	2,839.00	3,123.00	3,397.00
14,850.00	1,614.00	2,243.00	2,551.00	2,844.00	3,129.00	3,404.00
14,900.00	1,617.00	2,247.00	2,556.00	2,850.00	3,135.00	3,411.00
14,950.00	1,620.00	2,251.00	2,561.00	2,855.00	3,141.00	3,417.00

Georgia Schedule of Basic Child Support Obligations						
Combined Adjusted Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
15,000.00	1,623.00	2,255.00	2,566.00	2,861.00	3,147.00	3,424.00
15,050.00	1,626.00	2,260.00	2,571.00	2,866.00	3,153.00	3,430.00
15,100.00	1,629.00	2,264.00	2,576.00	2,872.00	3,159.00	3,437.00
15,150.00	1,632.00	2,268.00	2,581.00	2,877.00	3,165.00	3,444.00
15,200.00	1,635.00	2,272.00	2,585.00	2,883.00	3,171.00	3,450.00
15,250.00	1,638.00	2,277.00	2,590.00	2,888.00	3,177.00	3,457.00
15,300.00	1,641.00	2,281.00	2,595.00	2,894.00	3,183.00	3,463.00
15,350.00	1,644.00	2,285.00	2,600.00	2,899.00	3,189.00	3,470.00
15,400.00	1,647.00	2,290.00	2,605.00	2,905.00	3,195.00	3,476.00
15,450.00	1,650.00	2,294.00	2,610.00	2,910.00	3,201.00	3,483.00
15,500.00	1,653.00	2,298.00	2,615.00	2,916.00	3,207.00	3,490.00
15,550.00	1,656.00	2,302.00	2,620.00	2,921.00	3,213.00	3,496.00
15,600.00	1,659.00	2,307.00	2,625.00	2,927.00	3,219.00	3,503.00
15,650.00	1,663.00	2,311.00	2,630.00	2,932.00	3,226.00	3,509.00
15,700.00	1,666.00	2,315.00	2,635.00	2,938.00	3,232.00	3,516.00
15,750.00	1,669.00	2,320.00	2,640.00	2,943.00	3,238.00	3,523.00
15,800.00	1,672.00	2,324.00	2,645.00	2,949.00	3,244.00	3,529.00
15,850.00	1,675.00	2,328.00	2,650.00	2,954.00	3,250.00	3,536.00
15,900.00	1,678.00	2,332.00	2,655.00	2,960.00	3,256.00	3,542.00
15,950.00	1,681.00	2,337.00	2,659.00	2,965.00	3,262.00	3,549.00
16,000.00	1,684.00	2,341.00	2,664.00	2,971.00	3,268.00	3,555.00
16,050.00	1,687.00	2,345.00	2,669.00	2,976.00	3,274.00	3,562.00
16,100.00	1,690.00	2,349.00	2,674.00	2,982.00	3,280.00	3,569.00
16,150.00	1,692.00	2,353.00	2,678.00	2,986.00	3,285.00	3,574.00
16,200.00	1,695.00	2,356.00	2,682.00	2,990.00	3,289.00	3,579.00
16,250.00	1,698.00	2,360.00	2,686.00	2,994.00	3,294.00	3,584.00
16,300.00	1,700.00	2,363.00	2,689.00	2,999.00	3,299.00	3,589.00
16,350.00	1,703.00	2,367.00	2,693.00	3,003.00	3,303.00	3,594.00
16,400.00	1,706.00	2,370.00	2,697.00	3,007.00	3,308.00	3,599.00
16,450.00	1,708.00	2,374.00	2,701.00	3,011.00	3,313.00	3,604.00
16,500.00	1,711.00	2,377.00	2,705.00	3,016.00	3,317.00	3,609.00
16,550.00	1,714.00	2,381.00	2,708.00	3,020.00	3,322.00	3,614.00
16,600.00	1,716.00	2,384.00	2,712.00	3,024.00	3,327.00	3,619.00
16,650.00	1,719.00	2,388.00	2,716.00	3,028.00	3,331.00	3,624.00
16,700.00	1,722.00	2,391.00	2,720.00	3,033.00	3,336.00	3,630.00

Georgia Schedule of Basic Child Support Obligations						
Combined Adjusted Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
16,750.00	1,724.00	2,395.00	2,724.00	3,037.00	3,341.00	3,635.00
16,800.00	1,727.00	2,398.00	2,728.00	3,041.00	3,345.00	3,640.00
16,850.00	1,730.00	2,402.00	2,731.00	3,045.00	3,350.00	3,645.00
16,900.00	1,732.00	2,405.00	2,735.00	3,050.00	3,355.00	3,650.00
16,950.00	1,735.00	2,409.00	2,739.00	3,054.00	3,359.00	3,655.00
17,000.00	1,737.00	2,412.00	2,743.00	3,058.00	3,364.00	3,660.00
17,050.00	1,740.00	2,416.00	2,747.00	3,062.00	3,369.00	3,665.00
17,100.00	1,743.00	2,419.00	2,750.00	3,067.00	3,373.00	3,670.00
17,150.00	1,745.00	2,423.00	2,754.00	3,071.00	3,378.00	3,675.00
17,200.00	1,748.00	2,426.00	2,758.00	3,075.00	3,383.00	3,680.00
17,250.00	1,751.00	2,430.00	2,762.00	3,079.00	3,387.00	3,685.00
17,300.00	1,753.00	2,433.00	2,766.00	3,084.00	3,392.00	3,691.00
17,350.00	1,756.00	2,437.00	2,769.00	3,088.00	3,397.00	3,696.00
17,400.00	1,759.00	2,440.00	2,773.00	3,092.00	3,401.00	3,701.00
17,450.00	1,761.00	2,444.00	2,777.00	3,096.00	3,406.00	3,706.00
17,500.00	1,764.00	2,447.00	2,781.00	3,101.00	3,411.00	3,711.00
17,550.00	1,767.00	2,451.00	2,785.00	3,105.00	3,415.00	3,716.00
17,600.00	1,769.00	2,454.00	2,788.00	3,109.00	3,420.00	3,721.00
17,650.00	1,772.00	2,458.00	2,792.00	3,113.00	3,425.00	3,726.00
17,700.00	1,774.00	2,461.00	2,796.00	3,118.00	3,429.00	3,731.00
17,750.00	1,777.00	2,465.00	2,800.00	3,122.00	3,434.00	3,736.00
17,800.00	1,780.00	2,468.00	2,804.00	3,126.00	3,439.00	3,741.00
17,850.00	1,782.00	2,472.00	2,808.00	3,130.00	3,443.00	3,746.00
17,900.00	1,785.00	2,475.00	2,811.00	3,135.00	3,448.00	3,752.00
17,950.00	1,788.00	2,478.00	2,815.00	3,139.00	3,453.00	3,757.00
18,000.00	1,790.00	2,482.00	2,819.00	3,143.00	3,457.00	3,762.00
18,050.00	1,793.00	2,485.00	2,823.00	3,147.00	3,462.00	3,767.00
18,100.00	1,796.00	2,489.00	2,827.00	3,152.00	3,467.00	3,772.00
18,150.00	1,798.00	2,492.00	2,830.00	3,156.00	3,471.00	3,777.00
18,200.00	1,801.00	2,496.00	2,834.00	3,160.00	3,476.00	3,782.00
18,250.00	1,804.00	2,499.00	2,838.00	3,164.00	3,481.00	3,787.00
18,300.00	1,806.00	2,503.00	2,842.00	3,169.00	3,485.00	3,792.00
18,350.00	1,809.00	2,506.00	2,846.00	3,173.00	3,490.00	3,797.00
18,400.00	1,812.00	2,510.00	2,849.00	3,177.00	3,495.00	3,802.00
18,450.00	1,814.00	2,513.00	2,853.00	3,181.00	3,499.00	3,807.00

Georgia Schedule of Basic Child Support Obligations						
Combined Adjusted Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
18,500.00	1,817.00	2,517.00	2,857.00	3,186.00	3,504.00	3,813.00
18,550.00	1,819.00	2,520.00	2,861.00	3,190.00	3,509.00	3,818.00
18,600.00	1,822.00	2,524.00	2,865.00	3,194.00	3,513.00	3,823.00
18,650.00	1,825.00	2,527.00	2,868.00	3,198.00	3,518.00	3,828.00
18,700.00	1,827.00	2,531.00	2,872.00	3,203.00	3,523.00	3,833.00
18,750.00	1,830.00	2,534.00	2,876.00	3,207.00	3,528.00	3,838.00
18,800.00	1,833.00	2,538.00	2,880.00	3,211.00	3,532.00	3,843.00
18,850.00	1,835.00	2,541.00	2,884.00	3,215.00	3,537.00	3,848.00
18,900.00	1,838.00	2,545.00	2,888.00	3,220.00	3,542.00	3,853.00
18,950.00	1,841.00	2,548.00	2,891.00	3,224.00	3,546.00	3,858.00
19,000.00	1,843.00	2,552.00	2,895.00	3,228.00	3,551.00	3,863.00
19,050.00	1,846.00	2,555.00	2,899.00	3,232.00	3,556.00	3,868.00
19,100.00	1,849.00	2,559.00	2,903.00	3,237.00	3,560.00	3,874.00
19,150.00	1,851.00	2,562.00	2,907.00	3,241.00	3,565.00	3,879.00
19,200.00	1,854.00	2,566.00	2,910.00	3,245.00	3,570.00	3,884.00
19,250.00	1,856.00	2,569.00	2,914.00	3,249.00	3,574.00	3,889.00
19,300.00	1,859.00	2,573.00	2,918.00	3,254.00	3,579.00	3,894.00
19,350.00	1,862.00	2,576.00	2,922.00	3,258.00	3,584.00	3,899.00
19,400.00	1,864.00	2,580.00	2,926.00	3,262.00	3,588.00	3,904.00
19,450.00	1,867.00	2,583.00	2,929.00	3,266.00	3,593.00	3,909.00
19,500.00	1,870.00	2,587.00	2,933.00	3,271.00	3,598.00	3,914.00
19,550.00	1,872.00	2,590.00	2,937.00	3,275.00	3,602.00	3,919.00
19,600.00	1,875.00	2,594.00	2,941.00	3,279.00	3,607.00	3,924.00
19,650.00	1,878.00	2,597.00	2,945.00	3,283.00	3,612.00	3,929.00
19,700.00	1,880.00	2,601.00	2,948.00	3,288.00	3,616.00	3,935.00
19,750.00	1,883.00	2,604.00	2,952.00	3,292.00	3,621.00	3,940.00
19,800.00	1,886.00	2,608.00	2,956.00	3,296.00	3,626.00	3,945.00
19,850.00	1,888.00	2,611.00	2,960.00	3,300.00	3,630.00	3,950.00
19,900.00	1,891.00	2,615.00	2,964.00	3,305.00	3,635.00	3,955.00
19,950.00	1,893.00	2,618.00	2,967.00	3,309.00	3,640.00	3,960.00
20,000.00	1,896.00	2,622.00	2,971.00	3,313.00	3,644.00	3,965.00
20,050.00	1,899.00	2,625.00	2,975.00	3,317.00	3,649.00	3,970.00
20,100.00	1,901.00	2,628.00	2,979.00	3,321.00	3,654.00	3,975.00
20,150.00	1,904.00	2,632.00	2,983.00	3,326.00	3,658.00	3,980.00
20,200.00	1,907.00	2,635.00	2,987.00	3,330.00	3,663.00	3,985.00

Georgia Schedule of Basic Child Support Obligations						
Combined Adjusted Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
20,250.00	1,909.00	2,639.00	2,990.00	3,334.00	3,668.00	3,990.00
20,300.00	1,912.00	2,642.00	2,994.00	3,338.00	3,672.00	3,996.00
20,350.00	1,915.00	2,646.00	2,998.00	3,343.00	3,677.00	4,001.00
20,400.00	1,917.00	2,649.00	3,002.00	3,347.00	3,682.00	4,006.00
20,450.00	1,920.00	2,653.00	3,006.00	3,351.00	3,686.00	4,011.00
20,500.00	1,923.00	2,656.00	3,009.00	3,355.00	3,691.00	4,016.00
20,550.00	1,925.00	2,660.00	3,013.00	3,360.00	3,696.00	4,021.00
20,600.00	1,928.00	2,663.00	3,017.00	3,364.00	3,700.00	4,026.00
20,650.00	1,931.00	2,667.00	3,021.00	3,368.00	3,705.00	4,031.00
20,700.00	1,933.00	2,670.00	3,025.00	3,372.00	3,710.00	4,036.00
20,750.00	1,936.00	2,674.00	3,028.00	3,377.00	3,714.00	4,041.00
20,800.00	1,938.00	2,677.00	3,032.00	3,381.00	3,719.00	4,046.00
20,850.00	1,941.00	2,681.00	3,036.00	3,385.00	3,724.00	4,051.00
20,900.00	1,944.00	2,684.00	3,040.00	3,389.00	3,728.00	4,056.00
20,950.00	1,946.00	2,688.00	3,044.00	3,394.00	3,733.00	4,062.00
21,000.00	1,949.00	2,691.00	3,047.00	3,398.00	3,738.00	4,067.00
21,050.00	1,952.00	2,695.00	3,051.00	3,402.00	3,742.00	4,072.00
21,100.00	1,954.00	2,698.00	3,055.00	3,406.00	3,747.00	4,077.00
21,150.00	1,957.00	2,702.00	3,059.00	3,411.00	3,752.00	4,082.00
21,200.00	1,960.00	2,705.00	3,063.00	3,415.00	3,756.00	4,087.00
21,250.00	1,962.00	2,709.00	3,067.00	3,419.00	3,761.00	4,092.00
21,300.00	1,965.00	2,712.00	3,070.00	3,423.00	3,766.00	4,097.00
21,350.00	1,968.00	2,716.00	3,074.00	3,428.00	3,770.00	4,102.00
21,400.00	1,970.00	2,719.00	3,078.00	3,432.00	3,775.00	4,107.00
21,450.00	1,973.00	2,723.00	3,082.00	3,436.00	3,780.00	4,112.00
21,500.00	1,975.00	2,726.00	3,086.00	3,440.00	3,784.00	4,117.00
21,550.00	1,978.00	2,730.00	3,089.00	3,445.00	3,789.00	4,123.00
21,600.00	1,981.00	2,733.00	3,093.00	3,449.00	3,794.00	4,128.00
21,650.00	1,983.00	2,737.00	3,097.00	3,453.00	3,798.00	4,133.00
21,700.00	1,986.00	2,740.00	3,101.00	3,457.00	3,803.00	4,138.00
21,750.00	1,989.00	2,744.00	3,105.00	3,462.00	3,808.00	4,143.00
21,800.00	1,991.00	2,747.00	3,108.00	3,466.00	3,812.00	4,148.00
21,850.00	1,994.00	2,751.00	3,112.00	3,470.00	3,817.00	4,153.00
21,900.00	1,997.00	2,754.00	3,116.00	3,474.00	3,822.00	4,158.00
21,950.00	1,999.00	2,758.00	3,120.00	3,479.00	3,827.00	4,163.00

Georgia Schedule of Basic Child Support Obligations						
Combined Adjusted Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
22,000.00	2,002.00	2,761.00	3,124.00	3,483.00	3,831.00	4,168.00
22,050.00	2,005.00	2,765.00	3,127.00	3,487.00	3,836.00	4,173.00
22,100.00	2,007.00	2,768.00	3,131.00	3,491.00	3,841.00	4,178.00
22,150.00	2,010.00	2,772.00	3,135.00	3,496.00	3,845.00	4,184.00
22,200.00	2,012.00	2,775.00	3,139.00	3,500.00	3,850.00	4,189.00
22,250.00	2,015.00	2,779.00	3,143.00	3,504.00	3,855.00	4,194.00
22,300.00	2,018.00	2,782.00	3,147.00	3,508.00	3,859.00	4,199.00
22,350.00	2,020.00	2,785.00	3,150.00	3,513.00	3,864.00	4,204.00
22,400.00	2,022.00	2,788.00	3,153.00	3,515.00	3,867.00	4,207.00
22,450.00	2,024.00	2,790.00	3,155.00	3,517.00	3,869.00	4,210.00
22,500.00	2,025.00	2,792.00	3,157.00	3,520.00	3,872.00	4,212.00
22,550.00	2,027.00	2,793.00	3,158.00	3,522.00	3,874.00	4,215.00
22,600.00	2,028.00	2,795.00	3,160.00	3,524.00	3,876.00	4,217.00
22,650.00	2,029.00	2,797.00	3,162.00	3,526.00	3,878.00	4,220.00
22,700.00	2,031.00	2,799.00	3,164.00	3,528.00	3,881.00	4,222.00
22,750.00	2,032.00	2,801.00	3,166.00	3,530.00	3,883.00	4,225.00
22,800.00	2,034.00	2,803.00	3,168.00	3,532.00	3,885.00	4,227.00
22,850.00	2,035.00	2,804.00	3,169.00	3,534.00	3,888.00	4,230.00
22,900.00	2,036.00	2,806.00	3,171.00	3,536.00	3,890.00	4,232.00
22,950.00	2,038.00	2,808.00	3,173.00	3,538.00	3,892.00	4,235.00
23,000.00	2,039.00	2,810.00	3,175.00	3,540.00	3,894.00	4,237.00
23,050.00	2,041.00	2,812.00	3,177.00	3,542.00	3,897.00	4,240.00
23,100.00	2,042.00	2,814.00	3,179.00	3,544.00	3,899.00	4,242.00
23,150.00	2,044.00	2,816.00	3,181.00	3,546.00	3,901.00	4,245.00
23,200.00	2,045.00	2,817.00	3,182.00	3,548.00	3,904.00	4,247.00
23,250.00	2,046.00	2,819.00	3,184.00	3,550.00	3,906.00	4,250.00
23,300.00	2,048.00	2,821.00	3,186.00	3,552.00	3,908.00	4,252.00
23,350.00	2,049.00	2,823.00	3,188.00	3,555.00	3,910.00	4,254.00
23,400.00	2,051.00	2,825.00	3,190.00	3,557.00	3,913.00	4,257.00
23,450.00	2,052.00	2,827.00	3,192.00	3,559.00	3,915.00	4,259.00
23,500.00	2,053.00	2,828.00	3,193.00	3,561.00	3,917.00	4,262.00
23,550.00	2,055.00	2,830.00	3,195.00	3,563.00	3,919.00	4,264.00
23,600.00	2,056.00	2,832.00	3,197.00	3,565.00	3,922.00	4,267.00
23,650.00	2,058.00	2,834.00	3,199.00	3,567.00	3,924.00	4,269.00
23,700.00	2,059.00	2,836.00	3,201.00	3,569.00	3,926.00	4,272.00

Georgia Schedule of Basic Child Support Obligations						
Combined Adjusted Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
23,750.00	2,061.00	2838.00	3,203.00	3,571.00	3,929.00	4,274.00
23,800.00	2,062.00	2,840.00	3,204.00	3,573.00	3,931.00	4,277.00
23,850.00	2,063.00	2,841.00	3,206.00	3,575.00	3,933.00	4,279.00
23,900.00	2,065.00	2,843.00	3,208.00	3,577.00	3,935.00	4,282.00
23,950.00	2,066.00	2,845.00	3,210.00	3,579.00	3,938.00	4,284.00
24,000.00	2,068.00	2,847.00	3,212.00	3,581.00	3,940.00	4,287.00
24,050.00	2,069.00	2,849.00	3,214.00	3,583.00	3,942.00	4,289.00
24,100.00	2,070.00	2,851.00	3,216.00	3,585.00	3,945.00	4,292.00
24,150.00	2,072.00	2,852.00	3,217.00	3,587.00	3,947.00	4,294.00
24,200.00	2,073.00	2,854.00	3,219.00	3,589.00	3,949.00	4,297.00
24,250.00	2,075.00	2,856.00	3,221.00	3,592.00	3,951.00	4,299.00
24,300.00	2,076.00	2,858.00	3,223.00	3,594.00	3,954.00	4,302.00
24,350.00	2,077.00	2,860.00	3,225.00	3,596.00	3,956.00	4,304.00
24,400.00	2,079.00	2,862.00	3,227.00	3,598.00	3,958.00	4,307.00
24,450.00	2,080.00	2,864.00	3,228.00	3,600.00	3,961.00	4,309.00
24,500.00	2,082.00	2,865.00	3,230.00	3,602.00	3,963.00	4,312.00
24,550.00	2,083.00	2,867.00	3,232.00	3,604.00	3,965.00	4,314.00
24,600.00	2,085.00	2,869.00	3,234.00	3,606.00	3,967.00	4,317.00
24,650.00	2,086.00	2,871.00	3,236.00	3,608.00	3,970.00	4,319.00
24,700.00	2,087.00	2,873.00	3,238.00	3,610.00	3,972.00	4,322.00
24,750.00	2,089.00	2,875.00	3,240.00	3,612.00	3,974.00	4,324.00
24,800.00	2,090.00	2,876.00	3,241.00	3,614.00	3,977.00	4,326.00
24,850.00	2,092.00	2,878.00	3,243.00	3,616.00	3,979.00	4,329.00
24,900.00	2,093.00	2,880.00	3,245.00	3,618.00	3,981.00	4,331.00
24,950.00	2,094.00	2,882.00	3,247.00	3,620.00	3,983.00	4,334.00
25,000.00	2,096.00	2,884.00	3,249.00	3,622.00	3,986.00	4,336.00
25,050.00	2,097.00	2,886.00	3,251.00	3,624.00	3,988.00	4,339.00
25,100.00	2,099.00	2,887.00	3,252.00	3,626.00	3,990.00	4,341.00
25,150.00	2,100.00	2,889.00	3,254.00	3,629.00	3,993.00	4,344.00
25,200.00	2,102.00	2,891.00	3,256.00	3,631.00	3,995.00	4,346.00
25,250.00	2,103.00	2,893.00	3,258.00	3,633.00	3,997.00	4,349.00
25,300.00	2,104.00	2,895.00	3,260.00	3,635.00	3,999.00	4,351.00
25,350.00	2,106.00	2,897.00	3,262.00	3,637.00	4,002.00	4,354.00
25,400.00	2,107.00	2,899.00	3,264.00	3,639.00	4,004.00	4,356.00
25,450.00	2,109.00	2,900.00	3,265.00	3,641.00	4,006.00	4,359.00

Georgia Schedule of Basic Child Support Obligations						
Combined Adjusted Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
25,500.00	2,110.00	2,902.00	3,267.00	3,643.00	4,009.00	4,361.00
25,550.00	2,111.00	2,904.00	3,269.00	3,645.00	4,011.00	4,364.00
25,600.00	2,113.00	2,906.00	3,271.00	3,647.00	4,013.00	4,366.00
25,650.00	2,114.00	2,908.00	3,273.00	3,649.00	4,015.00	4,369.00
25,700.00	2,116.00	2,910.00	3,275.00	3,651.00	4,018.00	4,371.00
25,750.00	2,117.00	2,911.00	3,276.00	3,653.00	4,020.00	4,374.00
25,800.00	2,119.00	2,913.00	3,278.00	3,655.00	4,022.00	4,376.00
25,850.00	2,120.00	2,915.00	3,280.00	3,657.00	4,024.00	4,379.00
25,900.00	2,121.00	2,917.00	3,282.00	3,659.00	4,027.00	4,381.00
25,950.00	2,123.00	2,919.00	3,284.00	3,661.00	4,029.00	4,384.00
26,000.00	2,124.00	2,921.00	3,286.00	3,663.00	4,031.00	4,386.00
26,050.00	2,126.00	2,923.00	3,287.00	3,666.00	4,034.00	4,389.00
26,100.00	2,127.00	2,924.00	3,289.00	3,668.00	4,036.00	4,391.00
26,150.00	2,128.00	2,926.00	3,291.00	3,670.00	4,038.00	4,394.00
26,200.00	2,130.00	2,928.00	3,293.00	3,672.00	4,040.00	4,396.00
26,250.00	2,131.00	2,930.00	3,295.00	3,674.00	4,043.00	4,399.00
26,300.00	2,133.00	2,932.00	3,297.00	3,676.00	4,045.00	4,401.00
26,350.00	2,134.00	2,934.00	3,299.00	3,678.00	4,047.00	4,403.00
26,400.00	2,136.00	2,935.00	3,300.00	3,680.00	4,050.00	4,406.00
26,450.00	2,137.00	2,937.00	3,302.00	3,682.00	4,052.00	4,408.00
26,500.00	2,138.00	2,939.00	3,304.00	3,684.00	4,054.00	4,411.00
26,550.00	2,140.00	2,941.00	3,306.00	3,686.00	4,056.00	4,413.00
26,600.00	2,141.00	2,943.00	3,308.00	3,688.00	4,059.00	4,416.00
26,650.00	2,143.00	2,945.00	3,310.00	3,690.00	4,061.00	4,418.00
26,700.00	2,144.00	2,947.00	3,311.00	3,692.00	4,063.00	4,421.00
26,750.00	2,145.00	2,948.00	3,313.00	3,694.00	4,066.00	4,423.00
26,800.00	2,147.00	2,950.00	3,315.00	3,696.00	4,068.00	4,426.00
26,850.00	2,148.00	2,952.00	3,317.00	3,698.00	4,070.00	4,428.00
26,900.00	2,150.00	2,954.00	3,319.00	3,701.00	4,072.00	4,431.00
26,950.00	2,151.00	2,956.00	3,321.00	3,703.00	4,075.00	4,433.00
27,000.00	2,153.00	2,958.00	3,323.00	3,705.00	4,077.00	4,436.00
27,050.00	2,154.00	2,959.00	3,324.00	3,707.00	4,079.00	4,438.00
27,100.00	2,155.00	2,961.00	3,326.00	3,709.00	4,082.00	4,441.00
27,150.00	2,157.00	2,963.00	3,328.00	3,711.00	4,084.00	4,443.00
27,200.00	2,158.00	2,965.00	3,330.00	3,713.00	4,086.00	4,446.00

Georgia Schedule of Basic Child Support Obligations						
Combined Adjusted Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
27,250.00	2,160.00	2,967.00	3,332.00	3,715.00	4,088.00	4,448.00
27,300.00	2,161.00	2,969.00	3,334.00	3,717.00	4,091.00	4,451.00
27,350.00	2,162.00	2,970.00	3,335.00	3,719.00	4,093.00	4,453.00
27,400.00	2,164.00	2,972.00	3,337.00	3,721.00	4,095.00	4,456.00
27,450.00	2,165.00	2,974.00	3,339.00	3,723.00	4,098.00	4,458.00
27,500.00	2,167.00	2,976.00	3,341.00	3,725.00	4,100.00	4,461.00
27,550.00	2,168.00	2,978.00	3,343.00	3,727.00	4,102.00	4,463.00
27,600.00	2,170.00	2,980.00	3,345.00	3,729.00	4,104.00	4,466.00
27,650.00	2,171.00	2,982.00	3,347.00	3,731.00	4,107.00	4,468.00
27,700.00	2172.00	2,983.00	3,348.00	3,733.00	4,109.00	4,471.00
27,750.00	2,174.00	2,985.00	3,350.00	3,735.00	4,111.00	4,473.00
27,800.00	2,175.00	2,987.00	3,352.00	3,738.00	4,114.00	4,475.00
27,850.00	2,177.00	2,989.00	3,354.00	3,740.00	4,116.00	4,478.00
27,900.00	2,178.00	2,991.00	3,356.00	3,742.00	4,118.00	4,480.00
27,950.00	2,179.00	2,993.00	3,357.00	3,744.00	4,120.00	4,483.00
28,000.00	2,181.00	2,994.00	3,359.00	3,746.00	4,122.00	4,485.00
28,050.00	2,182.00	2,996.00	3,361.00	3,748.00	4,125.00	4,488.00
28,100.00	2,184.00	2,998.00	3,363.00	3,750.00	4,127.00	4,490.00
28,150.00	2,185.00	3,000.00	3,365.00	3,752.00	4,129.00	4,492.00
28,200.00	2,186.00	3,001.00	3,366.00	3,754.00	4,131.00	4,495.00
28,250.00	2,188.00	3,003.00	3,368.00	3,756.00	4,133.00	4,497.00
28,300.00	2,189.00	3,005.00	3,370.00	3,758.00	4,136.00	4,500.00
28,350.00	2,190.00	3,007.00	3,372.00	3,759.00	4,138.00	4,502.00
28,400.00	2,192.00	3,009.00	3,374.00	3,761.00	4,140.00	4,504.00
28,450.00	2,193.00	3,010.00	3,375.00	3,763.00	4,142.00	4,507.00
28,500.00	2,194.00	3,012.00	3,377.00	3,765.00	4,145.00	4,509.00
28,550.00	2,196.00	3,014.00	3,379.00	3,767.00	4,147.00	4,512.00
28,600.00	2,197.00	3,016.00	3,381.00	3,769.00	4,149.00	4,514.00
28,650.00	2,199.00	3,017.00	3,382.00	3,771.00	4,151.00	4,516.00
28,700.00	2,200.00	3,019.00	3,384.00	3,773.00	4,153.00	4,519.00
28,750.00	2,201.00	3,021.00	3,386.00	3,775.00	4,156.00	4,521.00
28,800.00	2,203.00	3,023.00	3,388.00	3,777.00	4,158.00	4,524.00
28,850.00	2,204.00	3,025.00	3,390.00	3,779.00	4,160.00	4,526.00
28,900.00	2,205.00	3,026.00	3,391.00	3,781.00	4,162.00	4,528.00
28,950.00	2,207.00	3,028.00	3,393.00	3,783.00	4,164.00	4,531.00

Georgia Schedule of Basic Child Support Obligations						
Combined Adjusted Income	One Child	Two Children	Three Children	Four Children	Five Children	Six Children
29,000.00	2,208.00	3,030.00	3,395.00	3,785.00	4,167.00	4,533.00
29,050.00	2,210.00	3,032.00	3,397.00	3,787.00	4,169.00	4,536.00
29,100.00	2,211.00	3,034.00	3,398.00	3,789.00	4,171.00	4,538.00
29,150.00	2,212.00	3,035.00	3,400.00	3,791.00	4,173.00	4,540.00
29,200.00	2,214.00	3,037.00	3,402.00	3,793.00	4,175.00	4,543.00
29,250.00	2,215.00	3,039.00	3,404.00	3,795.00	4,178.00	4,545.00
29,300.00	2,216.00	3,041.00	3,406.00	3,797.00	4,180.00	4,548.00
29,350.00	2,218.00	3,042.00	3,407.00	3,799.00	4,182.00	4,550.00
29,400.00	2,219.00	3,044.00	3,409.00	3,801.00	4,184.00	4,552.00
29,450.00	2,220.00	3,046.00	3,411.00	3,803.00	4,186.00	4,555.00
29,500.00	2,222.00	3,048.00	3,413.00	3,805.00	4,189.00	4,557.00
29,550.00	2,223.00	3,050.00	3,415.00	3,807.00	4,191.00	4,560.00
29,600.00	2,225.00	3,051.00	3,416.00	3,809.00	4,193.00	4,562.00
29,650.00	2,226.00	3,053.00	3,418.00	3,811.00	4,195.00	4,564.00
29,700.00	2,227.00	3,055.00	3,420.00	3,813.00	4,197.00	4,567.00
29,750.00	2,229.00	3,057.00	3,422.00	3,815.00	4,200.00	4,569.00
29,800.00	2,230.00	3,058.00	3,423.00	3,817.00	4,202.00	4,572.00
29,850.00	2,231.00	3,060.00	3,425.00	3,819.00	4,204.00	4,574.00
29,900.00	2,233.00	3,062.00	3,427.00	3,821.00	4,206.00	4,576.00
29,950.00	2,234.00	3,064.00	3,429.00	3,823.00	4,208.00	4,579.00
30,000.00	2,236.00	3,066.00	3,431.00	3,825.00	4,211.00	4,581.00

(Ga. L. 1870, p. 413, § 2; Code 1873, § 1742; Code 1882, § 1742; Civil Code 1895, § 2462; Civil Code 1910, § 2981; Code 1933, § 30-207; Ga. L. 1979, p. 466, § 12; Ga. L. 1989, p. 861, § 1; Ga. L. 1991, p. 94, § 19; Ga. L. 1992, p. 1833, § 1; Ga. L. 1994, p. 1728, § 1; Ga. L. 1995, p. 603, § 2; Ga. L. 1996, p. 453, § 6; Ga. L. 2005, p. 224, § 5/HB 221; Ga. L. 2006, p. 72, § 19/SB 465; Ga. L. 2006, p. 583, § 4/SB 382; Ga. L. 2007, p. 47, § 19/SB 103; Ga. L. 2008, p. 272, §§ 1-9/SB 483; Ga. L. 2009, p. 96, §§ 1-6/HB 145; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2010, p. 878, § 19/HB 1387; Ga. L. 2011, p. 550, § 1/SB 115; Ga. L. 2014, p. 457, §§ 1-8/SB 282.)

The 2014 amendment, effective July 1, 2014, rewrote this Code section.

Cross references. — Collection of support payments by child support receivers, T. 15, C. 15. Temporary order of support pending paternity determination, § 19-7-46.2.

Code Commission notes. — The amendment of this Code section by Ga. L. 2006, p. 72, § 19, irreconcilably conflicted with and was treated as superseded by Ga. L. 2006, p. 583, § 4. See *County of Butts v. Strahan*, 151 Ga. 417 (1921).

Editor’s notes. — Ga. L. 1979, p. 466,

§ 12 amended the prior version of this Code section to provide that either parent may be liable for child support. Cases decided prior to the 1979 enactment appear to remain valid except insofar as they may imply that the father only may be liable for such support.

Ga. L. 1995, p. 603, § 4, not codified by the General Assembly, provides that it is the intention of Sections 1 and 2 of that Act to encourage judges in divorce cases to require all couples involved in contested divorces to go to mediation to attempt a mutually agreeable settlement.

Ga. L. 2005, p. 224, § 1/HB 221, not codified by the General Assembly, provides that: “The General Assembly finds and declares that it is important to assess periodically child support guidelines and determine whether existing guidelines continue to be viable and effective or whether they have failed or ceased to accomplish their original policy objectives. The General Assembly further finds that supporting Georgia’s children is vitally important to the citizens of Georgia. Therefore, the General Assembly has determined that it is in the best interests of the state and its citizenry to undertake an evaluation of the child support guidelines on a continuing basis. The General Assembly declares that it is important that all of Georgia’s children are provided with adequate financial support whether the children’s parents are living together or not living together. The General Assembly finds that both parents have a continuing obligation with respect to providing financial and emotional stability for their child or children. It is the hope of the members of the General Assembly that all parents work together to advance the best interest of their children.”

Ga. L. 2006, p. 583, § 10(b)/SB 382, not codified by the General Assembly, provides: “Sections 1 through 7 of this Act shall become effective on January 1, 2007, and shall apply to all pending civil actions on or after January 1, 2007.”

U.S. Code. — Title II of the federal Social Security Act, referred to in division (f)(1)(A)(xiii), and subparagraphs (f)(3)(A) and (f)(3)(D) is codified at 42 U.S.C. § 401 et seq. Title IV-A of the federal Social Security Act, referred to in division

(f)(2)(B)(i), is codified at 42 U.S.C. § 601 et seq. Title IV-D of the federal Social Security Act, referred to in subparagraph (k)(3)(C), is codified at 42 U.S.C. § 651 et seq. Title XVI of the federal Social Security Act, referred to in division (f)(2)(B)(iii), is codified at 42 U.S.C. § 1381 et seq. Section 402(d) of the federal Social Security Act, referred to in division (f)(2)(B)(iv), is codified at 42 U.S.C. § 602.

Law reviews. — For article, “Tax Aspects of Divorce and Separation and the Innocent Spouse Rules,” see 3 Ga. St. U.L. Rev. 201 (1987). For annual survey article discussing developments in domestic relations law, see 52 Mercer L. Rev. 213 (2000). For article, “Why Georgia’s Child Support Guidelines Are Unconstitutional,” see 6 Ga. St. B.J. 8 (2000). For article, “Constitutionally Sound Objectives and Means,” see 6 Ga. St. B.J. 16 (2000). For survey article on domestic relations cases, see 55 Mercer L. Rev. 223 (2003). For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004). For article on 2005 amendment of this Code section, see 22 Ga. St. U.L. Rev. 73 (2005). For annual survey of domestic relations cases, see 57 Mercer L. Rev. 173 (2005). For article, “Georgia’s Child Support Guidelines: Effective January 1, 2007,” see 12 Ga. St. B.J. 12 (2006). For annual survey of domestic relations law, see 58 Mercer L. Rev. 133 (2006). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 103 (2006). For survey article on domestic relations law, see 59 Mercer L. Rev. 139 (2007). For survey article on domestic relations law, see 60 Mercer L. Rev. 121 (2008). For annual survey on domestic relations, see 61 Mercer L. Rev. 117 (2009). For annual survey of law on domestic relations, see 62 Mercer L. Rev. 105 (2010). For annual survey on domestic relations law, see 64 Mercer L. Rev. 121 (2012). For annual survey on domestic relations, see 65 Mercer L. Rev. 107 (2013). For article on domestic relations, see 66 Mercer L. Rev. 65 (2014).

For note discussing Georgia’s child support laws, their problems, and some proposed solutions, see 11 Ga. L. Rev. 387 (1977). For note on 1989 amendment to

this Code section, see 6 Ga. St. U.L. Rev. 227 (1989). For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev.

234 (1992). For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 171 (1994).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

ROLE OF JURY

MODIFICATION OF AWARD

WRITING REQUIREMENT

EDUCATION OF CHILDREN

General Consideration

Purpose of statute was to relieve father of common-law liability to support minor children, and substitute therefor a liability by virtue of a court decree. *Thomas v. Holt*, 209 Ga. 133, 70 S.E.2d 595 (1952); *Booker v. Booker*, 219 Ga. 358, 133 S.E.2d 353 (1963).

Purpose of statute was to substitute for a father's common-law liability to support his children a liability by virtue of a court decree, whereby he is required to contribute a specified amount at fixed intervals. *Clark v. Clark*, 228 Ga. 838, 188 S.E.2d 487 (1972); *Newsome v. Newsome*, 237 Ga. 221, 227 S.E.2d 347 (1976).

Constitutionality. — Statutory child support guidelines under O.C.G.A. § 19-6-15 were not unconstitutionally violative of the constitutional guarantees of due process, equal protection, and privacy, when inherent classifications and distinctions therein were required in order to ensure fairness and equity between the parents and that the welfare of the children were protected; a rational basis existed to ensure that adequate support was provided for Georgia's children whose parents have divorced or separated. *Ga. Dep't of Human Res. v. Sweat*, 276 Ga. 627, 580 S.E.2d 206, cert. denied, 540 U.S. 966, 124 S. Ct. 432, 157 L. Ed. 2d 310 (2003).

O.C.G.A. § 19-6-15 is not unconstitutional under the Supremacy Clause. *Ward v. McFall*, 277 Ga. 649, 593 S.E.2d 340, cert. denied, 543 U.S. 818, 125 S. Ct. 57, 160 L. Ed. 2d 26 (2004).

Applicability of 1992 amendment. — Plain language of subsection (f) of O.C.G.A. § 19-6-15 precludes a divorce decree entered before July 1, 1992, from

being modified under subsections (e) and (f). *Honey v. Honey*, 263 Ga. 722, 438 S.E.2d 87 (1994).

Plain language of subsection (f) of O.C.G.A. § 19-6-15 itself precludes a divorce decree intended before July 1, 1992, from being modified under subsections (e) and (f). *Cote v. Waldrop*, 263 Ga. 752, 438 S.E.2d 630 (1994).

Applicability of 2005 amendment. — Trial court's nunc pro tunc order, referencing the court's original order dated before the effective date of the 2005 amendment to O.C.G.A. § 19-6-15, was held to have not actually applied to the amended statute as the appellant failed to show otherwise through evidence contained in the record on appeal. *Sebby v. Costo*, 290 Ga. App. 61, 658 S.E.2d 830 (2008).

Application. — Statutory framework for establishing child support obligations is set forth in O.C.G.A. § 19-6-15, and paragraph (k)(1) provides that a parent may seek a modification of a prior child support decision when there is a substantial change in either parent's income and financial status or the needs of the child. *Stoddard v. Meyer*, 291 Ga. 739, 732 S.E.2d 439 (2012).

Use of guidelines mandatory. — Guidelines for computing the amount of child support found in O.C.G.A. § 19-6-15(b) and (c), known as the "Child Support Guidelines," are the expression of the legislative will regarding the calculation of child support and must be considered by any court setting the child support. *Pruitt v. Lindsey*, 261 Ga. 540, 407 S.E.2d 750 (1991).

Trial court abused the court's discretion in calculating child support without deter-

mining the mother's gross income. *Gordy v. Gordy*, 246 Ga. App. 802, 542 S.E.2d 536 (2000).

While the trial court's failure to identify every fact that could qualify as a special circumstance under O.C.G.A. § 19-6-15(c) was not error per se: (1) the court failed to actually consider whether ordering a parent to pay 20 percent of that parent's gross income each month was excessive when coupled with other financial obligations under the order; (2) no evidence existed as to the actual future costs of the parent's additional financial obligations under the order, nor did the court place any limitations on how much the parent would be required to pay toward these expenses; and (3) the court made no written findings as to whether the parent had the financial resources to pay these obligations in addition to the child support obligation. Hence, the court's order was vacated, and the matter was remanded for the trial court to make an express determination of whether the parent's presumptive child support amount was excessive under the circumstances presented, and, if so, to reduce the presumptive amount accordingly. *Weil v. Paseka*, 282 Ga. App. 403, 638 S.E.2d 833 (2006).

O.C.G.A. § 19-6-15(c)(6) does not limit the support obligations to current obligations to minor children. *Betty v. Betty*, 274 Ga. 194, 552 S.E.2d 846 (2001).

Under O.C.G.A. § 19-6-15(c)(6), a trial court was permitted to deviate from the child support guidelines set forth under § 19-6-15(b) if a trial court found that a party's support obligations to another household made the presumptive amount of support either excessive or inadequate; the mere fact of additional children did not justify a reduction in the guideline range. *Betty v. Betty*, 274 Ga. 194, 552 S.E.2d 846 (2001).

Statute authorized lump sum child support awards. — Trial court did not err in ordering a husband to pay his entire child support obligation for the next 13 years in a single payment because nothing in the child support guidelines statute, O.C.G.A. § 19-6-15, expressly precluded lump-sum child support awards; the statute as amended explicitly authorizes trial

courts to exercise discretion in setting the manner and timing of payment, and the language of § 19-6-15(c)(2)(B), which requires trial courts to specify in what manner, how often, to whom, and until when the support shall be paid is certainly broad enough to encompass an order to pay a child support obligation all at once. *Mullin v. Roy*, 287 Ga. 810, 700 S.E.2d 370 (2010).

Inclusion of second child, solely for calculation, proper. — Consideration of the existence of a second child in calculating the level-of-support payment was proper, although the order was for only one child, the subject of a paternity suit, in which suit the other child was not involved; the legislature intended that the trial courts would consider the totality of the circumstances in setting the level of support, and not be bound by the recommended guidelines. *Batterson v. Groves*, 204 Ga. App. 52, 418 S.E.2d 373, cert. denied, 204 Ga. App. 921, 418 S.E.2d 373 (1992).

Use of guidelines in criminal proceedings. — It would not be improper to use the guidelines for computation of a child support award in civil proceedings as a condition in a criminal abandonment action since the child support award is neither a part of the sentence nor a punishment. *Vogel v. State*, 196 Ga. App. 514, 396 S.E.2d 262 (1990).

Noncustodial parent paying child support. — Georgia General Assembly has not specified that only non-custodial parents are to pay child support. *Williamson v. Williamson*, 293 Ga. 721, 748 S.E.2d 679 (2013).

Legislature did not specify that only noncustodial parents are to pay child support. *James v. James*, 246 Ga. 233, 271 S.E.2d 151 (1980).

Trial court's express finding about the father's income at the time the father and mother divorced should have been used to determine whether the father's income had changed significantly in the five years between entry of the parties' divorce decree and the mother's filing of a petition to modify the father's child support obligation; thus, the trial court erred by not using that express finding, but instead using the father's tax returns that showed

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the father earned significantly more income around the time the divorce decree was entered than was reflected in the divorce decree's finding. *Hulett v. Sutherland*, 276 Ga. 596, 581 S.E.2d 11 (2003).

By law, father was responsible for support of his minor children and this may include providing for their education. *Collins v. Collins*, 231 Ga. 683, 203 S.E.2d 524 (1974).

There is no legal requirement that father support his children once they reach majority. *Newton v. Newton*, 222 Ga. 175, 149 S.E.2d 128 (1966) (decided prior to the 1992 amendment, which added subsections (e) and (f)).

Requirement to provide support beyond age of majority may not, as matter of law, be imposed. *Clavin v. Clavin*, 238 Ga. 421, 233 S.E.2d 151 (1977); *Coleman v. Coleman*, 240 Ga. 417, 240 S.E.2d 870 (1977) (decided prior to the 1992 amendment, which added subsections (e) and (f)).

Construed with § 19-6-19(a). — In an action to modify child support, the computational reference of subsection (b) of O.C.G.A. § 19-6-15 may be applied only after the finder of fact first finds that the requirements of O.C.G.A. § 19-6-19(a) have been satisfied. *Willingham v. Willingham*, 216 Ga. 674, 410 S.E.2d 98 (1991).

Construction with O.C.G.A. § 19-5-12. — Although a spouse alleged on appeal that a motion to set aside that portion of the divorce decree which dealt with the issue of child support, which incorporated the parties' settlement agreement, was properly granted because the decree failed to set forth a specific baseline dollar amount for child support, as required by O.C.G.A. § 19-5-12, the decree contained stated dollar amounts which could be considered baseline payments; hence, pursuant to O.C.G.A. § 19-6-15 as applicable at the time, the trial court properly found that the spouse was liable for paying child support for two children in the range of 23 to 28 percent of the spouse's gross income. *Scott v. Scott*, 282 Ga. 36, 644 S.E.2d 842 (2007).

Theoretical child support order does not require written findings. — To the extent that *Adame v. Herndandez*, 327 Ga. App. 869 (2014) holds that the trial court must support with written findings the court's exercise of discretion and consideration of the best interest of the child for whom child support is being awarded when applying a theoretical child support order under O.C.G.A. § 19-6-15(f)(5)(C), that decision is hereby overruled. *Neal v. Hibbard*, 770 S.E.2d 600, No. S14A1673, 2015 Ga. LEXIS 183 (2015).

Children are entitled to be supported commensurate with their proven customary needs and the father's financial ability to provide for them. *Clavin v. Clavin*, 238 Ga. 421, 233 S.E.2d 151 (1977).

Father cannot provide bare subsistence existence for his children and consider that he has done his duty; his support, as far as he is able, must be appropriate to the children's situation. *Clavin v. Clavin*, 238 Ga. 421, 233 S.E.2d 151 (1977).

Father's duty to provide support and maintenance for minor children does not cease with former wife's remarriage. *Vereen v. Arp*, 237 Ga. 241, 227 S.E.2d 331 (1976).

Obligation for future child support. — Trial court erred in failing to issue an award establishing the defendant's obligation for future child support when by the defendant's failure to file a timely answer, the defendant admitted the allegation in Georgia Department of Human Resources (DHR's) petition that the defendant was obligated to provide for the future support of the defendant's minor child as the defendant's ability permitted. *Department of Human Resources v. Hedgepath*, 204 Ga. App. 755, 420 S.E.2d 638 (1992).

Uncertainty of children's future expenses did not show departure from guidelines. — Requirement in an order modifying a final judgment and decree of divorce that the former spouses alternate years in paying for their children's clothing, uniforms, school fees, and similar items was not improperly vague and indefinite; the inherent uncertainty of the future expenses of the children did not, at

the time of the award, show that the award departed from the statutory guidelines. *Facey v. Facey*, 281 Ga. 367, 638 S.E.2d 273 (2006).

Future uninsured medical and counseling expenses. — Trial court did not err in the amount of the child support obligation that the court bestowed upon the mother when the father was given custody of the children because the mere possibility of the parties' children incurring amounts of uninsured medical expenses and uninsured counseling expenses so as to constitute extraordinary medical costs was not sufficient at that juncture to support a finding that the award of child support departed from the Georgia Child Support Guidelines. *Moon v. Moon*, 277 Ga. 375, 589 S.E.2d 76 (2003).

Medical expenses. — Trial court did not abuse the court's discretion in requiring a husband to pay the entire cost of the child's medical insurance and uncovered medical expenses because the child support worksheet incorporated into the trial court's order clearly showed that an adjustment to the presumptive amounts of child support had been made to account for the expense of the premiums for the child's insurance coverage; in accordance with O.C.G.A. § 19-6-15(h)(2)(A), and using the wife's pro rata share of the parties' combined income, 26 percent of the amount of the health insurance premium had been deducted from the husband's basic child support obligation and added to the wife's obligation. *Simmons v. Simmons*, 288 Ga. 670, 706 S.E.2d 456 (2011).

Child care expenses. — Trial court did not abuse the court's discretion in ordering the husband to reimburse the wife up to \$250 per month for work-related childcare expenses instead of allowing the husband to watch the children because the parties' younger child was diagnosed with high-functioning autism and needed some special care; a few times when the younger child was solely in the husband's care, the child wandered off and was left alone in situations where the child could have been hurt; and the wife testified that the children's daycare provided the special care, attention, and consistency the

younger child needed while allowing the younger child to stay in the company of the older brother who had a calming effect on the younger child. *Sahibzada v. Sahibzada*, 294 Ga. 783, 757 S.E.2d 51 (2014).

Expenses of nanny not excessive. — Court upheld an increase in child support owed by a mother, finding that the costs of a nanny were reasonable work-related child care expenses for the father, although he worked from home, considering the young age of the children, that the costs of a nanny were small in comparison to the father's monthly income, and the nanny's qualifications. *Taylor v. Taylor*, 293 Ga. 615, 748 S.E.2d 873 (2013).

Support amount from deceased father based on these guidelines. — Guidelines for child support established by O.C.G.A. § 19-6-15 provide the best means of estimating the amount of support a child born out of wedlock had a reasonable expectation of receiving from the child's deceased father. *In re Adventure Bound Sports, Inc.*, 858 F. Supp. 1192 (S.D. Ga. 1994).

Child support is part of alimony, and right to receive alimony ceases upon death of husband unless the decree expressly provides to the contrary. *Veal v. Veal*, 226 Ga. 285, 174 S.E.2d 435 (1970).

With respect to a divorced father and a child support decree, absent some express, voluntary provision in the decree, the decree will not be enforced after the death of the father. *Clavin v. Clavin*, 238 Ga. 421, 233 S.E.2d 151 (1977).

In making decisions about child support, trial court is charged with considering child's welfare. *James v. James*, 246 Ga. 233, 271 S.E.2d 151 (1980).

Court to compare need and ability to pay. — When the existence and terms of an agreement between the parties are disputed, and the sufficiency of child support is called into question, the record should reflect the trial court's comparison of need and ability to pay and the record should reflect an award that is consistent with that comparison. *Arrington v. Arrington*, 261 Ga. 547, 407 S.E.2d 758 (1991).

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Earning capacity in lieu of a finding of gross income. — Evidence showing that the father had a mechanical engineering degree from the University of Alabama and had recently earned sums in excess of \$50,000 per year was sufficient to support the trial court's findings as to earning capacity in lieu of a finding of gross income under O.C.G.A. § 19-6-15. *Walker v. Walker*, 248 Ga. App. 177, 546 S.E.2d 315 (2001).

Earning capacity rather than gross income may be used to determine the amount of child support in certain circumstances, including the absence of any evidence as to actual income. *Russ v. Russ*, 272 Ga. 438, 530 S.E.2d 469 (2000).

Superior court properly based a child support award on one spouse's earning capacity rather than the income the spouse stated in a financial affidavit when the spouse admitted to making thousands of dollars more than was stated in the affidavit and additional evidence established that the spouse owned a stucco company, that some employees of the company earned more than the income the spouse stated in the affidavit, and that the parties had multiple real estate holdings. *Banciu v. Banciu*, 282 Ga. 616, 652 S.E.2d 552 (2007).

Trial court did not err in imputing income of \$1,100 to a father, although the father was disabled and unemployed; the father represented himself at the trial, could drive, received substantial, unsupervised visitation with his four-year-old daughter, and could obtain family assistance benefits and part-time employment. *Larizza v. Larizza*, 286 Ga. 461, 689 S.E.2d 306 (2010).

Trial court properly imputed income to the mother when calculating child support because the evidence showed that the mother was making \$32,000 and had health insurance available when the mother apparently made the decision to quit a job in Florida and move to Georgia to live with the mother's parents, and there was no evidence that the mother involuntarily left that employment. *Caldwell v. Meadows*, 312 Ga. App. 70, 717 S.E.2d 668 (2011).

K-1 income is self-employment income. — Because Internal Revenue Service Schedule K-1 income is categorized as self-employment income, O.C.G.A. § 19-6-15(f)(1)(B), that income is not subject to the requirements set forth in § 19-6-15(f)(1)(D) for variable income. *Simmons v. Simmons*, 288 Ga. 670, 706 S.E.2d 456 (2011).

Understatement of income. — Trial court properly found that the term "gross income" in the parties' divorce settlement agreement was ambiguous, and, in construing the agreement against the father as the obligor, that the parties intended for child support to be based on Georgia's Child Support Guidelines, and that, by assigning earned income to the father's professional corporation, thereby substantially understating the father's gross income, the father wilfully violated the conditions of the settlement agreement; the father's "gross income" significantly exceeded Form W-2 wages, and the father's computation of child support based only on the father's Form W-2 salary created a child support deficiency. *Pate v. Pate*, 280 Ga. 796, 631 S.E.2d 103 (2006).

Imputed income. — Trial court did not err by imputing income of \$4,180 per month to a father in addition to the \$1,320 in monthly unemployment benefits received based on evaluating the reasonableness of the father's occupational choices, the father's past employment, current assets, current monthly receipts, and self-imposed salary restrictions regarding a job search, which supported a finding that the father was willfully unemployed or underemployed under O.C.G.A. § 19-6-15(f)(4)(D). *Friday v. Friday*, 294 Ga. 687, 755 S.E.2d 707 (2014).

When considering wilful unemployment or underemployment under O.C.G.A. § 19-6-15(f)(4)(D), the statute does not require a trial court to make written findings as to why it decided to impute income to a spouse. *Friday v. Friday*, 294 Ga. 687, 755 S.E.2d 707 (2014).

Imputation of income upheld. — In modifying a father's child support obligation, the court did not err by imputing income as the court was authorized to consider not only the father's income of record, but also the assets owned, which

showed that the father owned four real properties, that the law office practice had declined, a car purchase was made with an attendant monthly payment of \$2,036.00, and \$2,500.00 per month was being paid in rent, and it was proven that monthly income was understated by more than \$10,000 in prior years. *Neal v. Hibbard*, 770 S.E.2d 600, No. S14A1673, 2015 Ga. LEXIS 183 (2015).

No imputed income found from gift. — Without some evidence of the amount of regular, ongoing gift income to the father, attributing to him a monthly lump-sum gift income of \$3,000 was not supported by the record. *Dodson v. Walraven*, 318 Ga. App. 586, 734 S.E.2d 428 (2012).

Imputed income from job change. — Determination that there had been a substantial change in the husband's income was not an abuse of discretion as the husband was employed in the mortgage industry, which had been unstable, downsizing, and affected by the recession, and while the husband earned \$48,000, rather than the \$75,000 imputed to the husband at the time of the divorce, the trial court imputed income of \$ 52,500 to the husband because the husband accepted a lower base salary in exchange for the chance of advancement. *Strunk v. Strunk*, 294 Ga. 280, 749 S.E.2d 701 (2013).

Military housing allowance properly applied. — In a child support case, the trial court properly included only \$702 of the military father's \$3,555 basic allowance for housing (BAH) in calculating the father's gross income because the difference was based on the father's deployment to Bahrain, and under O.C.G.A. § 19-6-15(f)(1)(E)(iv), BAH was to include only so much of the allowance that was not attributable to area variable housing costs. *Wallace v. Wallace*, 296 Ga. 307, 766 S.E.2d 452 (2014).

Capital gains properly included in gross income. — When a mother sought to increase the father's child support under earlier provisions of O.C.G.A. § 19-6-19(a) based on his increased income, the trial court properly included capital gains realized by reselling real property in the father's gross income; earlier provisions of O.C.G.A. § 19-6-15

stated that gross income included "all other income" except for public assistance, and 26 U.S.C. § 61(a)(3) included "gains derived from dealings in property" in gross income. *Sharpe v. Perkins*, 284 Ga. App. 376, 644 S.E.2d 178 (2007), cert. denied, 2007 Ga. LEXIS 509 (Ga. 2007).

Inquiry into evidence of income. — In a divorce case when the wife was awarded child support, the trial court did not abuse the court's discretion in overruling the husband's objection to the wife's questions regarding checks that had been paid to him but that he had not deposited into his bank account. The wife was entitled to inquire whether the deposited and undeposited checks matched the amount of income reported by the husband. *Leggette v. Leggette*, 284 Ga. 432, 668 S.E.2d 251 (2008).

Trial court abused the court's discretion in calculating a father's gross income for purposes of a child support award because the court considered the gross revenue of a certain company, without accounting for business expenses and other deductions or the fact that the father only owned a one percent share of the company. *Harrell v. Ga. Dep't of Human Res.*, 300 Ga. App. 497, 685 S.E.2d 441 (2009).

It is within judge's discretion to whom child support shall be paid. *Mathews v. Mathews*, 123 Ga. App. 81, 179 S.E.2d 547 (1970).

Trial court may properly order custodial parent to pay for support of minor children while visiting with the noncustodial parent. *James v. James*, 246 Ga. 233, 271 S.E.2d 151 (1980).

Trial court is not bound by an agreement between the parties regarding child support, nor is the court's obligation satisfied by simply adopting the agreement. The court is obligated to consider whether such support is sufficient based on the children's needs, and the parent's ability to pay. *Arrington v. Arrington*, 261 Ga. 547, 407 S.E.2d 758 (1991).

Agreement for payments exceeding guidelines. — Contractual agreement for modification providing for child support payments that exceed the statutory guidelines did not contravene O.C.G.A. § 19-6-15 or the public policy of the state.

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Kendrick v. Childers, 267 Ga. 98, 475 S.E.2d 604 (1996).

Support obligation below the minimum percentage in the guidelines. — Evidence supported the presence of special circumstances that provided sufficient justification for the court's reduction of the mother's child support obligation below the minimum percentage in the guidelines. *Walker v. Walker*, 248 Ga. App. 177, 546 S.E.2d 315 (2001).

Support obligation exceeding guidelines. — Even though under O.C.G.A. § 19-6-15(b)(5), the range of percentages of gross income to be considered for child support was 17 percent to 23 percent, the jury's award of periodic child support in the amount of approximately 40 percent of the father's gross income was proper and was affirmed because the jury found that this upward variation from the percentage table was justified by the fact that the mother had no income, and found that the father's ability to pay the amount ordered as permanent child support was shown by the fact that the father had been paying the same amount as temporary child support and alimony. *Ward v. Ward*, 268 Ga. App. 394, 601 S.E.2d 851 (2004).

Because the jury was presented with sufficient evidence via a husband's deposition and trial testimony supporting the jury's determination of the husband's monthly gross income, which included income from two landscaping businesses and a salary from the sheriff's department, which in turn supported a finding of special circumstances warranting an upward modification of child support, the husband was not entitled to a new trial. *Dyals v. Dyals*, 281 Ga. 894, 644 S.E.2d 138 (2007).

Superior court did not abuse the court's discretion when the court deviated from the child support guidelines in former O.C.G.A. § 19-6-15(b) based on the specific finding that special circumstances existed in that one spouse's gross income was approximately \$90,000 per year while the other spouse had an income of only \$325 per month, and the parties were sharing custody of their three children.

Banciu v. Banciu, 282 Ga. 616, 652 S.E.2d 552 (2007).

No deviation from guidelines. — Based on the applicable version of the revised child support guidelines under O.C.G.A. § 19-6-15, the trial court properly exercised the court's discretion when the court imposed the presumptive amount of child support on a wife without applying a discretionary deviation under § 19-6-15(c)(2)(E) and (i)(1)(B); since no deviation was made, there was no requirement that an explanation be given of how that decision was reached. *Rumley-Miawama v. Miawama*, 284 Ga. 811, 671 S.E.2d 827 (2009).

Trial court's findings supporting the court's child support and alimony awards were proper because the trial court considered, inter alia, the husband's personal expenses paid by the husband's companies and the husband's loan application and financial affidavit in arriving at the court's determination of the husband's income; additionally, the trial court took into account the wife's status as a stay-at-home mother since the birth of the parties' son, the husband's conduct towards the wife, and the wife's potential income from the trial court's award to the wife of one of the husband's companies. The evidence also supported the trial court's finding that no deviation from the presumptive child support award was warranted under O.C.G.A. § 19-6-15(i) based on the alimony award. *Walton v. Walton*, 285 Ga. 706, 681 S.E.2d 165 (2009).

Trial court did not abuse the court's discretion in declining to make a deviation to the presumptive amount of child support because under O.C.G.A. § 19-6-15(c)(2)(E)(iii) the trial court stated that the court did not find that the presumptive amount of child support was excessive or inadequate, or that it was unjust or inappropriate under the circumstances and also did not find that a downward deviation in the husband's support amount would be in the child's best interests; in order to grant any deviation, the trial court must find that the application of the presumptive amount of child support would be unjust or inappropriate and that the best interest of the child for whom support is being determined will be

served by deviation from the presumptive amount of child support under § 19-6-15(c)(2)(E)(iii). *Willis v. Willis*, 288 Ga. 577, 707 S.E.2d 344 (2010).

In a mother's paternity suit to establish the legitimation, custody, and support of her minor child by the father who worked as an NFL football player, the trial court did not err in failing to allow for a high income deviation under O.C.G.A. § 19-6-15(i)(2)(A). The trial court considered the fact that the combined adjusted income of the parents exceeded \$30,000 per month by \$1,261.50, but exercised the court's discretion not to provide for a high income deviation. *Jackson v. Irvin*, 316 Ga. App. 560, 730 S.E.2d 48 (2012).

Payment of life insurance policies. — Trial court did not abuse the court's discretion by declining to consider the cost of the life insurance in calculating the parent's child support obligation because the evidence indicated that a parent's company, rather than the parent, paid the premiums on the parent's life insurance policies. *Simmons v. Simmons*, 288 Ga. 670, 706 S.E.2d 456 (2011).

Non-custodial parent should not receive child support. — Trial court erred by incorrectly starting with the father's presumptive amount of child support and incorrectly applying a parenting time deviation available only to the noncustodial parent under O.C.G.A. § 19-6-15(b)(1)-(7) when the court ordered the father to pay the non-custodial mother child support per month. *Williamson v. Williamson*, 293 Ga. 721, 748 S.E.2d 679 (2013).

Child support from prior marriage excluded from gross income. — Former spouse's gross income was incorrectly calculated under O.C.G.A. § 19-6-15(f)(2)(A) for the purposes of determining the spouse's child support obligation because the spouse's gross income included monthly child support received for a child from a previous marriage. *Hammond v. Hammond*, 282 Ga. 456, 651 S.E.2d 95 (2007).

Amount allowed for support not disturbed when evidence indicates reasonableness. — When that part of the verdict which made an allowance for the support of the defendant's minor children has the approval of the trial judge,

the Supreme Court has no right to disturb it on the ground of excessiveness when its reasonableness as to the amount awarded has some support in the evidence. *Hubbard v. Hubbard*, 214 Ga. 294, 104 S.E.2d 451 (1958).

It is presumed that judgment for child support is based on sufficient evidence. *Nichols v. Nichols*, 209 Ga. 811, 76 S.E.2d 400 (1953).

Verdict need not state names and ages of children when petition lists. — When the petition for divorce and alimony lists the names and ages of the minor children, and the verdict and decree awarding alimony states definitely how much alimony is to be paid each month for each child until the child attained the age of 18 years, it is not necessary that the verdict and decree should restate the names and ages of the children; and certainly such objection to the verdict and decree cannot be raised for the first time in defense of a proceeding for contempt of court for failure to pay the alimony decreed. *Kirby v. Johnson*, 188 Ga. 49, 2 S.E.2d 640 (1939).

When award is to group as family unit, Supreme Court could not attempt to separate amounts awarded to the mother from the amounts awarded to the children. *Blalock v. Blalock*, 214 Ga. 586, 105 S.E.2d 721 (1958).

Consent judgments have been uniformly recognized in this state, and have been given the same force and effect as judgments rendered in due course of litigation upon findings by a jury. *Estes v. Estes*, 192 Ga. 94, 14 S.E.2d 681 (1941).

Content of settlement agreement. — Trial courts, in determining whether to incorporate a marital settlement agreement into a final verdict or divorce decree, are required to make specific written findings as to the gross income of the husband and the wife, and the presence or absence of special circumstances justifying a departure from the percentages set out in the child support guidelines; however, a parties' marital settlement agreement called for the wife not to pay child support, and, instead, have her receive a lesser amount of alimony in lieu of paying child support as the right to child support belonged to the child and could not be

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waived by agreement of the parents. *Swanson v. Swanson*, 276 Ga. 566, 580 S.E.2d 526 (2003).

Noncustodial parent entitled to social security credit payable after execution of settlement agreement. — Pursuant to O.C.G.A. § 19-6-15(f)(3)(A), a non-custodial parent was entitled to a credit against that parent's child support obligation for social security retirement benefits which became payable to the parent's dependent children following the execution of a settlement agreement as the parent earned the benefits and the agreement did not evidence a contrary intent; thus, the trial court erred in finding otherwise. *Scarborough v. Scarborough*, 282 Ga. 427, 651 S.E.2d 42 (2007).

Parents cannot by subsequent voluntary settlement nullify or modify final decree so as to deprive the child of the support to which the child is entitled by the verdict and decree. *Glaze v. Strength*, 186 Ga. 613, 198 S.E. 721 (1938); *Hardy v. Pennington*, 187 Ga. 523, 1 S.E.2d 667 (1939); *Corriher v. McElroy*, 209 Ga. 885, 76 S.E.2d 782 (1953).

Other children considered to vary final award. — Guideline percentage is to be computed on the basis of the number of children for whom support is being determined in a particular case and, after that calculation is made, the final award can be adjusted on the basis of other children to whom the obligor owes support. *Ehlers v. Ehlers*, 264 Ga. 668, 449 S.E.2d 840 (1994); *Hoodenpyl v. Reason*, 268 Ga. 10, 485 S.E.2d 750 (1997).

Husband was entitled to a credit as a result of a child born to the husband and the husband's new wife. *Strunk v. Strunk*, 294 Ga. 280, 749 S.E.2d 701 (2013).

Social security disability payments received for benefit of children should be credited toward the father's obligation under an alimony decree. *Perteet v. Summer*, 246 Ga. 182, 269 S.E.2d 453 (1980).

Workers' compensation lump sum settlement is gross income. — Because a lump settlement of a workers' compensation claim is primarily for future lost wages, it is within the scope of gross

income and should be considered in calculating the child support obligation. *Cromer v. Denmark*, 273 Ga. 290, 540 S.E.2d 183 (2001).

Husband failed to establish that a trial court abused the court's discretion in awarding child support to his wife because in the court's order and attached schedules, the trial court made all of the specific written findings required by O.C.G.A. § 19-6-15, and the final decree gave the husband substantial, unsupervised visitation with his child, which was inconsistent with the husband's claims of a disability so severe as to render him utterly incapable of part-time employment. *Larizza v. Larizza*, 286 Ga. 461, 689 S.E.2d 306 (2010).

Trust fund established in decree is to be paid during a child's minority. Use contemplated which clearly extends beyond the age of 18 is an attempt to circumvent the statutory limitations on the duty to support and is void and unenforceable. *Coleman v. Coleman*, 240 Ga. 417, 240 S.E.2d 870 (1977).

Award of alimony to child of full amount of husband's earning capacity is excessive. *Johnson v. Johnson*, 131 Ga. 606, 62 S.E. 1044 (1908).

Trial court's award excessive based on exaggerated determination of spouse's earning capacity. *Duncan v. Duncan*, 262 Ga. 872, 426 S.E.2d 857 (1993).

Husband's responsibility for support did not extend to awarding title to property. He was not required to settle an estate upon his children. *Clark v. Clark*, 228 Ga. 838, 188 S.E.2d 487 (1972).

Former spouse not entitled to pre-judgment garnishment. — O.C.G.A. § 19-6-15(h)(3) did not entitle a former spouse to collect an alleged debt for health care and extracurricular activity expenses of the parties' children through garnishment of the other spouse's wages without first reducing the alleged debt to a judgment. The amounts allegedly due for these expenses could not be computed from the terms of the divorce decree but required reference to evidence of specific expenditures and reimbursements. *Stoker v. Severin*, 292 Ga. App. 870, 665 S.E.2d 913 (2008).

Agreement to pay fixed sum to all children provides for lump sum payment. — Agreement whereby one parent was obliged to pay to the other a fixed sum per month for the maintenance and support of minor children, continuing each month thereafter until the children reach majority, or die, or marry before the age, provides for a lump sum payment rather than an allocation for each child which would be reduced as each child became emancipated. *Martin v. Martin*, 254 Ga. 376, 329 S.E.2d 503 (1985).

Providing a home is child support. — Provision in both the jury verdict and the final judgment requiring the husband to provide a home for his children is in the nature of child support. *Scherberger v. Scherberger*, 260 Ga. 635, 398 S.E.2d 363 (1990).

Fringe benefits properly excluded in gross income. — Trial court properly excluded a husband's fringe benefits, including the husband's employer's contributions for life insurance, medical insurance, and a retirement plan, in calculating the husband's gross income for the purpose of determining a child support obligation because the benefits were not part of the husband's gross income for income tax purposes, and were not for daily personal living expenses; the decision was consistent with the 2005 amendment to O.C.G.A. § 19-6-15, which has a delayed effective date of July 1, 2006. *Hayes v. Hayes*, 279 Ga. 741, 620 S.E.2d 806 (2005).

Fringe benefits properly included in gross income. — Trial court did not improperly include in a husband's gross income a company's payment on the loan for the husband's company-owned truck, the company's coverage of vehicle expenses, including gas, tags, insurance and repairs, the company's payment for the husband's cell phone, and the husband's use of a company-issued credit card because those benefits were properly considered fringe benefits and included in gross income under O.C.G.A. § 19-6-15(f)(1)(C) because those payments significantly reduced personal living expenses. *Simmons v. Simmons*, 288 Ga. 670, 706 S.E.2d 456 (2011).

Job-related moving expenses excluded. — In calculating child support

under earlier requirements of O.C.G.A. § 19-6-15, the trial court erred in including as part of the husband's gross income sums he had received from his employer as reimbursement for job-related moving expenses; reimbursement for moving expenses did not improve an obligor's financial position but merely maintained the status quo by offsetting the unusual and often significant costs incurred as part of a job-related move. *Padilla v. Padilla*, 282 Ga. 273, 646 S.E.2d 672 (2007).

Book royalties improperly excluded from gross income. — Trial court erred in failing to include the book royalties a husband received in calculating the husband's gross income for the purpose of determining a child support obligation because O.C.G.A. § 19-6-15(b)(2) required that the trial court include compensation for personal services and all other income when calculating a party's obligation for child support. *Hayes v. Hayes*, 279 Ga. 741, 620 S.E.2d 806 (2005).

Income from medical practice not counted twice in child support and property division awards. — Trial court did not erroneously count a husband's income twice by awarding portions of his business in the child support awards and again in the property division as "business alimony". Under both capitalization methods, the wife's expert deducted a reasonable salary expense for the husband. With the separate bases for the alimony award and the property division clearly acknowledged before the court, there was no double dipping. *Miller v. Miller*, 288 Ga. 274, 705 S.E.2d 839 (2010).

Economic in-kind benefits may be excluded in gross income. — O.C.G.A. § 19-6-15(b)(1) and (2) do not address economic in-kind benefits and thus do not require the inclusion of such benefits in gross income; O.C.G.A. § 19-6-15(b)(4), however, does specifically address such benefits and provides only that those benefits may be included in calculating the obligor's gross monthly income. *Hayes v. Hayes*, 279 Ga. 741, 620 S.E.2d 806 (2005).

Deviation from guidelines. — Trial court properly deviated from the child

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support guidelines under O.C.G.A. § 19-6-15(c) based on the court's finding that the husband earned an average of \$1 million per year during the marriage and continued to have the potential to earn this sum; the trial court took into account the income and earning potential of both spouses as well as the historical needs of the children. *Bloomfield v. Bloomfield*, 282 Ga. 108, 646 S.E.2d 207 (2007).

Trial court erred in denying a wife's motion for a new trial, which argued that a divorce decree contained a deviation from the child support guidelines without including any findings stating why the deviation was appropriate because the separation agreement between the wife and her husband, as well as the trial court's order incorporating that agreement, contained a deviation since there was, at least, an \$18 difference in the amount of child support mandated by the child support guidelines and that which was actually being paid by the parties, and the trial court's order contained none of the findings required by O.C.G.A. § 19-6-15; because the parties' separation agreement did not comply with the provisions contained in § 19-6-15 and did not contain findings of fact as required to support a deviation, the trial court should have rejected the agreement. *Holloway v. Holloway*, 288 Ga. 147, 702 S.E.2d 132 (2010).

In determining a father's child support obligation, the trial court erred in applying a nonspecific deviation from the presumptive amount of child support to account for his support obligations to another child because the current version of O.C.G.A. § 19-6-15 does not contemplate a specific variance of a child support award based on a party's support obligations to another household. The record failed to show that the father was paying any support for the subsequent child, and his ability to pay all of his child support obligations was a matter of speculation. *Jackson v. Irvin*, 316 Ga. App. 560, 730 S.E.2d 48 (2012).

Trial court abused the court's discretion by ordering a deviation for life insurance premiums because the court failed to jus-

tify the deviation by setting forth the court's findings; thus, a remand was required on that issue. *Black v. Black*, 292 Ga. 691, 740 S.E.2d 613 (2013).

Deviation for visitation-related travel expenses was not an abuse of discretion on the part of the trial court because the mother had the option to remain with the children in the marital home for which the father was financially responsible, but chose instead to move to New York and incur unnecessary expenses. *Black v. Black*, 292 Ga. 691, 740 S.E.2d 613 (2013).

Trial court not required to calculate a discounted present value. — Trial court did not abuse the court's broad discretion in setting the amount of a child support award because nothing in the child support guidelines statute, O.C.G.A. § 19-6-15, mandated that the trial court calculate a discounted present value, and a husband did not propose or provide supporting evidence of a discount rate that better reflected the economic outlook; the trial court recognized the court's discretion to engage in a present value calculation but declined to do so, explaining that the husband failed to show that such a reduction would be appropriate in light of the current economic climate, one in which even the most secure financial investments offer extremely low rates of return. *Mullin v. Roy*, 287 Ga. 810, 700 S.E.2d 370 (2010).

Consideration of insurance premiums. — Trial court properly set child support at 30 percent of the husband's earnings as under earlier provisions of O.C.G.A. § 19-6-15(b)(5) the applicable percentage range was 25 to 32 percent, and the trial court clearly applied a correct percentage; the court was not required to reduce the award of child support due to health insurance premiums or to eliminate the insurance requirement. *Messaadi v. Messaadi*, 282 Ga. 126, 646 S.E.2d 230 (2007).

Trial court erred by ordering a parent to maintain health insurance on the parent's minor child because the court failed to account for the parent's payment of health insurance in calculating the parent's child support obligation. *Dupree v. Dupree*, 287 Ga. 319, 695 S.E.2d 628 (2010).

Gross income does not include employee

benefits that are typically added to the salary, wage, or other compensation that a parent may receive as a standard added benefit including, but not limited to, employer paid portions of health insurance premiums. *Hendry v. Hendry*, 292 Ga. 1, 734 S.E.2d 46 (2012).

Husband was properly awarded a credit for the cost of providing health insurance for the children. *Strunk v. Strunk*, 294 Ga. 280, 749 S.E.2d 701 (2013).

Determination of gross income proper. — Findings that a husband's income was \$65,000 per year for the purposes of calculating child support were not clearly erroneous as evidence was presented that the husband often would not take business engagements unless the husband could make at least \$10,000 and the husband testified that the husband's gross earnings varied from \$67,000 to \$88,000 per year. *Vereen v. Vereen*, 284 Ga. 755, 670 S.E.2d 402 (2008).

Trial court did not abuse the court's discretion in the court's review of a husband's history of Internal Revenue Service Schedule K-1 income because other amounts not actually received, e.g., payroll taxes, were included in gross income under O.C.G.A. § 19-6-15(f)(1)(A); the statutory guidelines provide only that income from a closely held corporation "should be carefully reviewed" when determining an appropriate level of gross income to use in calculating child support pursuant to § 19-6-15(f)(1)(B). *Simmons v. Simmons*, 288 Ga. 670, 706 S.E.2d 456 (2011).

Computation of child support proper. — Because the trial court properly found that the monthly net business profit listed on a husband's child support worksheet was the most credible calculation of his monthly income, and because a child's competitive cheerleading expenses were not a "necessity," the trial court properly awarded child support to the wife pursuant to O.C.G.A. § 19-6-15(f)(1)(B) and (i)(2)(J)(ii). *Ellis v. Ellis*, 290 Ga. 616, 724 S.E.2d 384 (2012).

Dismissal of modification petition adjudication on the merits. — Superior court erred in attempting to recast the court's dismissal of a husband's first petition for modification of child support as

"simply a sanction" and not an adjudication on the merits so as to render the dismissal outside the ambit of O.C.G.A. § 19-6-15(k)(2) because in dismissing the husband's first petition for modification, the superior court did not specify that the order was not an adjudication on the merits, and under O.C.G.A. § 9-11-41(b), it was a final order on the claim for downward modification of child support. *Bagwell v. Bagwell*, 290 Ga. 378, 721 S.E.2d 847 (2012).

Improper use of erroneous facts on worksheets. — Mother was entitled to reversal of the trial court's order awarding no child support because the child support worksheets contained erroneous facts and the nonspecific deviations were erroneous; inaccurate factual data was plugged into the worksheets for the purpose of arriving at a pre-determined result that the trial judge announced at the hearing, to "zero out" any child obligations of the parties to each other. *Parker v. Parker*, 293 Ga. 300, 745 S.E.2d 605 (2013).

Contempt finding. — Trial court did not abuse the court's discretion by finding that a father was in contempt for the failure to meet a support obligation because, under the decree, the father was to pay \$2,000 per month in child support and after December 15, 2010, following an involuntary job termination, the father was to pay \$1,040 per month, but did not do so, paying only \$179 per month, or \$1,821 less than the original figure. *Friday v. Friday*, 294 Ga. 687, 755 S.E.2d 707 (2014).

Claims of error on appeal were rejected. — On appeal from a child support and visitation order, because a parent failed to support claims of error regarding the order, including the trial court's application of the revised child support guidelines under O.C.G.A. § 19-6-15 et seq., with any citation of authority or argument, and failed to provide the appeals court with a transcript of the proceedings below, that parent's claims were rejected and the orders entered by the trial court had to be affirmed. *Sebby v. Costo*, 290 Ga. App. 61, 658 S.E.2d 830 (2008).

Final order required. — Since a parent's children were found to be deprived and were placed temporarily with rela-

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tives, pursuant to O.C.G.A. § 15-11-28(c)(2)(A), the trial court had jurisdiction to order the parent to pay temporary support. However, the court lacked jurisdiction to enter a final award of support under O.C.G.A. § 19-6-15 as no final order was entered disposing of the case. In the Interest of R.F., 295 Ga. App. 739, 673 S.E.2d 108 (2009).

Motion for new trial for failure to make findings. — Trial court erred in failing to hold a hearing as required by Ga. Unif. Super. Ct. R. 6.3 on a husband's post-trial motion for a new trial on the basis of the trial court's failure to make child support findings as required by O.C.G.A. § 19-6-15. The husband was not required to file a written request for oral argument. *Kuriatnyk v. Kuriatnyk*, 286 Ga. 589, 690 S.E.2d 397 (2010).

Only one party can be prevailing party in determining attorney's fees. — In a child support modification action that resulted in an increase in the father's child support, even if not to the extent requested by the mother, the mother was the prevailing party under O.C.G.A. § 19-6-15(k)(5), and only the mother could be awarded attorney's fees; the trial court erred in finding that there could be, and were, two prevailing parties. *Mironov v. Mironov*, 296 Ga. 114, 765 S.E.2d 326 (2014).

Cited in *Jackson v. Jackson*, 179 Ga. 152, 175 S.E. 456 (1934); *Rozetta v. Banks*, 183 Ga. 701, 189 S.E. 513 (1937); *Glaze v. Strength*, 186 Ga. 613, 198 S.E.2d 721 (1938); *Murphey v. Murphey*, 215 Ga. 19, 108 S.E.2d 872 (1959); *Kennison v. Lee*, 217 Ga. 155, 121 S.E.2d 821 (1961); *Levine v. Seley*, 217 Ga. 384, 123 S.E.2d 1 (1961); *Kendrick v. Kendrick*, 218 Ga. 284, 127 S.E.2d 379 (1962); *DuPree v. DuPree*, 224 Ga. 52, 159 S.E.2d 708 (1968); *Mullinax v. Mullinax*, 234 Ga. 553, 216 S.E.2d 802 (1975); *Anderson v. Anderson*, 237 Ga. 886, 230 S.E.2d 272 (1976); *Ford v. Ford*, 243 Ga. 763, 256 S.E.2d 446 (1979); *Kirkpatrick v. Woodruff*, 243 Ga. 736, 256 S.E.2d 465 (1979); *Dupre v. Scappaticcio*, 244 Ga. 179, 259 S.E.2d 440 (1979); *Stewart v. Stewart*, 160 Ga. App. 463, 287 S.E.2d 378 (1981); *Green v.*

Krebs, 245 Ga. App. 756, 538 S.E.2d 832 (2000); *Frazier v. Frazier*, 280 Ga. 687, 631 S.E.2d 666 (2006); *Penny v. McBride*, 282 Ga. App. 590, 639 S.E.2d 561 (2006); *McCoy v. McCoy*, 281 Ga. 604, 642 S.E.2d 18 (2007); *Bankston v. Warbington*, No. A14A1515, 2015 Ga. App. LEXIS 185 (Mar. 24, 2015).

Role of Jury

It is duty of jury to fix amount minor children shall be entitled to for their permanent support. *Hardy v. Pennington*, 187 Ga. 523, 1 S.E.2d 667 (1939).

Jury is vested with discretion as to amount, character, and duration of permanent support to be awarded to the child or children of the unsuccessful marriage, and an instruction, that if the jury found in favor of the children, the jury should fix an allowance that would be sufficient to provide for their maintenance, protection, and education until their majority is erroneous. *Mell v. Mell*, 190 Ga. 508, 9 S.E.2d 756 (1940).

Factors jury should not "discount." — In determining husband's gross income, the jury was not entitled to "discount" amounts such as retirement pay awarded to the wife, the minor child's college costs, insurance premiums, etc. *Franz v. Franz*, 268 Ga. 465, 490 S.E.2d 377 (1997).

Factors jury may consider. — On the husband's ability to pay, the jury may take into consideration his age, the condition of his health, his material resources, his present income, and any previous allowance voluntarily made by the husband for the support of the wife. *Fried v. Fried*, 211 Ga. 149, 84 S.E.2d 576 (1954) (decided prior to the 1989 amendment establishing guidelines for child support awards).

Settlement between husband and wife, in which no provision is made for child, is not considered by jury in estimating the allowance to a child which had not been previously awarded to her by decree of the court. *Johnson v. Johnson*, 131 Ga. 606, 62 S.E. 1044 (1908).

Jury must award specific amount and not percentage of income. — Jury award which based child support solely on a percentage computation of the father's

income, without setting a flat sum for which he was liable, did not comply with the requirement of the statute that a definite amount be specified. *Newsome v. Newsome*, 237 Ga. 221, 227 S.E.2d 347 (1976); *Wilcox v. Wilcox*, 242 Ga. 598, 250 S.E.2d 465 (1978).

Jury authorized to grant support until children reach majority. — When viewed in connection with the remedy provided in former Code 1933, § 30-207 (see now O.C.G.A. § 19-6-15), the principle of former Code 1933, § 74-105 (see now O.C.G.A. § 19-7-2) operates to authorize, though it does not require, the jury to find a support for the minor children until their majority. *Mell v. Mell*, 190 Ga. 508, 9 S.E.2d 756 (1940).

Amount found by jury may or may not be calculated to support children until majority. *Mell v. Mell*, 190 Ga. 508, 9 S.E.2d 756 (1940).

Modification of Award

Enforceability of agreement between parties. — While parties may enter into an agreement concerning modification of child support, the agreement becomes an enforceable agreement only when made an order of the court pursuant to O.C.G.A. § 19-6-19. *Pearson v. Pearson*, 265 Ga. 100, 454 S.E.2d 124 (1995).

Extension of support period. — When the original child support decree provided for a reduction of child support upon the oldest child's majority, thus providing an ending time for that portion of the parent's support obligation relating to the oldest child, the trial court in a modification action had no authority to extend the period for which the parent would be required to pay child support for three children. *Eubanks v. Rabon*, 281 Ga. 708, 642 S.E.2d 652 (2007).

Retroactive application of guidelines. — Guidelines added by the 1989 amendment may be applied retroactively to a petition to modify child support provisions in a decree entered before the effective date of the amendment. *Walker v. Walker*, 260 Ga. 442, 396 S.E.2d 235 (1990).

Child support guidelines of O.C.G.A. § 19-6-15 apply to child support modifica-

tion actions and to divorce actions seeking to establish an initial obligation of child support. That section can be applied retroactively to modify a 1983 divorce judgment. *Riggs v. Darsey*, 260 Ga. 487, 396 S.E.2d 905 (1990).

Child-support guidelines are applicable to a modification action (*Riggs v. Darsey*, 260 Ga. 487, 396 S.E.2d 905 (1990)), and the trial court must review the agreement in light of the child support amounts contained in the child-support guidelines. *Pearson v. Pearson*, 265 Ga. 100, 454 S.E.2d 124 (1995).

Modification was not retroactive to the filing of the petition. — Trial court did not err in imputing income of \$2,500 to an unemployed parent based on the parent's training and experience as a paralegal and the trial court's finding that the parent had failed to show efforts to obtain employment and was choosing not to work. The downward adjustment by the trial court was not retroactive to the date of the petition for modification; O.C.G.A. § 19-6-15(j) did not apply to this case, in which only modification of child support was sought. *Galvin v. Galvin*, 288 Ga. 125, 702 S.E.2d 155 (2010).

Petition for modification time-barred. — Parent's petition for downward modification of the parent's child support obligation should have been dismissed because the parent did not invoke the exception contained in O.C.G.A. § 19-6-15(k)(2)(C) in the parent's successive petition; the relevant time frame for the parent's alleged loss of income in excess of the statutory exception was from the date of the prior modification ruling, and the material allegations of the petition were essentially that of the prior petition for modification. *Bagwell v. Bagwell*, 290 Ga. 378, 721 S.E.2d 847 (2012).

Future modification must be tied to finances. — Trier of fact may place a time limit on child support but only if the court ties it to some financial consideration. *Scherberger v. Scherberger*, 260 Ga. 635, 398 S.E.2d 363 (1990).

Award of a home to the wife and the children until the youngest child turns 18 or the wife remarries constitute an illegal future modification of child support not

Modification of Award (Cont'd)

tied to income fluctuation. *Scherberger v. Scherberger*, 260 Ga. 635, 398 S.E.2d 363 (1990).

Modification procedure not dependent upon public assistance. — When the Department of Human Resources (DHR) petitions the superior court to adopt the Department's recommendation, the court is not required to find a need for additional support but, without regard to whether a child is receiving public assistance, may increase child support based solely on a significant inconsistency between an existing order and the amount which would result from application of the child support guidelines; the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq., does not contain any basis for continuing to distinguish between the procedure available since the child is receiving public assistance and that which is available in the absence of any such assistance. The trial court erred in concluding that evidence of the need for additional support was necessary and that DHR lacked standing, and in failing to apply child support guidelines and to justify any departure therefrom. *Falkenberry v. Taylor*, 278 Ga. 842, 607 S.E.2d 567 (2005).

In a child support modification action, the trial court erred in concluding that evidence of the need for additional support was necessary and that the Department of Human Resources (DHR) lacked standing to file a modification action on behalf of a child not receiving public assistance unless the court could show the child's need for additional support, and in failing to apply the child support guidelines of O.C.G.A. § 19-6-15 and to justify any departure therefrom; by express statutory amendment, the General Assembly no longer reserved for the private bar those modification actions which involved children who did not receive public assistance and needed no additional support, but whose court-ordered provider enjoyed an enhanced financial status. *Falkenberry v. Taylor*, 278 Ga. 842, 607 S.E.2d 567 (2005) (Unpublished).

Trial court erred by requiring that an ex-wife refrain from applying for any government assistance for the children while

the ex-wife receives child support from the ex-husband because it was an effort to make a predetermined finding with respect to a potential future modification and was unauthorized under O.C.G.A. § 19-6-15. *Singh v. Hammond*, 292 Ga. 579, 740 S.E.2d 126 (2013).

Modification outside range of guidelines. — Trial court's order modifying child support outside the range of the Georgia Child Support Guidelines was required to state the amount of support that would have been required under the guidelines and to contain a written finding as to the father's gross income. *Faulkner v. Frampton*, 216 Ga. App. 785, 456 S.E.2d 88 (1995).

Order that the father pay increased child support based on a substantial change in the father's financial condition was reversed because although the jury checked several special circumstances listed on the verdict form, the jury failed to explicitly state whether an award under the guidelines was excessive; the special circumstances checked did not imply that the jury thought the award was excessive, in fact, the checked circumstances supported an inference that the guideline award was inadequate and that the jury intended for the father to pay more, not less. *Lewis v. Scruggs*, 261 Ga. App. 573, 583 S.E.2d 240 (2003).

Wife was entitled to an upward modification of child support because the wife presented evidence that the husband's gross monthly income had increased from \$8,898 to \$10,700.91 during the period between entry of the final divorce decree and the filing of the petition for modification and there was evidence that the husband's net worth had increased by almost three million dollars. That evidence supported the trial court's finding of a substantial change in income and financial status sufficient to authorize modification of the support award and supported the trial court's deviation from the presumptive amount of child support based on a parent's financial ability to provide for private school education. *Odom v. Odom*, 291 Ga. 811, 733 S.E.2d 741 (2012).

Modification below guidelines permitted, but no forgiveness of arrearages. — While the trial court did

not erroneously set a mother's child support obligation at a percentage well below the guidelines, the court lacked the authority to completely forgive the mother's arrearage as the General Assembly did not intend to permit forgiveness of past-due child support arrearage, regardless of whether the modification proceeding fell under the general statutory scheme or the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq. *Ga. Dep't of Human Res. v. Prater*, 278 Ga. App. 900, 630 S.E.2d 145 (2006).

In modifying a father's child support obligation, the trial court erred in increasing support above the amount in the guidelines without making a finding of special circumstances warranting such a deviation; furthermore, the trial court erred in not applying the guidelines to the father's counterclaim for an increase of the support the mother was to pay the father during the summer. *Eubanks v. Rabon*, 281 Ga. 708, 642 S.E.2d 652 (2007).

Modification of a child support obligation in a garnishment action, rather than a petition to modify, was erroneous. *Twineham v. Daniel*, 223 Ga. App. 25, 476 S.E.2d 814 (1996).

Prejudgment garnishment not authorized. — O.C.G.A. § 19-6-15(h)(3)(B)(i) does not authorize garnishment for uninsured health care expenses that have not been reduced to a money judgment without compliance with the requirements of the more restrictive prejudgment garnishment procedure set out in O.C.G.A. § 18-4-40. *Stoker v. Severin*, 292 Ga. App. 870, 665 S.E.2d 913 (2008).

In a proceeding to legitimate a child, the trial court did not err in calculating the petitioning parent's child support obligation to be \$2,200 per month as the trial court relied on the testimony of the petitioning parent's accountant, the ex-spouse who remained a business partner, and the petitioning parent's tax returns and self-employment income documentation. *Appling v. Tatum*, 295 Ga. App. 78, 670 S.E.2d 795 (2008).

Consideration of father's new household. — In increasing a remarried father's child support obligation based on

increased income, the trial court properly considered his support obligation to his child by his new wife; the trial court had considered the father's income as well as his current wife's income and ultimately decided that based on his obligations to his current household, the father was entitled to reduce the upward modification of child support payments. *Sharpe v. Perkins*, 284 Ga. App. 376, 644 S.E.2d 178 (2007), cert. denied, 2007 Ga. LEXIS 509 (Ga. 2007).

Modifications following custody change. — Following a change of custody from mother to father, it was error to include child support formerly paid by the father in the mother's income for purposes of calculating her child support obligation. *Martin v. Greco*, 225 Ga. App. 752, 484 S.E.2d 789 (1997).

Modification must be tied to guidelines. — Since the parties' settlement agreement modified custody so each would be the residential custodian of one child, the trial court erred by approving a provision in the agreement that neither would pay the other child support because the court did not determine whether this provision complied with the child support guidelines. *Ford v. Hanna*, 293 Ga. App. 863, 668 S.E.2d 271 (2008).

Trial court did not address whether there had been a change in the financial circumstances of the husband since the original child support award. If the husband's financial status had not substantially changed, then no modification was appropriate, if modification was appropriate, then the court was required to use the child support guidelines to calculate the new amount. *Wetherington v. Wetherington*, 291 Ga. 722, 732 S.E.2d 433 (2012).

Trial court's child support award was reversed and the case was remanded for reconsideration because the trial court's award of child support was predicated on the court's decision to change custody of the parties' son, which change was vacated. *Blue v. Hemmans*, 327 Ga. App. 353, 759 S.E.2d 72 (2014).

Temporary child support judgment was reversed and the case remanded for entry of an order that complied with O.C.G.A. § 19-6-15(f)(4)(D) because the order

Modification of Award (Cont'd)

showed on the order's face that the guidelines were not used and that the trial court was unable to calculate various items relating to child support and arrears; if modification was appropriate, then the trial court was required to use the child support guidelines to calculate the new amount. *Neal v. Hibbard*, 770 S.E.2d 600, No. S14A1673, 2015 Ga. LEXIS 183 (2015).

Modification with deviation from guidelines prohibited. — In the mother's petition to modify child support, there was no articulated basis for application of a specified discretionary deviation from the presumptive child support obligation because the history of the parties was not a ground for deviation in child support, and the modified physical custody awarded the father fell far short of being substantially equal to that with the mother. *Crook v. Crook*, 293 Ga. 867, 750 S.E.2d 334 (2013).

Delay in effective date of modification improper. — A 15-month delay in the effective date of an upward modification of child support was improper under O.C.G.A. § 19-6-15(k)(3)(B). When a modification award involved at least a 30% difference, as in the instant case, the new child support award could be phased in over a period of up to two years with at least an initial immediate adjustment of not less than 25 percent of the difference. *Hampton v. Nesmith*, 294 Ga. App. 514, 669 S.E.2d 489 (2008).

Child support available even though child reached age 18. — Trial court could properly award child support to a parent who filed a petition for change of custody and child support, even though the child had reached the age of 18 by the time the petition was considered. The parent was not divested of the right to seek child support for the period of time between the filing of the petition and the date on which the child turned 18, and as the child had not yet completed high school, an order for support beyond the child's 18th birthday could be entered. *Wade v. Corinthian*, 283 Ga. 514, 661 S.E.2d 532 (2008).

Failure to show that discretionary parenting-time deviation applied. —

Trial court did not abuse the court's discretion by refusing to apply discretionary parenting-time deviation from the presumptive child support amount set forth in O.C.G.A. § 19-6-15(i)(2)(K) as sought by a parent because the parent failed to show a special circumstance showing the presumptive amount of support excessive or that the child's best interest would be served by subtracting from the presumptive amount. *Hamlin v. Ramey*, 291 Ga. App. 222, 661 S.E.2d 593 (2008).

Monetary gifts count as income and impact ability to modify. — Parent did not prove entitlement to a modification of child support because, even assuming the money the parent received from a trust of which the parent and the children's grandparent were the sole beneficiaries was a gift, it had to be included in the parent's gross income under O.C.G.A. § 19-6-15(f)(1)(A)(xvii). *In the Interest of R.F.*, 295 Ga. App. 739, 673 S.E.2d 108 (2009).

Modification properly denied. — When a parent agreed to child support in excess of the O.C.G.A. § 19-6-15 support guidelines and did not subsequently show a reduction in the parent's financial status and income, a downward modification of child support under O.C.G.A. § 19-6-19(a) was properly denied. *Moccia v. Moccia*, 277 Ga. 571, 592 S.E.2d 664 (2004).

Because two years had not elapsed from a prior court order disposing of an earlier petition for support modification filed by one parent, the trial court did not err when the court dismissed under O.C.G.A. § 19-6-15(k)(2) the portion of a petition seeking modification of the child-support award. *Avren v. Garten*, 289 Ga. 186, 710 S.E.2d 130 (2011).

Mother required to pay support to father. — Trial court properly designated a father as the custodial parent pursuant to O.C.G.A. § 19-6-15(a)(9), and required the mother to pay child support to the father because it was undisputed that the child was spending equal time with the parents and that the mother had the higher income. *Stoddard v. Meyer*, 291 Ga. 739, 732 S.E.2d 439 (2012).

Trial court did not err by imputing income to the mother because there was evidence that the mother and new husband had determined that it was to the advantage of their children that the mother not work outside the home. *Carr-MacArthur v. Carr*, 296 Ga. 30, 764 S.E.2d 840 (2014).

Evidence did not support upward modification. — Trial court record was devoid of evidence that a parent had the ability or means to earn an amount found by the trial court, such that the court's grant of the other parent's request for an upward modification of the parent's child support obligation could not stand; the evidence was uncontroverted that the parent's income and earning capacity had dramatically decreased. *Herrin v. Herrin*, 287 Ga. 427, 696 S.E.2d 626 (2010).

Increase of child support obligation improper. — Trial court abused the court's discretion in increasing a mother's child support obligation because the court failed to determine whether her income had substantially changed from the entry of the divorce decree pursuant to O.C.G.A. § 19-6-15(k)(4), and even if the trial court correctly disregarded the reduction in the mother's income, the evidence failed to show an increase in the mother's income since her divorce; while it appeared that the trial court modified the child support award consistent with existing child support guidelines, the court had no valid basis to do so. *Harris v. Williams*, 304 Ga. App. 390, 696 S.E.2d 131 (2010), overruled on other grounds, *Viskup v. Visкуп*, 291 Ga. 103, 727 S.E.2d 97 (2012).

Annual payment of child support based on commissions. — Trial court, by including an additional child support provision requiring a father to pay an annual payment of 25 percent of his gross commissions on top of the presumptive child support amount, circumvented the requirement that a court only may deviate from the presumptive amount after making the necessary findings in O.C.G.A. § 19-6-15(i)(1)(B). *Stowell v. Huguenard*, 288 Ga. 628, 706 S.E.2d 419 (2011).

Consideration of new spouse's income erroneous. — Child support award was reversed because nothing in O.C.G.A. § 19-6-15 authorized the trial

court to consider the income or other resources of the father's new spouse as a part of the calculation of the child support obligation as his new wife had no legal obligation to contribute, directly or indirectly, to the support of the parties' three children. *Blumenshine v. Hall*, 329 Ga. App. 449, 765 S.E.2d 647 (2014).

Judicial notice. — It was error for the trial court in modifying a child support award to take judicial notice of an increase in the needs of the children because the question of whether there had been such an increase would be a matter of proof if it had been placed in issue; the error was harmless, however, as the modification order did not expressly mention an increase in the children's needs as a basis for increasing the child support. *Eubanks v. Rabon*, 281 Ga. 708, 642 S.E.2d 652 (2007).

Accrual pending modification petition. — Father's child support obligation did not continue to accrue at the same rate after the mother was served with the father's petition to modify child support. Under O.C.G.A. § 19-6-15(j), support due before the entry of a modification order did not accrue to the extent that the obligation was based on the father's income from employment from which the father had been involuntarily terminated. *Morgan v. Bunzendahl*, 316 Ga. App. 338, 729 S.E.2d 476 (2012).

No duty to pay miscellaneous expenses when whole support order modified. — Since the modification order encompassed and modified the entire child support obligation including the duty to pay miscellaneous expenses, and the order modified child support without deviation for miscellaneous expenses, the order did not leave the prior miscellaneous expense provision in full force and effect and the father could not be in contempt for failure to pay those expenses. *East v. Stephens*, 292 Ga. 604, 740 S.E.2d 156 (2013).

Remand of attorney fee award required. — In a child custody modification proceeding, the trial court erred by awarding attorney fees to the father in the amount of \$4,000 under O.C.G.A. § 19-9-3 as the award was not supported by the record since the trial court did not

Modification of Award (Cont'd)

explain the statutory basis for the award and did not enter any findings necessary to support the award as required by O.C.G.A. § 19-6-15(k)(5). *Kuehn v. Key*, 325 Ga. App. 512, 754 S.E.2d 103 (2014).

Writing Requirement

Written findings required. — Trial court, upon modifying an award of child support, must enter written findings of special circumstances in order to deviate, up or down, from the child support guidelines. *Ehlers v. Ehlers*, 264 Ga. 668, 449 S.E.2d 840 (1994).

Award of child support in the case sub judice being beyond the range of statutory guidelines, the trial court erred in failing to provide the required written findings. *Kennedy v. Adams*, 218 Ga. App. 120, 460 S.E.2d 540 (1995).

Even though O.C.G.A. § 19-6-15 was amended since the finding in *Ehlers v. Ehlers*, 264 Ga. 668, 449 S.E.2d 840 (1994), the requirement for written findings remains. *Department of Human Resources v. Wilcox*, 219 Ga. App. 757, 466 S.E.2d 662 (1996).

Trial court erred in setting aside a father's child support obligation because the trial court failed to make a written finding of the gross income of the father and the mother as required by O.C.G.A. § 19-6-15(a), or of the presence or absence of special circumstances justifying a departure from the guidelines applicable range as required by O.C.G.A. § 19-6-15(c). *Eleazer v. Eleazer*, 275 Ga. 482, 569 S.E.2d 521 (2002).

Trial court erred in not fully adopting the recommendation of the Department of Human Resources to reduce a father's child support obligation to \$718 per month and in ordering that the father's child support obligation be reduced to \$1,000 per month because the trial court's written order failed to state how application of the presumptive amount of child support would be unjust or inappropriate and how the best interest of the children for whom support was being determined would be served by the deviation pursuant to O.C.G.A. § 19-6-15(c)(2)(E) and (i)(1)(B); O.C.G.A. § 19-11-12(e) does not

authorize the trial court to refrain from written findings or any other compliance with § 19-6-15 because like § 19-6-15(d), § 19-11-12(e) serves to emphasize that the qualitative determinations of whether special circumstances make the presumptive amount of child support excessive or inadequate and whether deviating from the presumptive amount serves the best interest of the child are committed to the discretion of the court. *Spurlock v. Dep't of Human Res.*, 286 Ga. 512, 690 S.E.2d 378 (2010).

Juvenile court erred in awarding child support without making the written findings required by O.C.G.A. § 19-6-15(c)(2), including a determination of the parents' gross income and certain findings regarding the child's health insurance coverage and apportionment of the child's uninsured health care expenses. *Roberts v. Tharp*, 286 Ga. 579, 690 S.E.2d 404 (2010).

When a final child support order included a specific deviation for extraordinary educational expenses under O.C.G.A. § 19-6-15(i)(2)(J)(i), but the trial court failed to make the statutorily required written findings necessary to support the deviation, remand was required for a redetermination of the order, with any deviation to be based upon proper written findings. *Brogdon v. Brogdon*, 290 Ga. 618, 723 S.E.2d 421 (2012).

Order of modification deviating from the presumptive child support obligation was flawed because the modification failed to comply with the statutory requirements of supporting findings and documentation for a discretionary downward deviation in the amount of child support. *Crook v. Crook*, 293 Ga. 867, 750 S.E.2d 334 (2013).

In a child support case, although both parties waived findings of fact, the trial court in deviating from the child support guidelines was nevertheless required to set forth how application of the guidelines would be unjust or inappropriate, or how the best interests of the children would be served by a deviation, under O.C.G.A. § 19-6-15(c)(2)(E). *Wallace v. Wallace*, 296 Ga. 307, 766 S.E.2d 452 (2014).

Written finding of fact not required when the court orders the statutory presumptive amount. If no deviation applies and the trial court or jury decides not to deviate from the presumptive amount of child support, then the order need not explain how the trial court or jury reached that decision. *Hamlin v. Ramey*, 291 Ga. App. 222, 661 S.E.2d 593 (2008).

Father failed to show that a trial court's determination that the mother had no monthly gross income constituted a "deviation" that required the trial court to make findings of fact under O.C.G.A. § 19-6-15. The statute contemplated that a deviation was an increase or decrease from the presumptive amount of child support. *Kennedy v. Kennedy*, 309 Ga. App. 590, 711 S.E.2d 103 (2011).

In a divorce action in which the mother earned \$5,097 monthly and the father earned \$54,732 monthly, the trial court in granting a \$2,000 upward deviation from the presumptive amount of support failed to explain how the guidelines amount would be unjust or inappropriate and how the best interest of the children was served by deviation as required by O.C.G.A. § 19-6-15(c)(2)(E)(iii); remand was required for such written findings. *Fladger v. Fladger*, 296 Ga. 145, 765 S.E.2d 354 (2014).

Trial court erred by failing to include findings in the court's child support award as to the court's deviation from the presumptive amount of child support based on the parent's military deployment. *Carr-MacArthur v. Carr*, 296 Ga. 30, 764 S.E.2d 840 (2014).

Written finding as to the gross incomes required. — Award was vacated and the case remanded after the trial court awarded child support without making a written finding as to the gross incomes of the child's parents, without applying the applicable statutory percentage range, and without making a written finding of special circumstances justifying the departure from the guidelines' applicable range. *Urquhart v. Urquhart*, 272 Ga. 548, 533 S.E.2d 80 (2000).

Georgia Supreme Court has noted that an award of child support may be based on the earning capacity of the obligor and not

on gross income in certain circumstances; but it is also apparent that the obligor's gross income is the starting point for a child support determination under O.C.G.A. § 19-6-15(b). However, an order awarding child support was vacated since the trial court failed to determine the father's gross income, but made a child support award based on the earning capacity of the father; therefore, the section of the child support award as to attorney fees and the fees of the guardian ad litem was also vacated inasmuch as the trial court made these determinations in the context of the court's ruling awarding child support. *Eldridge v. Ireland*, 259 Ga. App. 44, 576 S.E.2d 44 (2002).

O.C.G.A. § 19-6-15(a) requires a divorce decree to include a written finding of the gross income of the father and the mother; when the decree included a finding of the husband's income, but did not include a finding of the wife's income, it was necessary that the case be remanded to the trial court with direction to make a finding of the wife's income, to reconsider the award of child support based on that finding, and to amend the decree accordingly. *Southerland v. Southerland*, 278 Ga. 188, 598 S.E.2d 442 (2004).

Because the trial court's order failed to specify the amount of child support to be paid, include a written finding of the gross income of each parent, and discuss the presence or absence of special circumstances in accordance with O.C.G.A. § 19-6-15(c), the failure to include these requisite findings constituted reversible error. *Simmons v. Williams*, 290 Ga. App. 644, 660 S.E.2d 435 (2008).

Findings not required if court adheres to child support obligation table. — Trial court adhered to the child support obligation table and, thus, pursuant to O.C.G.A. § 19-6-15(i)(1)(B), was not required to make any fact findings or explain the court's decision to forego applying the children's private school tuition to the child support calculations. *Johnson v. Johnson*, 284 Ga. 366, 667 S.E.2d 350 (2008).

Court erred in not making best interests findings in modification. — Although in making adjustments to a mother's income for other qualified children,

Writing Requirement (Cont'd)

the trial court was not required to make the type of findings that would support a deviation from presumptive child support, the trial court erred in not making findings regarding the child's best interests under O.C.G.A. § 19-6-15(f)(5)(C). *Wheeler v. Akins*, 327 Ga. App. 830, 761 S.E.2d 383 (2014).

Education of Children

Court may include in decree provision for educational funds including expenses for attending a college during minority when the circumstances of the case warrant it. *Coleman v. Coleman*, 240 Ga. 417, 240 S.E.2d 870 (1977).

Providing for education acceptable. — Jury is not prohibited from providing for the education of minor children of an unsuccessful marriage. *Bateman v. Bateman*, 224 Ga. 20, 159 S.E.2d 387 (1968).

Extraordinary educational expenses not required to be factored into child support calculation. — Trial court did not err in leaving the children's private school tuition out of the court's child support calculations because, under O.C.G.A. § 19-6-15(i)(2)(J)(i), extraordinary educational expenses were not required to be factored into that calculation. *Johnson v. Johnson*, 284 Ga. 366, 667 S.E.2d 350 (2008).

Verdict merely finding amount for education of child is contrary to law. While it would scarcely be possible to educate a child without supporting the child, such a verdict leaves the question of support undecided and in such case a new trial should be granted. *Flynn v. Flynn*, 149 Ga. 693, 101 S.E. 806 (1920); *Bateman v. Bateman*, 224 Ga. 20, 159 S.E.2d 387 (1968).

Award of tuition outside of support award without necessary findings was unexplained deviation. — Trial court's order regarding child support did not comply with O.C.G.A. § 19-6-15(c)(2)(E) and (i)(1)(B) because the order failed to include the necessary findings; the trial court's award of tuition outside of the support award was an unexplained deviation. *Johnson v. Ware*, 313

Ga. App. 774, 723 S.E.2d 18 (2012).

Obligation for educational expenses terminates on majority or marriage. — Any obligation to pay educational expenses of a child imposed by the decree terminates when the child reaches majority or marries. *Coleman v. Coleman*, 240 Ga. 417, 240 S.E.2d 870 (1977).

Indirect costs considered to vary final award. — In determining the amount of child support to be paid, the trial court can give consideration to indirect costs paid by the obligor, e.g., health insurance premiums, in departing from guidelines, but such indirect payments can be considered only to vary the final award. *Ehlers v. Ehlers*, 264 Ga. 668, 449 S.E.2d 840 (1994).

Modification due to continuing education. — Modification action to extend support payments to allow a child who had reached the age of majority to complete a secondary school education was not required to be filed before the child's 18th birthday. *Ferguson v. Ferguson*, 267 Ga. 886, 485 S.E.2d 475 (1997).

In order to extend support payments to allow a child who had reached the age of majority to complete a secondary school education, it was not required that provision for such possibility have been made in the temporary or final support order. *Ferguson v. Ferguson*, 267 Ga. 886, 485 S.E.2d 475 (1997).

Continuous full-time student. — Because the superior court erroneously focused on a son's absences, tardiness, and failure to attend summer school when the court concluded that the son was not a "continuous full time student" when the son reached the age of majority, the decision was not in accord with the parties' agreement or the legislative purpose of O.C.G.A. § 19-6-15. *Bullard v. Swafford*, 279 Ga. 577, 619 S.E.2d 665 (2005).

Trial court erred when the court determined that a father's child-support obligation terminated because the child was not enrolled in and attending school on a full-time basis between June and August because the agreement between the father and the mother did not require the child's continuous attendance in school during the summer months but required only the

child's full-time attendance in school; full-time school does not require attendance in school during the summer months. *Draughn v. Draughn*, 288 Ga. 734, 707 S.E.2d 52 (2011).

Child enrolled in online courses. — Trial court erred in finding that a child's enrollment in online courses did not satisfy a modification order's requirement that the child "attend" school in order to have the father pay child support beyond the child's attainment of majority; once a child enrolls in approved online courses in an effort to graduate from a secondary school, the child's online attendance constitutes "attending school" for purposes of

extending child support beyond the child's attainment of the age of majority. *Draughn v. Draughn*, 288 Ga. 734, 707 S.E.2d 52 (2011).

Custodial parent to pay education expenses. — Res judicata did not bar a father's claim for interpretation and enforcement of child support provisions in the parties' settlement agreement; the agreement clearly gave the father final authority over the children's school and the mother, as custodial parent, was obligated to pay the children's tuition from the support she received. *Hardman v. Hardman*, 295 Ga. 732, 763 S.E.2d 861 (2014).

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, § 939 et seq.

C.J.S. — 27C C.J.S., Divorce, §§ 655 et seq., 694 et seq., 767.

ALR. — Liability of parent for necessities furnished to adult child, 42 ALR 150.

Duty of father to support child as affected by decree which awards general custody to him, but permits mother to have custody part of time, 52 ALR 286.

Education as element in allowance for benefit of child in decree of divorce or separation, 133 ALR 902; 56 ALR2d 1207.

Power of court in divorce or separation suit to provide for support of, or aid to, adult child, or to continue provision for support after child attains majority, 162 ALR 1084.

Death of parent as affecting decree for support of child, 18 ALR2d 1126.

Father's duty under divorce or separation decree to support child as affected by latter's induction into military service, 20 ALR2d 1414.

Marriage of minor child as terminating support provisions in divorce or similar decree, 58 ALR2d 355.

Father's liability for support of child furnished after entry of decree of absolute divorce not providing for support, 69 ALR2d 203.

Opening or modification of divorce decree as to custody or support of child not provided for in the decree, 71 ALR2d 1370.

Allocation or apportionment of previous combined award of alimony and child support, 78 ALR2d 1110.

Propriety and effect of undivided award for support of more than one person, 2 ALR3d 596.

Statutory family allowance to minor children as affected by previous agreement or judgment for their support, 6 ALR3d 1387.

Power of court which denied divorce, legal separation, or annulment, to award custody or make provisions for support of child, 7 ALR3d 1096.

Spouse's acceptance of payments under alimony or property settlement or child support provisions of divorce judgment as precluding appeal therefrom, 29 ALR3d 1184.

Right of child to enforce provisions for his benefit in parents' separation or property settlement agreement, 34 ALR3d 1357.

Income of child from other source as excusing parent's compliance with support provisions of divorce decree, 39 ALR3d 1292.

Divorce: provision in decree that one party obtain or maintain life insurance for benefit of other party or child, 59 ALR3d 9.

Father's liability for support of child furnished after divorce decree which awarded custody to mother but made no provision for support, 91 ALR3d 530.

Propriety of decree in proceeding between divorced parents to determine mother's duty to pay support for children in custody of father, 98 ALR3d 1146.

Responsibility of noncustodial divorced

parent to pay for, or contribute to, costs of child's college education, 99 ALR3d 322.

Validity and effect, as between former spouses, of agreement releasing parent from payment of child support provided for in an earlier divorce decree, 100 ALR3d 1129.

Excessiveness or adequacy of money awarded as child support, 27 ALR4th 864.

Excessiveness or adequacy of amount of money awarded for alimony and child support combined, 27 ALR4th 1038.

What constitutes "extraordinary" or similar medical or dental expenses for purposes of divorce decree requiring one parent to pay such expenses for child in custody of other parent, 39 ALR4th 502.

Death of obligor parent as affecting decree for support of child, 14 ALR5th 557.

Consideration of obligated spouse's earnings from overtime or "second job" held in addition to regular full-time employment in fixing alimony or child support awards, 17 ALR5th 143.

Treatment of depreciation expenses claimed for tax or accounting purposes in determining ability to pay child or spousal support, 28 ALR5th 46.

Right to credit on child support payments for social security of other government dependency payments made for benefit of child, 34 ALR5th 447.

Support provisions of judicial decree or order as limit of parent's liability for expenses of child, 35 ALR5th 757.

Application of child-support guidelines to cases of joint-, split-, or similar shared-custody arrangements, 57 ALR5th 389.

Consideration of obligor's personal-injury recovery or settlement in fixing alimony or child support, 59 ALR5th 489.

Basis for imputing income for purpose of determining child support where obligor spouse is voluntarily unemployed or underemployed, 76 ALR5th 191.

Right to credit on child support

arrearages for time parties resided together after separation or divorce, 104 ALR5th 605.

Right to credit against child support arrearages for time child spent in custody of noncustodial parent, other than for visitation or under court order without custodial parent's approval, 108 ALR5th 359.

Right to credit against child support arrearages for time children spent in custody of noncustodial parent pursuant to visitation or court order, 118 ALR5th 385.

Right to credit on child-support arrearages for money given directly to child, 119 ALR5th 445.

Right to credit against child support arrearages for time child lived with noncustodial parent, other than for visitation or by court order, with approval of custodial parent, 120 ALR5th 229.

Right to credit on child support for contributions to housing costs, utility bills, and other alleged household necessities made for child's benefit while child is not living with obligor parent, 123 ALR5th 565.

Right to credit on child support arrearages for gifts to child, 124 ALR5th 441.

Right to credit on child support for health insurance, medical, dental, and orthodontic expenses paid for child's benefit while child is not living with obligor parent, 1 ALR6th 493.

Right to credit on child support for contributions to educational expenses of child while child is not living with obligor parent, 2 ALR6th 439.

Right to credit on child support for contributions to travel expenses of child while child is not living with obligor parent, 3 ALR6th 641.

Right to credit on child support for continued payments to custodial parent for child who has reached majority or otherwise become emancipated, 4 ALR6th 531.

Validity, construction, and application of Child Support Recovery Act of 1992 (18 USCA § 228), 147 ALR Fed. 1.

19-6-16. Enforcement of child support orders, decrees, or verdicts.

Orders, decrees, or verdicts, permanent or temporary, in favor of the children may be enforced as those in favor of a party. (Ga. L. 1870, p.

413, § 3; Code 1873, § 1743; Code 1882, § 1743; Civil Code 1895, § 2463; Civil Code 1910, § 2982; Code 1933, § 30-208; Ga. L. 1979, p. 466, § 13.)

JUDICIAL DECISIONS

No right to enforce past due part of alimony judgment is vested in children. *Levine v. Seley*, 217 Ga. 384, 123 S.E.2d 1 (1961).

Right to enforce child's support payment vested in parent. — Right to enforce a judgment for alimony either for the wife alone, or for herself and her minor children who are in her custody or only for her minor children when she has custody of them is vested exclusively in the mother. The same rule applies to the enforcement of an award for attorney fees in an alimony case. *Levine v. Seley*, 217 Ga. 384, 123 S.E.2d 1 (1961).

Adult child improper party for enforcement. — Adult daughter was not the proper party to bring an action against the father to recover child support arrearages and to revive a dormant child support decree. *Georgia Dep't of Human Resources ex rel. Holland v. Holland*, 263 Ga. 885, 440 S.E.2d 9 (1994).

Remedy available to wife when husband fails to pay support. — Wife is entitled to institute contempt proceeding against husband for failure to pay support of parties' minor children, custody of which was awarded by divorce decree to wife, notwithstanding the fact that payment of support was directed to be made to the children's grandmother. *Blackburn v. Blackburn*, 201 Ga. 793, 41 S.E.2d 519 (1947).

Trial court properly found a father in willful contempt of court for failure to make child support payments pursuant to the court's order legitimating the child, upon a mother's application, as the father's failure to make those payments was undisputed in the record, the father owned significant assets, and in contemplation of the contempt hearing, the father transferred some of the assets; however, an unsupported attorney-fee award to the mother was reversed, and an evidentiary hearing was ordered on remand. *Webb v. Watkins*, 283 Ga. App. 385, 641 S.E.2d 611 (2007).

Judgment ordering alimony for benefit of child sufficient basis for contempt proceeding. — In a decree of final divorce, a judgment and decree rendered against a father that he pay to the mother the sum of \$50 per month as alimony for the support of their minor son until he reached eighteen years of age is sufficient to form the basis of a contempt proceeding against the father if he did not make the required payments. *Morris v. Myers*, 219 Ga. 278, 133 S.E.2d 22 (1963).

Party charged with contempt bears burden to show good faith attempt at compliance. — In a contempt proceeding, the burden is on one who fails and refuses to pay an award for alimony or child support and maintenance to show that he has in good faith exhausted all of the resources at his command and has made a diligent and bona fide effort to comply with the decree awarding alimony or child support. *Fambrough v. Cannon*, 221 Ga. 289, 144 S.E.2d 335 (1965).

Essence of civil contempt involved in a proceeding to enforce payment of an alimony or child support award is willful disobedience of the court's order. *Costa v. Costa*, 249 Ga. 494, 292 S.E.2d 73 (1982).

Requirement of showing good faith effort to comply. — It is not sufficient for the defendant to show merely that the defendant has no money, or property which the defendant might convert into money, with which to satisfy the alimony installments, but it must be made to appear clearly that the defendant has in good faith exhausted all the resources at the defendant's command and has made a diligent and bona fide effort to comply with the order of the court. *Snider v. Snider*, 190 Ga. 381, 9 S.E.2d 654 (1940).

Imprisonment for contempt is matter of judicial discretion. — Because imprisonment for contempt is a matter solely within the sound discretion of the judge and the judge may at any time, in the exercise of that discretion, discharge

one so imprisoned, the Supreme Court will not interfere with the discretion vested in the trial judge unless the discretion has been manifestly abused. *Corriher v. McElroy*, 209 Ga. 885, 76 S.E.2d 782 (1953).

Finding of ability to pay required. — Person may not be imprisoned for failure to pay child support unless it is first found that the person has the ability to pay but merely refuses to do so. *Pittman v. Pittman*, 179 Ga. App. 454, 346 S.E.2d 594 (1986).

Temporary residence by child in Alabama could not excuse the father's de-

liberate refusal to support the child in accordance with the court's order in the divorce decree. *Fennell v. Fennell*, 209 Ga. 815, 76 S.E.2d 387 (1953).

Cited in *Borders v. Borders*, 206 Ga. 191, 56 S.E.2d 517 (1949); *Thomas v. Holt*, 209 Ga. 133, 70 S.E.2d 595 (1952); *Corriher v. McElroy*, 209 Ga. 885, 76 S.E.2d 782 (1953); *White v. Bowen*, 223 Ga. 94, 153 S.E.2d 706 (1967); *Griffin v. Griffin*, 226 Ga. 781, 177 S.E.2d 696 (1970).

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, § 696.

Am. Jur. Pleading and Practice Forms. — 8B Am. Jur. Pleading and Practice Forms, Divorce and Separation, § 175.

C.J.S. — 27B C.J.S., Divorce, §§ 309, 445 et seq. 27C C.J.S., Divorce, § 694 et seq.

ALR. — Right of wife or child by virtue of right to support to maintain action to set aside conveyance by husband or parent as fraudulent, without reducing claim to judgment, 164 ALR 524.

Contempt proceedings to enforce decree or order in divorce or separation suit for support of children, 172 ALR 869.

Right of child to enforce provisions for his benefit in parents' separation or property settlement agreement, 34 ALR3d 1357.

Withholding visitation rights for failure to make alimony or support payments, 65 ALR4th 1155.

Authority of court, upon entering default judgment, to make orders for child

custody or support which were not specifically requested in pleadings of prevailing party, 5 ALR5th 863.

Right to credit against child support arrearages for time children spent in custody of noncustodial parent pursuant to visitation or court order, 118 ALR5th 385.

Right to credit on child-support arrearages for money given directly to child, 119 ALR5th 445.

Right to credit against child support arrearages for time child lived with noncustodial parent, other than for visitation or by court order, with approval of custodial parent, 120 ALR5th 229.

Right to credit on child support for contributions to housing costs, utility bills, and other alleged household necessities made for child's benefit while child is not living with obligor parent, 123 ALR5th 565.

Right to credit on child support arrearages for gifts to child, 124 ALR5th 441.

Validity, construction, and application of Child Support Recovery Act of 1992 (18 USCA § 228), 147 ALR Fed. 1.

19-6-17. Application for child support following custody award; service of petition; hearing; review; modification of order; enforcement; judgment.

(a) Whenever the custody of a minor child or children has been lawfully awarded by any court having jurisdiction thereof to:

(1) Any person other than a parent of the children at any time subsequent to the rendition of a final divorce decree between the father and mother of the children; or

(2) A parent as part of the final divorce decree where the court awarding the decree was unable to obtain jurisdiction over the parent without custody for purposes of a determination as to whether the parent should be bound for support of the child or children and the court's decree contains no specific provisions binding the parent without custody for the support of the child or children,

the parent or other person to whom the custody of the child or children is awarded may apply by petition to the superior court in the county where the parent without custody of the child or children resides for an order and judgment fixing the amount of support money that the parent without custody shall provide in order to fulfill the parent's natural duty to supply the necessities of life for the child or children.

(b) The procedure provided for in this Code section shall be available in cases in which the parent with custody of the children is the petitioner, notwithstanding the fact that the divorce decree and judgment may have been rendered in favor of the parent without custody.

(c) The petition shall be served upon the respondent; it shall be heard by the court, unless a jury trial is demanded by either party to the case. The judgment shall be reviewable as in other cases. The order or judgment shall likewise be subject to modification in the event of changed circumstances, under the same terms and conditions as are provided for in other cases of permanent alimony for the support of children granted in connection with the rendition of a final decree in divorce cases.

(d) The order and judgment of the court shall remain in effect, except as limited by its own restrictions and subsection (c) of this Code section, so long as the petitioner remains in lawful custody of the child or children and until they become of age. Execution may be granted to the petitioner for any sums past due under the order and judgment, in accordance with procedures in other cases of judgments for alimony.

(e) Any payment or installment of support under any child support order is, on and after the date due:

(1) A judgment by operation of law, with the full force and effect and attributes of a judgment of this state, including the ability to be enforced;

(2) Entitled as a judgment to full faith and credit; and

(3) Not subject to retroactive modification. (Ga. L. 1958, p. 204, § 1; Ga. L. 1977, p. 619, § 1; Ga. L. 1979, p. 466, § 32; Ga. L. 1997, p. 1613, § 6.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1991, a semicolon was substituted for the comma following “children” near the end of paragraph (a)(1).

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997). For annual survey on domestic

relations, see 61 Mercer L. Rev. 117 (2009). For annual survey of law on domestic relations, see 62 Mercer L. Rev. 105 (2010).

For note discussing Georgia’s child support laws, their problems, and some proposed solutions, see 11 Ga. L. Rev. 387 (1977).

JUDICIAL DECISIONS

Venue. — In a divorce proceeding, in which the order did not determine an award of child support, a petition for child support must be brought as a separate action in the superior court of the county where the defendant to the petition resides. *Eaddy v. Thomas*, 190 Ga. App. 15, 378 S.E.2d 147 (1989).

Children need not be destitute to receive child support. — Ga. L. 1958, p. 204, § 1 does not require, as condition precedent to fixing child support, that children be in destitute condition because of the failure of the father to provide the children with necessities. *Murphey v. Murphey*, 215 Ga. 19, 108 S.E.2d 872 (1959).

No right to credit for voluntary overpayment of child support. — Party with obligation of child support payments has no right to credit for voluntary overpayment of the child support due without the request or consent of the party to whom it is owed; nor can the parties by private agreement modify the terms of a divorce decree regarding child support. *Peyton v. Peyton*, 243 Ga. 846, 257 S.E.2d 268 (1979).

Modification below guidelines permitted, but no forgiveness of arrearages. — While the trial court did not erroneously set a mother’s child support obligation at a percentage well below the guidelines, the court lacked the authority to completely forgive the mother’s arrearage as the General Assembly did not intend to permit forgiveness of past-due child support arrearage, regardless of whether the modification proceeding fell under the general statutory scheme or the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq. *Ga. Dep’t of Human Res. v. Prater*, 278 Ga. App. 900, 630 S.E.2d 145 (2006).

Contracts settling child support and maintenance, approved by court, are enforceable. — When parties separate and by contract settle right of their minor children for support and maintenance and such contract is approved by trial judge and made part of final divorce decree, courts will enforce the contract as made by the parties. *Halpern v. Anoff*, 247 Ga. 735, 279 S.E.2d 226 (1981).

No authority to grant or modify support in contempt proceeding. — In a divorce case, the trial court has no authority to grant or modify child support in a contempt proceeding. *Eaddy v. Thomas*, 190 Ga. App. 15, 378 S.E.2d 147 (1989).

In a contempt proceeding brought by the Georgia Department of Human Resources, the trial court erred in modifying a parent’s child support obligation and in forgiving a portion of the arrearage because the court lacked authority to modify support orders in contempt proceedings and O.C.G.A. § 19-6-17(e)(1)-(3) precluded retroactive modification of child support. *Ga. Dep’t of Human Res. v. Gamble*, 297 Ga. App. 509, 677 S.E.2d 713 (2009).

Retroactive arrearage judgment was not permitted. — Child support arrearage judgment of \$2,844 was reversed because the judgment was based on the amount that the mother would have paid from the time the father was granted custody to the date the mother was ordered to start paying child support; such a retroactive modification of child support was not permitted. *Wheeler v. Akins*, 327 Ga. App. 830, 761 S.E.2d 383 (2014).

Action for child support can be brought in addition to divorce action. — Although the complaint in the divorce

action did not seek child support, the custodial spouse was not barred from enforcing the responsibility of the non-custodial spouse to support the child, and the custodial spouse may institute an original action for an award of child support. *Hackbart v. Hackbart*, 272 Ga. 26, 526 S.E.2d 840 (2000).

Cited in *Thomas v. Thomas*, 215 Ga. 383, 110 S.E.2d 657 (1959); *Crane v. Crane*, 225 Ga. 605, 170 S.E.2d 392 (1969); *Newsome v. Newsome*, 232 Ga. 49,

205 S.E.2d 291 (1974); *Walsh v. Walsh*, 240 Ga. 154, 240 S.E.2d 702 (1977); *Greer v. Moss*, 240 Ga. 121, 239 S.E.2d 685 (1977); *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); *Nolan v. Moore*, 241 Ga. 156, 244 S.E.2d 10 (1978); *Ford v. Ford*, 243 Ga. 763, 256 S.E.2d 446 (1979); *Dupre v. Scappaticcio*, 244 Ga. 179, 259 S.E.2d 440 (1979); *Russ v. Russ*, 272 Ga. 438, 530 S.E.2d 469 (2000); *Rabon v. Brown*, 275 Ga. 46, 561 S.E.2d 816 (2002).

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, §§ 1022, 1100.

C.J.S. — 27C C.J.S., Divorce, §§ 641 et seq., 649, 655.

ALR. — Allowance in decree against parent for education of child, 18 ALR 899.

Jurisdiction of action by mother or child for support of child born after divorce in another state or country, 32 ALR 659.

Duty of father to support child as affected by decree which awards general custody to him, but permits mother to have custody part of time, 52 ALR 286.

Death of mother of child whose custody has been awarded to her or to third person by divorce decree as reviving father's common-law duty to support, or right to custody of, child, 128 ALR 989.

Power of court in divorce or separation suit to provide for support of, or aid to, adult child, or to continue provision for support after child attains majority, 162 ALR 1084.

Right of wife or child by virtue of right to support to maintain action to set aside conveyance by husband or parent as fraudulent, without reducing claim to judgment, 164 ALR 524.

Support provisions of judicial decree or order as limit of father's liability for expenses of child, 7 ALR2d 491.

Father's duty under divorce or separation decree to support child as affected by latter's induction into military service, 20 ALR2d 1414.

Foreign divorce as affecting local order previously entered for separate maintenance, 28 ALR2d 1346; 49 ALR3d 1266.

Necessity of personal service within state upon nonresident spouse as prereq-

uisite of court's power to modify its decree as to alimony or child support in matrimonial action, 62 ALR2d 544.

Opening or modification of divorce decree as to custody or support of child not provided for in the decree, 71 ALR2d 1370.

Allocation or apportionment of previous combined award of alimony and child support, 78 ALR2d 1110.

Change in financial condition or needs of parents or children as grounds for modification of decree for child support payments, 89 ALR2d 7.

Power of court which denied divorce, legal separation, or annulment, to award custody or make provisions for support of child, 7 ALR3d 1096.

Doctrine of forum non conveniens: assumption or denial of jurisdiction of action involving matrimonial dispute, 9 ALR3d 545; 55 ALR5th 647.

Right of child to enforce provisions for his benefit in parents' separation or property settlement agreement, 34 ALR3d 1357.

Noncustodial parent's rights as respects education of child, 36 ALR3d 1093.

Income of child from other source as excusing parent's compliance with support provisions of divorce decree, 39 ALR3d 1292.

Divorce: power of court to modify decree for support of child which was based on agreement of parties, 61 ALR3d 657.

Father's liability for support of child furnished after divorce decree which awarded custody to mother but made no provision for support, 91 ALR3d 530.

Propriety of decree in proceeding between divorced parents to determine

mother's duty to pay support for children in custody of father, 98 ALR3d 1146.

Responsibility of noncustodial divorced parent to pay for, or contribute to, costs of child's college education, 99 ALR3d 322.

Laches or acquiescence as defense, so as to bar recovery of arrearages of permanent alimony or child support, 5 ALR4th 1015.

Excessiveness or adequacy of money awarded as child support, 27 ALR4th 864.

Excessiveness or adequacy of amount of money awarded for alimony and child support combined, 27 ALR4th 1038.

Parent's child support liability as affected by other parent's fraudulent misrepresentation regarding sterility or use of birth control, or refusal to abort pregnancy, 2 ALR5th 337.

Authority of court, upon entering default judgment, to make orders for child custody or support which were not specifically requested in pleadings of prevailing party, 5 ALR5th 863.

Right to credit on child support payments for social security or other government dependency payments made for benefit of child, 34 ALR5th 447.

Decrease in income of obligor spouse following voluntary termination of employment as basis for modification of child support award, 39 ALR5th 1.

Validity, construction, and application of full faith and Credit for Child Support Orders Act (FFCCSOA), 28 USCS § 1738B - state cases, 18 ALR6th 97.

19-6-18. Revision of judgment rendered prior to July 1, 1977, for permanent alimony and child support; when authorized; petition and hearing; expenses for defense of litigation.

(a) The judgment of a court providing permanent alimony for the support of a wife or child or children, or both, rendered prior to July 1, 1977, shall be subject to revision upon petition filed by either the husband or the wife showing a change in the income and financial status of the husband. The petition shall be filed and returnable under the same rules of procedure applicable to divorce proceedings. The petition shall be filed in the proper venue provided by law in civil cases. No petition may be filed by the wife under this Code section within a period of two years from the date of the filing of a previous petition by the wife under this Code section. No petition may be filed by the husband under this Code section within a period of two years from the date of the filing of a previous petition by the husband under this Code section. After hearing both parties and the evidence, the jury, or the judge where a jury is not demanded, may modify and revise the previous judgment so as to provide for the wife or child or children, or both, in accordance with the changed income and financial status of the husband, if such a change in the income and financial status of the husband is satisfactorily proved so as to warrant the modification and revision. In the hearing upon a petition filed as provided in this Code section, testimony may be given and evidence introduced relative to the income and financial status of the wife.

(b) Upon an application as authorized in subsection (a) of this Code section, the merits of whether the wife, or child or children, or both, are entitled to alimony and support are not in issue, but only whether there

has been such a substantial change in the income and financial status of the husband as to warrant either a downward or upward revision and modification of the permanent alimony judgment.

(c) An application authorized in subsection (a) of this Code section can be filed only where the husband has been ordered by the final judgment in an alimony or divorce and alimony action to pay permanent alimony in weekly, monthly, annual, or similar periodic payments, and not where the wife, or child or children, or both, have been given an award from the corpus of the husband’s estate in lieu of such periodic payment.

(d) Where an application authorized in subsection (a) of this Code section is filed by the husband, the court may require the husband to pay reasonable expenses of litigation as may be incurred by the wife, either for herself or the child or children, or both, in defense thereof. (Ga. L. 1955, p. 630, §§ 1-4; Ga. L. 1964, p. 713, § 1.)

Law reviews. — For article discussing Georgia alimony provisions allowing modification of judgments with respect to federal and state constitutional limitations, see 18 Ga. B.J. 153 (1955). For article, “The Georgia Long Arm Statute: A Significant Advance in the Concept of Personal Jurisdiction,” see 4 Ga. St. B.J. 13 (1967). For article surveying Georgia cases dealing with domestic relations from June 1977 through May 1978, see 30 Mercer L. Rev. 59 (1978). For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For article discussing the law on alimony modification, see 19 Ga. St. B.J. 130 (1983). For annual survey on law of domestic relations, see 42 Mercer L. Rev. 201 (1990).
For note discussing Georgia’s child sup-

port laws, their problems, and some proposed solutions, see 11 Ga. L. Rev. 387 (1977).
For comment on *Varble v. Hughes*, 205 Ga. 29, 52 S.E.2d 303 (1949), see 12 Ga. B.J. 78 (1949). For comment concerning full faith and credit ramifications of alimony decrees, in light of *Connell v. Connell*, 119 Ga. App. 485, 167 S.E.2d 686 (1969), see 18 J. of Pub. L. 517 (1969). For comment on *Connell v. Connell*, 119 Ga. App. 485, 167 S.E.2d 686 (1969), as to enforcement of a foreign modification of a Georgia child support decree, see 21 Mercer L. Rev. 675 (1970). For comment, “Antenuptial Agreements and Divorce in Georgia: *Scherer v. Scherer*,” see 17 Ga. L. Rev. 231 (1982).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- PROCEDURE FOR MODIFICATION
- WAIVER OF RIGHT TO MODIFICATION
- CHANGE IN INCOME OR FINANCIAL STATUS
- WHAT CONSTITUTES PERMANENT ALIMONY JUDGMENT
- EXPENSES OF LITIGATION

General Consideration

Constitutionality. — See Bugden v. Bugden, 225 Ga. 413, 169 S.E.2d 337 (1969).

Section does not violate equal protection principles. Dill v. Dill, 232 Ga. 231, 206 S.E.2d 6 (1974).

Section subordinate to U.S. Constitution. — Ga. L. 1964, p. 713, § 1, being statutory only, is subordinate to U.S. Const., Art. IV, Sec. I, the full faith and credit clause. Connell v. Connell, 119 Ga. App. 485, 167 S.E.2d 686 (1969).

O.C.G.A. § 42-8-34 and subsection (a) of O.C.G.A. § 19-6-18 compared. — See Hudson v. State, 248 Ga. 397, 283 S.E.2d 271 (1981).

Automatic future modification of alimony or child support. — When definite amount of alimony or child support is awarded, automatic future modification is not invalid. Hayes v. Hayes, 248 Ga. 526, 283 S.E.2d 875 (1981).

Modification of judgment based on agreement not unconstitutional impairment of contractual obligation. — Modification of judgment incorporating contract between husband and wife governing property and alimony rights between them pursuant to Ga. L. 1964, p. 713, § 1 (see now O.C.G.A. § 19-6-18) is not an unconstitutional impairment of obligation of contracts in violation of Ga. Const. 1976, Art. I, Sec. I, Para. VII (see now Ga. Const. 1983, Art. I, Sec. I, Para. X). This is so because, technically, what is being modified is a judgment of the court and not a contract. Kitfield v. Kitfield, 237 Ga. 184, 227 S.E.2d 9 (1976).

Ga. L. 1964, p. 713, § 1 (see now O.C.G.A. § 19-6-18) does not offend U.S. Const., Art. I, Sec. X, Cl. I or Ga. Const. 1976, Art. I, Sec. I, Para. VII (see now Ga. Const. 1983, Art. I, Sec. I, Para. X), which provides that no law impairing an obligation of contracts shall be enacted, and this is true even though the amount of alimony or support so awarded by the judgment, as well as the time during which judgment was to be paid, was agreed to in writing by the parties. Nelson v. Roberts, 216 Ga. 741, 119 S.E.2d 545 (1961).

Purpose of statute. — See McGuire v. McGuire, 228 Ga. 782, 187 S.E.2d 859 (1972).

Section was passed to permit both parties to seek modification. — Statute was passed to give parties to Georgia divorce decree statutory power to seek modification of provisions of decree relating to permanent alimony support on petition of either party. McGuire v. McGuire, 228 Ga. 782, 187 S.E.2d 859 (1972).

Law reflects public policy of state in relation to its subject matter. Connell v. Connell, 119 Ga. App. 485, 167 S.E.2d 686 (1969).

Agreement based on 1976 version of section cannot be legislatively modified by amendments which change law and law's application. Shure v. Shure, 245 Ga. 36, 262 S.E.2d 800 (1980).

Section is inapplicable to judgments rendered prior to its passage. — Ga. L. 1955, p. 630, §§ 1-4 neither expressly nor by implication shows legislative intent that it should be applied to alimony judgments rendered prior to the law's passage. Anthony v. Penn, 212 Ga. 292, 92 S.E.2d 14 (1956).

No modification of permanent alimony judgments prior to section's enactment. — Prior to enactment of Ga. L. 1955, p. 630, §§ 1-4, a final decree for permanent alimony not excepted to passed beyond discretionary control of the trial judge, and the judge thereafter had no authority to modify the judgment's terms unless authority to do so was reserved in the decree. Ethridge v. Echols, 212 Ga. 597, 94 S.E.2d 377 (1956).

Exception to rule that decrees not within this provision cannot be modified. — Generally, decrees not coming within provisions of Ga. L. 1955, p. 630, §§ 1-4 cannot be modified or revised by the trial court. This general rule is subject to exception in those instances when: (1) case was tried before court without jury, and matter of permanent alimony was settled by agreement of parties, which agreement was incorporated in and made part of final judgment and decree; and (2) authority to change or modify decree as to alimony was reserved to the court by the consent of the parties. Daniel v. Daniel, 216 Ga. 567, 118 S.E.2d 369 (1961).

Section provides exclusive method for modifying support obligations. — Trial court has no authority save that

provided by this statute to revise or otherwise modify child support decree after term in which such judgment was rendered has expired. *Davis v. Davis*, 218 Ga. 250, 127 S.E.2d 296 (1962); *Mullins v. Mullins*, 219 Ga. 816, 136 S.E.2d 379 (1964).

After rendition of final divorce decree containing award for alimony in periodic payments, the only way to alter alimony award is pursuant to Ga. L. 1964, p. 713, § 1. *Bradley v. Dockery*, 232 Ga. 692, 208 S.E.2d 496 (1974), overruled on other grounds, *Abushmais v. Erby*, 282 Ga. 619, 652 S.E.2d 549 (2007); *Meredith v. Meredith*, 238 Ga. 595, 234 S.E.2d 510 (1977); *Skinner v. Skinner*, 252 Ga. 512, 314 S.E.2d 897 (1984).

Jury verdict stating fixed sum of alimony per calendar month is final and is subject to change only upon showing under Ga. L. 1964, p. 713, § 1. *Fitts v. Fitts*, 231 Ga. 528, 202 S.E.2d 414 (1973), overruled on other grounds, *Coleman v. Coleman*, 240 Ga. 417, 240 S.E.2d 870 (1977); *Hayes v. Hayes*, 248 Ga. 526, 283 S.E.2d 875 (1981).

Original decree is res judicata of obligation pending modification. — Until proceedings are instituted to modify alimony award, and judgment decreasing amount of alimony is duly entered, original alimony decree is res judicata of amount father must pay for support of children. *Roberts v. Mandeville*, 217 Ga. 90, 121 S.E.2d 150 (1961); *Vickers v. Vickers*, 220 Ga. 258, 138 S.E.2d 308 (1964).

When parties have entered into valid alimony contract, which might have provided that it was to terminate upon remarriage of wife, but which did not so provide, and such contract was made judgment of court, the judgment is binding and enforceable until modified, vacated, or set aside. *Holland v. Holland*, 221 Ga. 418, 144 S.E.2d 753 (1965).

Until a petition under O.C.G.A. § 19-6-18 or O.C.G.A. § 19-6-19 is brought, the original permanent decree is res judicata as to the amount a father is obligated to pay for the support of his children. *Bisno v. Biloon*, 161 Ga. App. 351, 291 S.E.2d 66 (1982), overruled on other grounds, *State ex rel. McKenna v.*

McKenna, 253 Ga. 6, 315 S.E.2d 885 (1984).

Trial judge on contempt proceeding lacks discretion to modify decree for divorce and alimony. *Roberts v. Mandeville*, 217 Ga. 90, 121 S.E.2d 150 (1961); *Vickers v. Vickers*, 220 Ga. 258, 138 S.E.2d 308 (1964); *Meredith v. Meredith*, 238 Ga. 595, 234 S.E.2d 510 (1977).

In a contempt citation as opposed to a suit for alimony modification, trial court has no authority to reduce amount awarded in former divorce decree. *Balasco v. Balasco*, 235 Ga. 214, 219 S.E.2d 104 (1975).

On hearing of rule for contempt, court is without authority to modify original decree by providing that husband may make future payments, even for one year period, in lesser amount than he was required to make under original decree. *Deese v. Deese*, 230 Ga. 105, 196 S.E.2d 16 (1973).

Trial judge in contempt proceeding for failure to pay child support was without authority to forgive portion of amount that father had failed to pay on judgment for support of minor children; and had no right to reduce amount that would be due in future since no proceeding had been brought for that purpose. *Hall v. Hall*, 230 Ga. 873, 199 S.E.2d 798 (1973).

Court approval of modification agreement. — If parties to decree agree to modification, the parties must present agreement to court for approval. *Meredith v. Meredith*, 238 Ga. 595, 234 S.E.2d 510 (1977).

Statute has been interpreted as being permissive; thus, the question on appeal is whether evidence demands revision. *Barker v. Barker*, 233 Ga. 170, 210 S.E.2d 705 (1974); *Trippe v. Trippe*, 237 Ga. 159, 227 S.E.2d 46 (1976).

Right of modification is entirely dependent on entry of original alimony judgment. No new action would accrue merely because of change in income and financial status if alimony judgment had not been previously rendered. *Ivey v. Ivey*, 234 Ga. 532, 216 S.E.2d 827 (1975).

Applicability of section. — Statute applies only to modification of Georgia final decrees as to permanent alimony. *Slowik v. Knorr*, 222 Ga. 669, 151 S.E.2d 726 (1966); *Connell v. Connell*, 119 Ga.

General Consideration (Cont'd)

App. 485, 167 S.E.2d 686 (1969); McGuire v. McGuire, 228 Ga. 782, 187 S.E.2d 859 (1972).

Georgia court cannot modify final decree of foreign state court awarding permanent alimony for support of minor children. McGuire v. McGuire, 228 Ga. 782, 187 S.E.2d 859 (1972).

Foreign court decree cannot be ignored or set aside as contrary to public policy. Connell v. Connell, 119 Ga. App. 485, 167 S.E.2d 686 (1969).

Statute provides for jury trial of issue of modification of previous alimony judgment. Johnston v. Still, 225 Ga. 222, 167 S.E.2d 646 (1969).

Section permits modification of judgment only as to amount payable. — Statute confers authority and power on court rendering alimony or child support judgment to revise and modify the judgment either downward or upward and in no other respect. The court has no legal authority to revise and modify the original judgment in any respect except as to the amount the court required to be paid each month. Kendrick v. Kendrick, 218 Ga. 284, 127 S.E.2d 379 (1962).

Statute confers no legal authority upon trial court to revise or modify original child support judgment in any respect except as to amount court requires husband to pay. Gallant v. Gallant, 223 Ga. 397, 156 S.E.2d 61 (1967).

Change of custody authorizes revision of alimony judgment. — If custody of child should be changed from mother to father, who would then provide for the child's support, this would be such a change in his financial status as would authorize revision of judgment which provided permanent alimony to wife for child's support. Perry v. Perry, 213 Ga. 847, 102 S.E.2d 534 (1958).

Situations in which section is inapplicable. — Section is inapplicable in situations where child support payments are terminated contemporaneous to a custody change from mother to father. Hasty v. Duncan, 239 Ga. 797, 239 S.E.2d 7 (1977).

Termination of support payments by father upon obtaining child custody is not a "modification and revision"

of child support and thus Ga. L. 1964, p. 713, § 1 does not apply. Hasty v. Duncan, 239 Ga. 797, 239 S.E.2d 7 (1977).

Construction of two-year petition limitation. — Proper construction of statute prohibits filing of petition for modification of alimony or child support within two years of filing of previous petition for modification of alimony or child support by same party. Wilde v. Wilde, 239 Ga. 750, 239 S.E.2d 3 (1977).

Two-year petition limitation not applicable to petition for custody change. — Ga. L. 1964, p. 713, § 1 (see now O.C.G.A. § 19-6-18) relates strictly to petitions for modification of alimony or child support, and should not be read so as to prohibit filing of such petition within two years of filing of petition for change of custody by same party under former Code 1933, § 30-127 (see now O.C.G.A. § 19-9-1). Wilde v. Wilde, 239 Ga. 750, 239 S.E.2d 3 (1977).

Modification cannot be obtained through URESA action. — See Ray v. Ray, 247 Ga. 467, 277 S.E.2d 495 (1981).

Order pursuant to URESA proceeding does not supersede support order. — Any order of support issued by a court of this state, entered in an action filed under O.C.G.A. Art. 2, Ch. 11, T. 19 (Uniform Reciprocal Enforcement of Support Act), shall not supersede any previous order of support issued in a divorce or separate maintenance action, and the latter order will not constitute a modification of the former order; thus, amounts for a particular period paid pursuant to either order shall be credited against amounts accruing or accrued for the same period under both. Ray v. Ray, 247 Ga. 467, 277 S.E.2d 495 (1981).

Evidence of an informal change in custody is not admissible in an action for nonpayment of child support since any modifications of the settlement must be made through O.C.G.A. § 19-6-18. Coley v. Coley, 169 Ga. App. 426, 313 S.E.2d 129 (1984).

Consent judgment subjects both parties to two year bar. — Considerations of judicial economy dictate that parties to a contempt proceeding be allowed to present the court with a binding consent judgment settling the matter of

future child support payments. However, neither party to such a consent judgment may file another action seeking modification within two years of the filing of what began as a contempt action. *Moody v. Moody*, 252 Ga. 210, 312 S.E.2d 330 (1984).

Two-year limitation invoked by unsuccessful action for increase under URESA. — When a party has unsuccessfully brought an action seeking increased child support under Art. 2, Ch. 11, T. 19, (Uniform Reciprocal Enforcement of Support Act) that party may not seek an increase in child support under O.C.G.A. § 19-6-18 within two years. *Ray v. Ray*, 247 Ga. 467, 277 S.E.2d 495 (1981).

No equity jurisdiction for garnishment. — Trial court has no authority to modify the child support provisions of a final judgment and divorce decree in a garnishment action; such a modification must be accomplished by the filing of a petition in superior court pursuant to O.C.G.A. § 19-6-18 or O.C.G.A. § 19-6-19. In addition, the court lacks equity jurisdiction in garnishment cases, even under unusual and exceptional circumstances. *Davis v. Davis*, 220 Ga. App. 745, 470 S.E.2d 268 (1996).

Award providing for automatic adjustments based on changes in Consumer Price Index is valid. *Hayes v. Hayes*, 248 Ga. 526, 283 S.E.2d 875 (1981).

Provision for automatic adjustments based on changes in Consumer Price Index does not preclude either party from seeking modification under O.C.G.A. § 19-6-18. *Hayes v. Hayes*, 248 Ga. 526, 283 S.E.2d 875 (1981).

Cited in *Goodloe v. Goodloe*, 211 Ga. 894, 89 S.E.2d 654 (1955); *Ethridge v. Echols*, 212 Ga. 597, 94 S.E.2d 377 (1956); *Bethke v. Taylor*, 214 Ga. 679, 107 S.E.2d 217 (1959); *Fricks v. Fricks*, 215 Ga. 137, 109 S.E.2d 596 (1959); *Lewis v. Lewis*, 215 Ga. 7, 108 S.E.2d 812 (1959); *Zuber v. Zuber*, 215 Ga. 314, 110 S.E.2d 370 (1959); *Allen v. Withrow*, 215 Ga. 388, 110 S.E.2d 663 (1959); *Wills v. Wills*, 215 Ga. 556, 111 S.E.2d 355 (1959); *Stephens v. Sudderth*, 216 Ga. 222, 115 S.E.2d 519 (1960); *Roberts v. Mandeville*, 217 Ga. 90, 121 S.E.2d 150 (1961); *Nelson v. Roberts*, 217 Ga.

613, 124 S.E.2d 85 (1962); *Kitchin v. Kitchin*, 219 Ga. 417, 133 S.E.2d 880 (1963); *Mallard v. Mallard*, 221 Ga. 480, 145 S.E.2d 533 (1965); *Holland v. Holland*, 222 Ga. 467, 150 S.E.2d 673 (1966); *Wayman v. Wayman*, 222 Ga. 535, 150 S.E.2d 840 (1966); *Winn v. Winn*, 222 Ga. 687, 152 S.E.2d 371 (1966); *Dance v. Smith*, 223 Ga. 328, 155 S.E.2d 10 (1967); *Everly v. Everly*, 223 Ga. 853, 159 S.E.2d 78 (1968); *Grizzard v. Grizzard*, 224 Ga. 42, 159 S.E.2d 400 (1968); *Parker v. Parker*, 224 Ga. 54, 159 S.E.2d 412 (1968); *Bodrey v. Bodrey*, 224 Ga. 348, 161 S.E.2d 864 (1968); *Terrell v. Fair*, 224 Ga. 745, 164 S.E.2d 843 (1968); *Knox v. Knox*, 225 Ga. 481, 169 S.E.2d 805 (1969); *Mallin v. Mallin*, 226 Ga. 628, 176 S.E.2d 709 (1970); *Ferris v. Ferris*, 227 Ga. 465, 181 S.E.2d 371 (1971); *Butterworth v. Butterworth*, 228 Ga. 277, 185 S.E.2d 59 (1971); *McGuire v. McGuire*, 228 Ga. 782, 187 S.E.2d 859 (1972); *Weeks v. High Point Sprinkler Co.*, 125 Ga. App. 511, 188 S.E.2d 144 (1972); *Bickford v. Bickford*, 229 Ga. 229, 190 S.E.2d 70 (1972); *Robbins v. Robbins*, 127 Ga. App. 351, 193 S.E.2d 193 (1972); *Deese v. Deese*, 230 Ga. 105, 196 S.E.2d 16 (1973); *Haire v. Branch*, 129 Ga. App. 164, 199 S.E.2d 127 (1973); *McCoy v. Pinnell*, 231 Ga. 648, 203 S.E.2d 529 (1974); *Johnson v. Johnson*, 232 Ga. 103, 205 S.E.2d 270 (1974); *Zimmerman v. Zimmerman*, 131 Ga. App. 567, 206 S.E.2d 583 (1974); *Bradley v. Dockery*, 232 Ga. 692, 208 S.E.2d 496 (1974); *Livsey v. Livsey*, 234 Ga. 53, 214 S.E.2d 520 (1975); *Roberson v. Fooster*, 234 Ga. 444, 216 S.E.2d 273 (1975); *Mitchell v. Mitchell*, 235 Ga. 101, 218 S.E.2d 747 (1975); *Haberman v. Bivens*, 235 Ga. 537, 221 S.E.2d 11 (1975); *Frost v. Frost*, 235 Ga. 672, 221 S.E.2d 567 (1975); *Gerron v. Gerron*, 235 Ga. 851, 221 S.E.2d 600 (1976); *Palmes v. Palmes*, 236 Ga. 115, 223 S.E.2d 86 (1976); *Trippe v. Trippe*, 237 Ga. 159, 227 S.E.2d 46 (1976); *Howerton v. Garrett*, 237 Ga. 371, 228 S.E.2d 786 (1976); *Quarles v. Quarles*, 237 Ga. 703, 229 S.E.2d 452 (1976); *In re Smith*, 436 F. Supp. 469 (N.D. Ga. 1977); *Walters v. Walters*, 238 Ga. 237, 232 S.E.2d 240 (1977); *Daniel v. Daniel*, 239 Ga. 466, 238 S.E.2d 108 (1977); *Bache v. Bache*, 240 Ga. 3, 239 S.E.2d 677 (1977); *Stock v. Commis-*

General Consideration (Cont'd)

sioner, 551 F.2d 614 (5th Cir. 1977); *In re Smith*, 436 F. Supp. 469 (N.D. Ga. 1977); *Francis v. Pittman*, 162 Ga. App. 40, 290 S.E.2d 288 (1982); *Everett v. Everett*, 256 Ga. 632, 352 S.E.2d 370 (1987).

Procedure for Modification

Exercise of right to petition for modification of child support. — Right to petition for modification of child support is a right which belongs to the child or children involved which may be exercised at the election of the mother or other person having legal custody of the children under the terms of the divorce decree. *Crosby v. Crosby*, 249 Ga. 569, 292 S.E.2d 814 (1982).

Proceeding to modify alimony judgment is a new action, not a continuation of a divorce case. *Slowik v. Knorr*, 222 Ga. 669, 151 S.E.2d 726 (1966); *Bugden v. Bugden*, 224 Ga. 517, 162 S.E.2d 719 (1968).

Proceeding to modify alimony judgment is subject to venue requirements. — Because a proceeding to modify an alimony judgment is a new action and not a continuation of a divorce case, it is subject to constitutional provisions respecting venue just as any other civil case. *Bugden v. Bugden*, 224 Ga. 517, 162 S.E.2d 719 (1968).

County in which modification actions must proceed. — Actions to modify alimony and divorce decrees must proceed in the county where the defendant currently resides. *Buckholts v. Buckholts*, 251 Ga. 58, 302 S.E.2d 676 (1983).

Supreme court jurisdiction over divorce and alimony cases. — Proceeding for modification of alimony judgment is an alimony case within the meaning of Ga. Const. 1976, Art. VI, Sec. II, Para. IV (see now Ga. Const. 1983, Art. VI, Sec. VI, Para. II, III, V; Art. VI, Sec. I, Para. VIII; Art. VI, Sec. V, Para. V), giving the Supreme Court jurisdiction of divorce and alimony cases. *Perry v. Perry*, 213 Ga. 847, 102 S.E.2d 534 (1958).

Rules of procedure applicable to divorce proceedings apply to modification petition. — Law makes prayer for process necessary in petition for divorce.

It follows that a petition to alter and revise a final decree fixing an amount of permanent alimony must pray for process and not be filed as a mere pleading or motion in original divorce suit. *Davis v. Davis*, 218 Ga. 250, 127 S.E.2d 296 (1962).

County in which action filed. — Action to modify decree awarding alimony must be filed in county of defendant's residence. *Connell v. Connell*, 119 Ga. App. 485, 167 S.E.2d 686 (1969); *Hill v. Harper*, 230 Ga. 246, 196 S.E.2d 397 (1973).

Action to modify decree against nonresident served only by publication. — Court which renders alimony judgment does not have jurisdiction of action to modify judgment against nonresident of state who has been served only by publication, and who has not waived personal service. *Slowik v. Knorr*, 222 Ga. 669, 151 S.E.2d 726 (1966).

Consents to and compliance with modification irrelevant if court lacked jurisdiction. — Fact that defendant consents to modification of original decree and acquiesces therein by making payments thereunder for several months is irrelevant if the court was wholly without authority to modify the original judgment and decree and was without jurisdiction of the subject matter. *Ethridge v. Echols*, 212 Ga. 597, 94 S.E.2d 377 (1956).

Petitions pursuant to this section are subject to § 19-5-8. — Petition under Ga. L. 1964, p. 713, § 1 (see now O.C.G.A. § 19-6-18) for modification of alimony judgment was governed by provision of former Code 1933, § 30-113 (see now O.C.G.A. § 19-5-8) that no verdict by default shall be taken in divorce cases. *Johnston v. Still*, 225 Ga. 222, 167 S.E.2d 646 (1969).

No time lapse requirement for filing modification petition. — No particular time need elapse after judgment as prerequisite to petition for modification. *Welch v. Welch*, 213 Ga. 589, 100 S.E.2d 431 (1957).

Child is not indispensable party to support modification agreement. — When husband and wife enter into contract for support of wife and a minor, and contract is made part of final decree of divorce, failure of former husband to make

child a party to proceedings for modification does not subject his petition to dismissal because the minor child is not an indispensable party to an action to revise the decree. *Dalon v. Dalon*, 219 Ga. 185, 132 S.E.2d 195 (1963).

Petition for modification must show facts relied upon to authorize relief desired, and must show that facts and circumstances relied upon have occurred since the date of alimony judgment, in case of first petition for revision, and since date of former application, in case of subsequent petition. *Welch v. Welch*, 213 Ga. 589, 100 S.E.2d 431 (1957).

Language "satisfactorily proved" does not reduce burden of proof to less than preponderance of evidence. Instead, a party must "satisfactorily prove" his or her case by a preponderance of the evidence. *Stiltz v. Stiltz*, 236 Ga. 308, 223 S.E.2d 689 (1976).

Appeal of decision supported by "some evidence." — Trial judge's decision on petition for modification not disturbed on appeal if supported by "some evidence." *Berkowitz v. Berkowitz*, 239 Ga. 1, 236 S.E.2d 7 (1977).

Modification of a child support obligation in a garnishment action, rather than a petition to modify, was erroneous. *Twineham v. Daniel*, 223 Ga. App. 25, 476 S.E.2d 814 (1996).

Waiver of Right to Modification

Statutory modification right may be waived by appropriate contract language but courts will not find language waived absent very clear waiver language. *Kitfield v. Kitfield*, 237 Ga. 184, 227 S.E.2d 9 (1976).

Waiver of right to modification must be in clear, unambiguous language. — Waiver of right to modification of judgment which incorporated contract between parties governing property and alimony rights between them has not occurred if language does not provide in clear and unambiguous language, needing no parol explanation, that the appellant waived the right to modify the alimony award. *Kitfield v. Kitfield*, 237 Ga. 184, 227 S.E.2d 9 (1976).

As to permanent alimony, a decree cannot be modified if there is an agreement between the parties, incorporated in a decree, which waives the right of modification. However, such waiver must be clearly intended and expressed by the person so waiving. *Garcia v. Garcia*, 232 Ga. 869, 209 S.E.2d 201 (1974).

Phrase "full, complete and final settlement" does not operate as waiver. — Use of term "full, complete, and final settlement" in divorce agreement which was made part of final judgment, alone, does not have effect of constituting waiver of right to seek modification. *McLoughlin v. McLoughlin*, 234 Ga. 259, 214 S.E.2d 925 (1975).

Mother may waive right to revise alimony, but not child support. — Statutory right to petition for a revision of alimony and child support payments insofar as it relates to alimony belongs to the wife and may be waived. But, insofar as it relates to child support, it is a right which belongs to the child or children involved which may be exercised at election of mother or other person having legal custody of children under terms of divorce decree. Since this right belongs to the children and not to the mother, she cannot waive the right. *Livsey v. Livsey*, 229 Ga. 368, 191 S.E.2d 859 (1972).

Divorced wife cannot waive right of minor children to increased support in accordance with improved financial condition of former husband. *Foreman v. Foreman*, 234 Ga. 646, 217 S.E.2d 257 (1975).

Mother cannot waive child support award. — Right to child support belongs to child, not to mother, and after award has become part of court's judgment she has no authority to waive the award. *Johnson v. Johnson*, 233 Ga. 664, 212 S.E.2d 835 (1975).

Right to petition for modification of child support belongs to the children and cannot be waived by the mother. *Crosby v. Crosby*, 249 Ga. 569, 292 S.E.2d 814 (1982).

Mother cannot barter away child support in return for elimination of father's privileges. *Johnson v. Johnson*, 233 Ga. 664, 212 S.E.2d 835 (1975).

Change in Income or Financial Status

Alimony judgments rendered prior to 1977. — Party in alimony action in which final judgment was entered prior to enactment of Ga. L. 1977, p. 1253, § 1, has vested right in judgment not being subject to modification because of change in income of recipient since law in effect at time of judgment did not permit modification on such change. *McClain v. McClain*, 241 Ga. 422, 246 S.E.2d 187 (1978).

Change in financial status of husband since award is prerequisite to modification. *Griffin v. Griffin*, 226 Ga. 781, 177 S.E.2d 696 (1970).

Husband's pending inheritance. — Evidence of the husband's pending inheritance from the husband's deceased parents could be considered for purposes of awarding alimony to a wife. *Searcy v. Searcy*, 280 Ga. 311, 627 S.E.2d 572 (2006).

Statute allows revision in child support payments as financial condition of parties changes over time. *Johnson v. Johnson*, 233 Ga. 664, 212 S.E.2d 835 (1975).

To authorize modification requires substantial change in husband's income or in his financial status so as to warrant an upward or downward revision of alimony or child support. *Berkowitz v. Berkowitz*, 239 Ga. 1, 236 S.E.2d 7 (1977).

Legislature did not intend to require showing of change in both income "and" financial status, but rather a change in husband's income "or" financial status. *Perry v. Perry*, 213 Ga. 847, 102 S.E.2d 534 (1958).

In order to carry out what the judiciary interprets to be intended by the legislature in Ga. L. 1964, p. 713, § 1 (see now O.C.G.A. § 19-6-18), the judiciary reads word "and" as "or," and word "or" is substituted for "and" between words "income" and "financial status" in that statute. *Perry v. Perry*, 213 Ga. 847, 102 S.E.2d 534 (1958).

There is no provision for modification or revision of child support judgment except if there has been a substantial change in income "or" financial status of father subsequent to rendition of such judgment.

Hooks v. Avret, 219 Ga. 743, 135 S.E.2d 899 (1964).

Only issue on application for modification. — Upon trial of application for modification of alimony decree, the only issue is whether there has been such change in the income or financial status of husband as to warrant a modification and revision of the original decree, either upward or downward, as the case may be. *McBrayer v. McBrayer*, 227 Ga. 224, 179 S.E.2d 772 (1971).

"Financial status" is much more comprehensive term than "income," and pertains to conditions or circumstances in which a person stands with regard to that person's income and property. *McClinton v. McClinton*, 217 Ga. 283, 122 S.E.2d 112 (1961).

Determination of change in financial status. — In order to determine whether there has been a change in financial status between the two pertinent dates, a comparison must be made between the plaintiff's financial status at the time of judgment and the plaintiff's financial status at the time of the petition. *McWilliams v. McWilliams*, 216 Ga. 270, 116 S.E.2d 215 (1960).

Substantial change in husband's ability to pay is issue involved. — To authorize modification of alimony, the crux of the matter is whether or not there has been a substantial change in the husband's ability to pay alimony required by the original decree. *Schuster v. Schuster*, 221 Ga. 614, 146 S.E.2d 636 (1966).

Change in ability to pay. — The legislature intended that the original alimony judgment could be revised upon a change in the husband's ability to pay, and there might be change in his ability to pay by reason of change in his financial status without any actual change in his income. *Perry v. Perry*, 213 Ga. 847, 102 S.E.2d 534 (1958); *McClinton v. McClinton*, 217 Ga. 283, 122 S.E.2d 112 (1961); *Parker v. Dyal*, 237 Ga. 598, 229 S.E.2d 370 (1976).

Petition may allege change in financial status without alleging change in income. *McWilliams v. McWilliams*, 216 Ga. 270, 116 S.E.2d 215 (1960).

There must be change in a party's net worth. — In regard to the statute, the legislature meant that irrespective of

change in income of husband, there should also be a change in his net worth, affecting his inability to pay the previously prescribed amount or affecting his ability to pay more than the previously prescribed amount. *Parker v. Dyal*, 237 Ga. 598, 229 S.E.2d 370 (1976).

Change may be shown by decreased financial obligations or other changed conditions even if there has been no increase in income. *Livsey v. Livsey*, 234 Ga. 53, 214 S.E.2d 520 (1975); *Spivey v. Schneider*, 234 Ga. 687, 217 S.E.2d 251 (1975).

Ten percent increase in hourly wages may warrant modification. — It cannot be held as a matter of law that 10 percent increase in former husband's hourly wages is not a substantial change so as to authorize a change in support payments. *Rolader v. Pendleton*, 231 Ga. 16, 200 S.E.2d 108 (1973).

Indebtedness incurred in acquisition of assets. — Man might become heavily indebted in order to acquire assets for himself, and such indebtedness would be no cause for reduction in alimony payments to support former wife and minor children. *Welch v. Welch*, 213 Ga. 589, 100 S.E.2d 431 (1957).

Substantial decrease in husband's income or financial status may warrant, but not demand, decrease of alimony. *Potts v. Potts*, 229 Ga. 827, 194 S.E.2d 471 (1972); *White v. White*, 233 Ga. 289, 210 S.E.2d 817 (1974); *Trippe v. Trippe*, 237 Ga. 159, 227 S.E.2d 46 (1976).

Adjustment based on changes in Consumer Price Index. — O.C.G.A. § 19-6-18 does not preclude adjustment based on changes in Consumer Price Index to award of fixed amount of alimony. *Hayes v. Hayes*, 248 Ga. 526, 283 S.E.2d 875 (1981).

Increased expenses resulting from remarriage does not authorize termination of support. — Fact that the father, subsequent to a divorce decree, voluntarily assumed additional obligation of a second family by marriage did not authorize termination of obligation to the daughter by his former marriage, and especially since it was shown that the income of the father had substantially increased since the date of the alimony

decree. *Strickland v. Strickland*, 220 Ga. 69, 137 S.E.2d 31 (1964).

Amount of original award must be considered. — While under the provisions of the statute, the trial court is not concerned with whether the wife or children are entitled to alimony or child support, when evidence of change in the husband's income or financial status is disclosed, the court of necessity is concerned with the amount originally awarded, and such fact must be considered in determining if a modification is appropriate under the evidence. *Rolader v. Pendleton*, 231 Ga. 16, 200 S.E.2d 108 (1973).

Subsection (b) excludes consideration of merits of alimony award. — Provision of subsection (b) of Ga. L. 1964, p. 713, § 1 to the effect that the only issue is the change in the former husband's income or financial status is intended merely to exclude consideration of "merits of whether the wife, or child or children, or both, are entitled in alimony and support," and not to exclude the issue of the former wife's income or financial status, evidence relative to which was specifically made admissible by the legislature in subsection (a). *Butterworth v. Butterworth*, 227 Ga. 301, 180 S.E.2d 549 (1971).

Evidence regarding increased earnings of wife alone does not authorize or require change in the amount of alimony which she is entitled to receive in absence of evidence as to change in the income or financial status of the husband. *McBrayer v. McBrayer*, 227 Ga. 224, 179 S.E.2d 772 (1971); *Butterworth v. Butterworth*, 227 Ga. 301, 180 S.E.2d 549 (1971).

Relevancy of evidence of wife's financial status. — Legislature intended that the prerequisite of revision of child support, either downward or upward, is proof of substantial change in the income or financial status of the former husband, and once this essential fact has been shown, evidence relative to the former wife's income or financial status is relevant, hence admissible, for purpose of equitably determining how much the amount of child support should be modified. *Butterworth v. Butterworth*, 227 Ga. 301, 180 S.E.2d 549 (1971).

Change in Income or Financial Status (Cont'd)

Once evidence is introduced showing change in the former husband's income or financial status, it is proper to consider evidence of the former wife's income or financial status. *Rolader v. Pendleton*, 231 Ga. 16, 200 S.E.2d 108 (1973).

Unless there is evidence of substantial change in the husband's ability to pay, evidence of the wife's income and financial status becomes immaterial. *Stiltz v. Stiltz*, 236 Ga. 308, 223 S.E.2d 689 (1976).

Wife's indulgence in illicit relations is irrelevant. — Whether or not the evidence showed that the wife has indulged in illicit relations with a man to whom she was not married was not relevant to any issues as to whether alimony awarded by a previous decree should be continued. *McBrayer v. McBrayer*, 227 Ga. 224, 179 S.E.2d 772 (1971).

Petition must plainly, fully, and distinctly allege facts relied upon. — Petition for modification of alimony judgment must show facts relied on to authorize relief desired, and it must be shown by facts alleged that a change has occurred in the financial status of the husband since the former adjudication. *McWilliams v. McWilliams*, 216 Ga. 270, 116 S.E.2d 215 (1960).

Petition to modify and revise judgment must plainly, fully, and distinctly allege facts upon which the petitioner relies for such relief; otherwise, the petition is subject to general demurrer (now motion to dismiss). *Perry v. Williamson*, 219 Ga. 701, 135 S.E.2d 412 (1964).

Amount awarded not inadequate. — Trial court's final award of alimony in the amount of \$1,000.00 a month, for a period of three years was upheld on appeal, despite the wife's claims that such was inadequate given the court's temporary award of \$2,130.00 a month as the wife held a doctoral degree in education, failed to make tremendous efforts to become self-sufficient during the pendency of the suit, and should be self-supporting in a real estate business in three to four years. *Hadden v. Hadden*, 283 Ga. 424, 659 S.E.2d 353 (2008).

What Constitutes Permanent Alimony Judgment

Statute is inapplicable to award from corpus of husband's estate in lieu of periodic alimony payments. *Daniel v. Daniel*, 216 Ga. 567, 118 S.E.2d 369 (1961).

Test for determining whether judgment is one for permanent alimony. — Test as to applicability of statute is not whether periodic payments will continue in the same amount, but whether payments will continue at periodic intervals as opposed to an award from the corpus of the husband's estate. *Foreman v. Foreman*, 234 Ga. 646, 217 S.E.2d 257 (1975).

Escalation feature of agreement providing for possible increases is not award from husband's estate. The escalation feature of an agreement merely provides for possible increase in periodic payments, which is no more an award from the corpus of the husband's estate than the per month minimum award. *Foreman v. Foreman*, 234 Ga. 646, 217 S.E.2d 257 (1975).

Expenses of Litigation

When wife initiates action, subsection (d) is inapplicable. — When the former wife and not the former husband seeks modification of an alimony award, attorney's fees are not allowable. *Griffin v. Griffin*, 226 Ga. 781, 177 S.E.2d 696 (1970).

Subsection (d) of statute does not permit award of attorney's fees to the former wife when it is she and not her former husband who seeks modification of the alimony award. *Spivey v. Schneider*, 234 Ga. 687, 217 S.E.2d 251 (1975).

Subsection (d) is inapplicable to action to increase visitation rights. — Subsection (d) allows award to wife of attorney's fees only when the husband has initiated action to modify a permanent alimony judgment, and not in an action seeking increased visitation rights. *Gallant v. Gallant*, 223 Ga. 397, 156 S.E.2d 61 (1967).

Subsection (d) is inapplicable to action for change of custody. — Subsection (d) authorizes award of attorney's fees to the wife when the husband has filed an

action to modify a permanent alimony judgment, but not in an action by the husband for a change of custody. *Wilkins v. Wilkins*, 234 Ga. 404, 216 S.E.2d 302 (1975).

Subsection (d) does not apply if child support payments are terminated contemporaneous with custody change. *Hasty v. Duncan*, 239 Ga. 797, 239 S.E.2d 7 (1977).

Motion to set aside modification not tantamount to filing action. — Filing of a motion by a husband to set aside judgment of the trial court modifying an original divorce decree is not tantamount to filing an action under this statute. *Herring v. Herring*, 233 Ga. 484, 211 S.E.2d 893 (1975).

Appeal from modification awarded is not equivalent to filing action. — Appeal by a husband from judgment for a

wife upon her successful application for alimony modification does not constitute an “application ... filed by the husband” within the meaning of the statute. *Spivey v. Schneider*, 234 Ga. 687, 217 S.E.2d 251 (1975).

Court need not award wife’s costs of preparing record for appeal. — When the trial court has awarded attorney’s fees to the former wife it is not an abuse of discretion to refuse to grant the wife an additional amount for purposes of preparing a record for appeal. *Parrott v. Parrott*, 224 Ga. 801, 164 S.E.2d 811 (1968).

Subsection (d) does not require payment of such expenses as condition precedent to maintaining of litigation by the defendant. *Wayman v. Wayman*, 222 Ga. 535, 150 S.E.2d 840 (1966).

OPINIONS OF THE ATTORNEY GENERAL

For discussion of two-year limitation on filing modification petitions, see 1980 Op. Att’y Gen. No. U80-46.

RESEARCH REFERENCES

Editor’s notes. — Research references dealing with this subject matter have been placed with annotations for § 19-6-19, dealing with same subject, but

by its terms confined to application in cases based on judgments rendered after July 1, 1977.

19-6-19. Revision of judgment for permanent alimony generally — When authorized; petition and hearing; cohabitation with third party as ground for revision; attorney’s fees; temporary modification pending final trial.

(a) The judgment of a court providing permanent alimony for the support of a spouse rendered on or after July 1, 1977, shall be subject to revision upon petition filed by either former spouse showing a change in the income and financial status of either former spouse. A petition shall be filed and returnable under the same rules of procedure applicable to divorce proceedings. No petition may be filed by either former spouse under this subsection within a period of two years from the date of the final order on a previous petition by the same former spouse. After hearing both parties and the evidence, the jury, or the judge where a jury is not demanded by either party, may modify and revise the previous judgment, in accordance with the changed income and financial status of either former spouse in the case of permanent

alimony for the support of a former spouse, or in accordance with the changed income and financial status of either former spouse if such a change in the income and financial status is satisfactorily proved so as to warrant the modification and revision. In the hearing upon a petition filed as provided in this subsection, testimony may be given and evidence introduced relative to the income and financial status of either former spouse.

(b) Subsequent to a final judgment of divorce awarding periodic payment of alimony for the support of a spouse, the voluntary cohabitation of such former spouse with a third party in a meretricious relationship shall also be grounds to modify provisions made for periodic payments of permanent alimony for the support of the former spouse. As used in this subsection, the word “cohabitation” means dwelling together continuously and openly in a meretricious relationship with another person, regardless of the sex of the other person. In the event the petitioner does not prevail in the petition for modification on the ground set forth in this subsection, the petitioner shall be liable for reasonable attorney’s fees incurred by the respondent for the defense of the action.

(c) When an action for revision of a judgment for permanent alimony under this Code section is pending, the court in its discretion may allow, upon motion, the temporary modification of such a judgment, pending the final trial on the petition. In considering an application for temporary modification under this subsection, the court shall consider evidence of any changed circumstances of the parties and the reasonable probability of the petitioner obtaining revision upon final trial. The order granting temporary modification shall be subject to revision by the court at any time before final trial.

(d) In proceedings for the modification of alimony for the support of a spouse pursuant to the provisions of this Code section, the court may award attorneys’ fees, costs, and expenses of litigation to the prevailing party as the interests of justice may require. (Ga. L. 1955, p. 630, § 1; Ga. L. 1964, p. 713, § 1; Ga. L. 1977, p. 1253, § 1; Ga. L. 1979, p. 466, § 23; Ga. L. 1984, p. 606, §§ 1, 2; Ga. L. 1985, p. 279, § 1; Ga. L. 1986, p. 1259, § 1; Ga. L. 1993, p. 1091, § 1; Ga. L. 2005, p. 224, § 6/HB 221; Ga. L. 2006, p. 583, § 8/SB 382.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1985, “judgement” was changed to “judgment” in subsection (b).

Editor’s notes. — Ga. L. 1984, p. 606, § 3, not codified by the General Assembly, provided that the provisions of § 1 of that Act, which section amended subsection (a) of this Code section, would apply to judgments

providing permanent alimony for the support of a spouse rendered on or after July 1, 1984, and to judgments providing permanent alimony for the support of a child or children rendered on or after July 1, 1984.

Ga. L. 1986, p. 1259, § 3, not codified by the General Assembly, provided: “This Act shall become effective July 1, 1986. The

provisions of this Act shall apply to judgments providing permanent alimony for the support of a child or children rendered on or after July 1, 1986.”

Ga. L. 1993, p. 1091, § 2, not codified by the General Assembly, provides that the 1993 amendment was applicable with respect to judgments entered before or after July 1, 1993.

Ga. L. 2005, p. 224, § 1/HB 221, not codified by the General Assembly, provides that: “The General Assembly finds and declares that it is important to assess periodically child support guidelines and determine whether existing guidelines continue to be viable and effective or whether they have failed or ceased to accomplish their original policy objectives. The General Assembly further finds that supporting Georgia’s children is vitally important to the citizens of Georgia. Therefore, the General Assembly has determined that it is in the best interests of the state and its citizenry to undertake an evaluation of the child support guidelines on a continuing basis. The General Assembly declares that it is important that all of Georgia’s children are provided with adequate financial support whether the children’s parents are living together or not living together. The General Assembly finds that both parents have a continuing obligation with respect to providing financial and emotional stability for their child or children. It is the hope of the members of the General Assembly that all parents work together to advance the best interest of their children.”

Ga. L. 2006, p. 583, § 10(b)/SB 382, not codified by the General Assembly, provides: “Sections 1 through 7 of this Act shall become effective on January 1, 2007, and shall apply to all pending civil actions on or after January 1, 2007.”

Law reviews. — For article surveying Georgia cases in the area of domestic relations from June 1979 through May

1980, see 32 Mercer L. Rev. 51 (1980). For article, “An Analysis of the Georgia ‘Live-In Lover’ Law,” see 32 Mercer L. Rev. 375 (1980). For article surveying developments in Georgia constitutional law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 51 (1981). For article surveying developments in Georgia domestic relations law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 109 (1981). For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For article discussing the law on alimony modification, see 19 Ga. St. B.J. 130 (1983). For article, “The Modification of Judgments for Spousal Alimony and for Child Support Alimony: Criticism and Suggested Reform,” see 22 Ga. St. B.J. 76 (1985). For annual survey of domestic relations law, see 41 Mercer L. Rev. 159 (1989). For annual survey article discussing developments in domestic relations law, see 51 Mercer L. Rev. 263 (1999). For survey article on domestic relations cases for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 223 (2003). For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004). For article on 2005 amendment of this Code section, see 22 Ga. St. U.L. Rev. 73 (2005). For annual survey of law on appellate practice and procedure, see 62 Mercer L. Rev. 25 (2010). For article, “Live-In Lover Complaints: Think Twice Before You File,” see 19 Ga. St. B.J. 11 (Oct. 2013).

For note, “The Significance of *Stokes v. Stokes*: An Examination of Property Rights Upon Divorce in Georgia,” see 16 Ga. L. Rev. 695 (1982). For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 118 (1993).

For comment, “Antenuptial Agreements and Divorce in Georgia: *Scherer v. Scherer*,” see 17 Ga. L. Rev. 231 (1982). For comment on adoptions by homosexuals, see 55 Mercer L. Rev. 1415 (2004).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- EFFECT OF RECENT AMENDMENTS TO SECTION
- WAIVER OF RIGHT TO MODIFICATION
- TWO-YEAR PETITION LIMITATION

CHANGES WARRANTING MODIFICATION
LIVE-IN LOVER PROVISION
APPLICATION
ATTORNEY'S FEES

General Consideration

Editor's notes. — For additional cases dealing with the same subject matter, but decided prior to the 1977 amendment to this Code section, see § 19-6-18.

Alimony is subject to modification. Taulbee v. Taulbee, 243 Ga. 52, 252 S.E.2d 481 (1979).

Section remedial in nature. — Modification statute is not law under which grant of alimony is made to a wife nor is it law which fails to provide opportunity for a husband to sue for alimony. The modification statute is merely a remedial act which allows either the former wife or former husband to seek relief from the terms of the previous alimony judgment according to the ability of provider of alimony to pay. Summerlin v. Summerlin, 247 Ga. 5, 274 S.E.2d 523 (1981).

Statute provided exclusive method for modifying or revising alimony provisions of divorce decree. Lindwall v. Lindwall, 242 Ga. 13, 247 S.E.2d 752 (1978); Fuller v. Squires, 242 Ga. 475, 249 S.E.2d 261 (1978).

Modification of a child support obligation in a garnishment action, rather than a petition to modify, was erroneous. Twineham v. Daniel, 223 Ga. App. 25, 476 S.E.2d 814 (1996).

Modification action as exclusive remedy for obtaining additional support. — When the divorce decree does, at the very least, address a question concerning the liability of the noncustodial parent for child-support-obligation items, a modification action under O.C.G.A. § 19-6-19 is the custodial parent's exclusive remedy in regard to supplementing the decree with a provision obligating the noncustodial parent to pay additional child support. Conley v. Conley, 259 Ga. 68, 377 S.E.2d 663 (1989).

Former wife, or the wife's father as assignee, could not enforce a note signed by the former husband that allegedly represented the husband's additional child support obligation since the note had not

been mentioned or incorporated into the parties' settlement agreement or divorce decree, and the wife had not sought recourse by way of modification of the husband's child support obligation pursuant to O.C.G.A. § 19-6-19. Cawley v. Bennett, 293 Ga. App. 46, 666 S.E.2d 438 (2008).

Enactment of guidelines insufficient to warrant modification. — Trial court erred by determining that the enactment of the guidelines of O.C.G.A. § 19-6-15(b) alone was sufficient to justify modifying a father's support obligation without any threshold showing by the mother of a substantial change in financial circumstances. Willingham v. Willingham, 216 Ga. 674, 410 S.E.2d 98 (1991).

Proper scope of the trial court's consideration is whether there had been, as alleged by the appellant, such a change in the financial status of each parent as would support a reconsideration of the level of the appellant's obligation to provide financial support for the parties' child. Miller v. Tashie, 265 Ga. 147, 454 S.E.2d 498 (1995).

Construction with § 19-11-12. — Fact that jury trials are allowed in private child support modification proceedings under O.C.G.A. § 19-6-19, but denied in agency modification proceedings under O.C.G.A. § 19-11-12, does not create a separate classification for litigants in proceedings under the latter provision in violation of equal protection rights. Kelley v. Georgia Dep't of Human Resources ex rel. Kelley, 269 Ga. 384, 498 S.E.2d 741 (1998).

Section permissive as to modifications due to financial status changes. — Change in father's income or financial status does not mandate revision in child support; statute merely permits such revision. Ivester v. Ivester, 242 Ga. 386, 249 S.E.2d 69 (1978).

O.C.G.A. § 42-8-34 and subsection (a) of O.C.G.A. § 19-6-19 compared. See Hudson v. State, 248 Ga. 397, 283 S.E.2d 271 (1981).

Effect of violating divorce decree.

— Failure of the father to comply with terms of the divorce decree requiring him to provide health insurance for the children did not act as a bar to his petition for modification of child support. *Scott v. Perkins*, 230 Ga. App. 496, 497 S.E.2d 21 (1998).

Uniform Reciprocal Enforcement of Support Act actions not limited.

— Provisions of O.C.G.A. § 19-6-19 are not intended to and do not provide any limitation on the filing of subsequent Uniform Reciprocal Enforcement of Support Act (URESA) actions. *Department of Human Resources v. Westmoreland*, 210 Ga. App. 603, 436 S.E.2d 706 (1993).

Modification cannot be obtained through URESA action.

— Purpose of O.C.G.A. Art. 2, Ch. 11, T. 19 (Uniform Reciprocal Enforcement of Support Act) is to improve enforcement of duty of support, not to impair that duty; if an intrastate support obligor wants modification of child support provisions of a divorce and alimony decree, the obligor can bring a suit for modification, but the obligor is not entitled to precipitate a URESA action in order to obtain modification. *Ray v. Ray*, 247 Ga. 467, 277 S.E.2d 495 (1981).

Order pursuant to URESA proceeding does not supersede support order.

— Any order of support issued by court of this state, entered in action filed under O.C.G.A. Art. 2, Ch. 11, T. 19 (Uniform Reciprocal Enforcement of Support Act), shall not supersede any previous order of support issued in a divorce or separate maintenance action, and the latter order will not constitute a modification of the former order; thus, amounts for a particular period paid pursuant to either order shall be credited against amounts accruing or accrued for the same period under both. *Ray v. Ray*, 247 Ga. 467, 277 S.E.2d 495 (1981).

No equity jurisdiction for garnishment.

— Trial court has no authority to modify the child support provisions of a final judgment and divorce decree in a garnishment action; such a modification must be accomplished by the filing of a petition in superior court pursuant to O.C.G.A. § 19-6-18 or O.C.G.A. § 19-6-19. In addition, the court lacks equity juris-

diction in garnishment cases, even under unusual and exceptional circumstances. *Davis v. Davis*, 220 Ga. App. 745, 470 S.E.2d 268 (1996).

Discretion to modify award lies with trier of fact.

— Final decision of whether to modify award is within discretion of trier of fact. *Marsh v. Marsh*, 243 Ga. 742, 256 S.E.2d 442 (1979).

Obligation remains static until modified.

— Although wife's receipt of social security benefits might constitute grounds for husband's obtaining future modification of alimony provisions of the parties' divorce decree, either on a discretionary basis under the statute, or as a matter of right, until the parties' divorce decree is so modified the decree remains a valid judgment binding on parties and enforceable according to the decree's terms. *Kight v. Kight*, 242 Ga. 563, 250 S.E.2d 451 (1978).

One seeking modification must initiate proceeding.

— Even though evidence of former spouse's voluntary cohabitation with another subsequent to final judgment of divorce awarding periodic payment of alimony is grounds to modify provisions made for periodic payments of permanent alimony, this does not preclude holding obligor in contempt for arrearages in alimony payments due, when previously decreed provisions have not been modified by separate proceeding instituted by petition for modification. *Lindwall v. Lindwall*, 242 Ga. 13, 247 S.E.2d 752 (1978).

Modification proceeding is new in personam proceeding.

— Action for modification of child support is not part of the original divorce action but is a new in personam proceeding for purposes of establishing jurisdiction over parties and venue. *Yarbrough v. Yarbrough*, 244 Ga. 313, 260 S.E.2d 47 (1979).

Modification proceedings must be brought in respondent's county of residence,

and this is so regardless of the fact that the decree may be modified by the court other than the court which rendered the decree. *Austin v. Austin*, 245 Ga. 487, 265 S.E.2d 788 (1980).

Actions to modify alimony and divorce decrees must proceed in the county where the defendant currently resides.

General Consideration (Cont'd)

Buckholts v. Buckholts, 251 Ga. 58, 302 S.E.2d 676 (1983).

Modification of spouse support judgments only by raising or lowering payments. — Cases holding that judgment for child support may be modified only by raising or lowering amount of payments, and that while periodic payments for child support can be changed from a group award to a per capita award in a modification action, other terms and conditions of the original judgment cannot be changed, apply equally to spouse support as well as child support. *Fender v. Fender*, 249 Ga. 765, 294 S.E.2d 472 (1982).

Modification may reduce support to zero. — When the financial circumstances of the parties so warrant, it is not error in a modification action for the amount of alimony payments to be lowered to zero. Reduction of the amount of alimony payments to zero does not terminate the alimony award in that it does not preclude the possibility of future modification. *Temples v. Temples*, 262 Ga. 779, 425 S.E.2d 851 (1993).

Retroactive modification of an alimony obligation would vitiate the finality of the judgment obtained as to each past due installment. Therefore, a judgment modifying an alimony obligation can be effective no earlier than the date of the judgment. *Hendrix v. Stone*, 261 Ga. 874, 412 S.E.2d 536 (1992).

Trial court may not retroactively modify an alimony obligation. *Donaldson v. Donaldson*, 262 Ga. 231, 416 S.E.2d 514 (1992).

Modification of child support was proper. — In appeals filed by both former spouses from a trial court order modifying visitation and child support provisions in their final judgment and decree of divorce, neither party was correct in claiming that the petitions were inadequate to permit the relief granted; the petition of one of the spouses for a change in custody and a corresponding change in child support embraced the change in visitation because visitation rights were a part of custody, and that spouse's request for a modification of child support met the requirements

of O.C.G.A. § 19-6-19(a). *Facey v. Facey*, 281 Ga. 367, 638 S.E.2d 273 (2006).

No modification of lump sum award. — Trial court did not err in dismissing a former spouse's motion for modification of alimony because the award was a lump sum settlement of property rights not subject to modification under O.C.G.A. § 19-6-19(a) or lump sum alimony not subject to modification under O.C.G.A. § 19-6-21. *Rivera v. Rivera*, 283 Ga. 547, 661 S.E.2d 541 (2008).

Findings supported downward modification of child support. — Findings made by a trial court that a former spouse's income had decreased significantly since the entry of a final judgment and decree of divorce directing the former spouse to pay child support of 25 percent of the former spouse's gross income as a photographer were sufficient to constitute the required findings under O.C.G.A. § 19-6-19 and to support a downward modification. *Facey v. Facey*, 281 Ga. 367, 638 S.E.2d 273 (2006).

Future modification must be tied to finances. — Award of a home to the wife and the children until the youngest child turns 18 or the wife remarries constitutes an illegal future modification of child support not tied to income fluctuation. *Scherberger v. Scherberger*, 260 Ga. 635, 398 S.E.2d 363 (1990).

No modification to extend beyond original termination date. — Award of periodic alimony for a specified number of years may not be modified to extend beyond the termination date in the original judgment. *Howard v. Howard*, 262 Ga. 144, 414 S.E.2d 203 (1992).

Purpose of a modification action is to decide whether the existing alimony or child support comports with the current financial circumstances. To make this determination, the modification jury must find a present change in financial conditions. Because the verdict of the jury must rest upon this limited evidence, it cannot reach into speculative future circumstances. Therefore, any modification award which attempts to reach that far by changing the time frames established in the original decree cannot stand. *Howard v. Howard*, 262 Ga. 144, 414 S.E.2d 203 (1992).

Mother is mere trustee of alimony for support of children. — When alimony is awarded for the support of minor children, the mother acquires no interest in the funds, and when the funds are paid to her she is a mere trustee charged with the duty of seeing that they are applied solely for the benefit of the children. She cannot consent to a reduction or remission of the alimony, and ordinarily her conduct cannot relieve the father of paying the alimony as directed by the court. *Law Office of Tony Center v. Baker*, 185 Ga. App. 809, 366 S.E.2d 167 (1988).

Revised child support in change of custody proceeding. — When the plaintiff brings suit for change of custody in county other than county of his residence, he submits himself to the jurisdiction of the court in which suit is filed for purpose of allowing the defendant to file a counterclaim for revision of child support. *Ledford v. Bowers*, 248 Ga. 804, 286 S.E.2d 293 (1982).

Counterclaim for increased child support in visitation modification proceeding. — When divorced nonresident had voluntarily submitted himself to jurisdiction of court in order to assert his claims to modify visitation rights, mother is not required to state her claim requesting increase in child support in an independent and separate action. *Houck v. Houck*, 248 Ga. 419, 284 S.E.2d 12 (1981).

Alimony obligation to pay indebtedness secured by automobile. — Husband's obligation (labeled as alimony in the parties' settlement agreement) to make payment on indebtedness secured by an automobile was not subject to revision. *Stone v. Stone*, 254 Ga. 519, 330 S.E.2d 887 (1985).

Not necessary for bankruptcy court to determine level of support. — Once the bankruptcy court concluded that alimony payments were "actually in the nature of alimony," and thereby nondischargeable, the court's task was at an end. There was no necessity for a precise investigation of the spouse's circumstances to determine the appropriate level of need or support. *Harrell v. Sharp*, 754 F.2d 902 (11th Cir. 1985).

Testimony as to amount paid pursuant to temporary order. — It was error

to permit a mother to testify in an action to modify child support payments as to the amount of money the father was paying her as alimony and child support pursuant to a temporary order, which payments were an increase over the amount of the order the mother was attempting to modify. *Haselden v. Haselden*, 255 Ga. 366, 338 S.E.2d 257 (1986).

Applicability of § 9-11-55 default provisions to modification of alimony. — Default provisions of O.C.G.A. § 9-11-55 have no application to proceedings for modification of alimony. *McElroy v. McElroy*, 252 Ga. 553, 314 S.E.2d 893 (1984).

Dischargeability in bankruptcy. — Fact that a lump sum alimony award to a wife was non-modifiable did not negate the possibility that the award was for the wife's maintenance and support; even though a lump sum alimony award was in the "nature" of a property settlement since the evidence showed that the lump sum award was for the wife's maintenance and support, the finding that it was for that purpose, rather than a division of property which was dischargeable in bankruptcy, was affirmed. *Daniel v. Daniel*, 277 Ga. 871, 596 S.E.2d 608 (2004).

Right of parties to contract regarding fixed property rights. — When modification under the statutory procedure is available, court-approved modification must be sought; but, once property rights have become fixed or perfected those rights may not be modified by the court, and the parties are free to contract with each other regarding that property. Such dealings between former spouses are governed by contract law rather than domestic relations law. *Spivey v. McClellan*, 259 Ga. 181, 378 S.E.2d 123 (1989).

Incorporation of private agreement in court order. — While parties may enter into an agreement concerning modification of child support, the agreement becomes an enforceable agreement only when made an order of the court pursuant to O.C.G.A. § 19-6-19. *Pearson v. Pearson*, 265 Ga. 100, 454 S.E.2d 124 (1995).

Before a private agreement which includes child support may be incorporated into a court order, the trial court has an

General Consideration (Cont'd)

obligation to consider whether the agreed-upon support is sufficient based on the child's needs and the parents' ability to pay. *Pearson v. Pearson*, 265 Ga. 100, 454 S.E.2d 124 (1995).

O.C.G.A. § 19-6-19 is not authority for the modification or revision of judgments for equitable division of property. *Douglas v. Cook*, 266 Ga. 644, 469 S.E.2d 656 (1996).

Overpayment is not a basis for modification of child support. Rather, the focus must be on a change in circumstances. *Gowins v. Gary*, 288 Ga. App. 409, 654 S.E.2d 162 (2007).

Cited in *Fetzer v. Fetzer*, 240 Ga. 862, 242 S.E.2d 597 (1978); *Lamb v. Lamb*, 241 Ga. 545, 246 S.E.2d 665 (1978); *McLean v. McLean*, 242 Ga. 71, 247 S.E.2d 867 (1978); *Moon v. Moon*, 242 Ga. 406, 249 S.E.2d 91 (1978); *Davidson v. Peck*, 242 Ga. 198, 249 S.E.2d 557 (1978); *LaMontagne v. Griffin*, 242 Ga. 98, 249 S.E.2d 593 (1978); *Browne v. Browne*, 242 Ga. 107, 249 S.E.2d 594 (1978); *Thumser v. Thumser*, 242 Ga. 509, 249 S.E.2d 616 (1978); *Sims v. Sims*, 243 Ga. 275, 253 S.E.2d 762 (1979); *Sims v. Sims*, 243 Ga. 276, 253 S.E.2d 763 (1979); *Ford v. Ford*, 243 Ga. 763, 256 S.E.2d 446 (1979); *Oliver v. Oliver*, 244 Ga. 20, 257 S.E.2d 527 (1979); *Tiller v. Tiller*, 245 Ga. 27, 262 S.E.2d 819 (1980); *Cale v. Cale*, 245 Ga. 62, 264 S.E.2d 22 (1980); *Lawrence v. Day*, 247 Ga. 474, 277 S.E.2d 35 (1981); *Norman v. Norman*, 255 Ga. 32, 334 S.E.2d 687 (1985); *Holler v. Holler*, 257 Ga. 27, 354 S.E.2d 140 (1987); *Newsom v. Newsom*, 257 Ga. 238, 356 S.E.2d 883 (1987); *Shelor v. Shelor*, 259 Ga. 462, 383 S.E.2d 895 (1989); *Giugliano v. Giugliano*, 260 Ga. 467, 396 S.E.2d 897 (1990); *Byrd v. Ault*, 260 Ga. 893, 401 S.E.2d 690 (1991); *Allen v. Georgia Dep't of Human Resources*, 262 Ga. 521, 423 S.E.2d 383 (1992); *Kent v. Kent*, 265 Ga. 211, 452 S.E.2d 764 (1995); *Department of Human Resources v. Siggers*, 219 Ga. App. 1, 463 S.E.2d 544 (1995); *Ashworth v. Busby*, 272 Ga. 228, 526 S.E.2d 570 (2000); *Williams v. Martin*, 283 F. Supp. 2d 1286 (N.D. Ga. Sept. 22, 2003); *Avren v. Garten*, 289 Ga. 186, 710 S.E.2d 130 (2011).

Effect of Recent Amendments to Section

Distinction between 1976 and 1979 versions of section. — The 1979 version of these provisions is dissimilar to the 1976 version because it allows the income and financial status of the former wife to be considered along with the income and financial status of the former husband, whereas the law in 1976 allowed only consideration of the income and financial status of the former husband. *Shure v. Shure*, 245 Ga. 36, 262 S.E.2d 800 (1980).

Applicable modification statute is that statute in effect at time of divorce. *Summerlin v. Summerlin*, 247 Ga. 5, 274 S.E.2d 523 (1981).

The 1977 amendment to Ga. L. 1977, p. 1253, § 1 did not apply retroactively and thus was not applicable to alimony judgments rendered prior to the effective date of the 1977 amendment. *Jowers v. Jowers*, 242 Ga. 208, 248 S.E.2d 618 (1978).

Basis for modification action prior to 1977. — Until 1977, only a change in the former husband's financial status could form the basis for a modification action. *Summerlin v. Summerlin*, 247 Ga. 5, 274 S.E.2d 523 (1981).

Agreement based on 1976 version of Ga. L. 1977, p. 1253, § 1 cannot be legislatively modified by amendments which change the law and the law's application. *Shure v. Shure*, 245 Ga. 36, 262 S.E.2d 800 (1980).

Alimony judgments rendered prior to 1977 amendment to section. — Party in an alimony action in which a final judgment was entered prior to the 1977 amendment to Ga. L. 1977, p. 1253, § 1 had a vested right in the judgment not being subject to modification because of a change in income of the recipient because the law in effect at the time of the judgment did not permit modification on such change. *McClain v. McClain*, 241 Ga. 422, 246 S.E.2d 187 (1978).

No alimony to husband prior to 1979. — Prior to 1979, there could have been no judgments for alimony to husband. *Summerlin v. Summerlin*, 247 Ga. 5, 274 S.E.2d 523 (1981).

Women awarded permanent alimony before July 1, 1977, are not per-

mitted to seek temporary modification under O.C.G.A. § 19-6-19(c). *Young v. Young*, 252 Ga. 564, 315 S.E.2d 878 (1984).

Waiver of Right to Modification

Waiver of right to modification is not void as against public policy. *Daniel v. Daniel*, 250 Ga. 849, 301 S.E.2d 643 (1983).

Alimony judgment based on agreement is subject to revision unless this right is waived by the parties by appropriate contract language in the agreement. *Varn v. Varn*, 242 Ga. 309, 248 S.E.2d 667 (1978).

Waiver must be clear and refer to right of modification. — In alimony agreements entered into after November 23, 1978, parties to the agreement may obtain modification unless the agreement expressly waives the right of modification by referring specifically to that right; the right to modification will be waived by agreement of the parties only in very clear waiver language which refers to the right of modification. *Varn v. Varn*, 242 Ga. 309, 248 S.E.2d 667 (1978).

Language incorporated in a divorce decree that “[t]he parties expressly waive their right to petition for any modification of the terms of this [settlement] agreement” did not waive the obligor parent’s right to seek a downward modification of child support payments since the language did not refer specifically to the right to seek modification, nor describe such right as statutory. *Nelson v. Mixon*, 265 Ga. 441, 457 S.E.2d 669 (1995).

Example of proper waiver. — In waiving the right to modify an alimony agreement the following waiver language will be deemed to comply with the requirement of express waiver: “The parties hereby waive their statutory right to future modifications, up or down, of the alimony payments provided for herein, based upon a change in the income or financial status of either party.” *Varn v. Varn*, 242 Ga. 309, 248 S.E.2d 667 (1978).

Party’s intent in premarital agreement clear. — Trial court properly dismissed the husband’s petition for alimony modification as the waiver language employed in the parties’ premarital agreement was plain and unambiguous, and

the reference to O.C.G.A. § 19-6-19 clarified that the parties intended to waive alimony revision under all subsections of the statute. *Carlos v. Lane*, 275 Ga. 762, 571 S.E.2d 735 (2002).

Settlement and release language in divorce agreement couched in present tense does not waive right to modification. *Sims v. Sims*, 245 Ga. 680, 266 S.E.2d 493 (1980).

Parent may waive right to seek reduction of child support payments. — While neither wife nor parents may waive or bargain away right of child to seek periodic child support payments, despite original decree which provides none, and when father has not relinquished all parental rights, he may waive right to seek reduction of periodic child support payments. *Forrester v. Buerger*, 241 Ga. 34, 244 S.E.2d 345 (1978).

Contract waiver of alimony modification did not waive child support modification. — Settlement agreement providing that parties “expressly waive any and all rights that they may have under § 30-220(a) (now O.C.G.A. § 19-6-19) to seek a revision of the Judicial Decree with respect to permanent alimony for Wife,” did not waive right to modification of child support obligation. *Beard v. Beard*, 250 Ga. 449, 298 S.E.2d 495 (1983).

Language in separation agreement constituted waiver of future modification. — Language in separation agreement that husband and wife expressly waived “their right to petition for any modification of ... future alimony payments in accordance with the existing or future laws and statutes” of Georgia or any other state constituted a valid waiver of any right to seek modification pursuant to subsection (b) of O.C.G.A. § 19-6-19. *Daniel v. Daniel*, 250 Ga. 849, 301 S.E.2d 643 (1983).

Waiver language held ambiguous and unenforceable. — See *Parker v. Parker*, 254 Ga. 188, 326 S.E.2d 451 (1985).

Right not waived. — Since the written agreement between the parties which was incorporated into their final divorce decree provided: “10. MODIFICATION. The provisions of this agreement shall not

Waiver of Right to Modification (Cont'd)

be modified or changed except by mutual consent and agreement of the parties, expressed in writing," the waiver language in the agreement did not refer to the right of modification of alimony, or to any waiver of that right, and was therefore not sufficient to meet the test that the right to modification will be waived by agreement of the parties only in very clear waiver language which refers to the right of modification. *Brenizer v. Brenizer*, 257 Ga. 427, 360 S.E.2d 250 (1987).

Because there was no evidence to support a trial court's decision to deem void a husband's waiver in the parties' original agreement of downward modification below a pre-determined "floor amount" of alimony in the form of child support, the trial court erred by relieving the husband of the husband's obligations imposed by the agreement and in reducing the husband's child support below the agreed-upon "floor amount." *Jones v. Jones*, 280 Ga. 712, 632 S.E.2d 121 (2006).

Two-year Petition Limitation

One purpose of two-year limitation is to protect parties from excessive litigation over same issues within two-year period. *Griffin v. Griffin*, 248 Ga. 743, 285 S.E.2d 710 (1982).

Applicability of two-year petition limitation. — General Assembly intended for the two-year petition limitation to apply only to modification actions grounded upon financial and income changes; the two-year limitation does not apply to the live-in lover provision of subsection (b) of Ga. L. 1979, p. 466, § 23. *Sims v. Sims*, 245 Ga. 680, 266 S.E.2d 493 (1980).

Limitation period did not apply to a father's petition for a change in child custody. *Petry v. Romo*, 249 Ga. App. 99, 547 S.E.2d 736 (2001).

Multiple petitions for modification. — O.C.G.A. § 19-6-19 should be strictly applied to multiple petitions for modification filed within this state. *Thomas v. Whaley*, 208 Ga. App. 362, 430 S.E.2d 655 (1993).

Previous adjudication in another state. — O.C.G.A. § 19-6-19 does not apply if the previous adjudication occurred in another state. *Thomas v. Whaley*, 208 Ga. App. 362, 430 S.E.2d 655 (1993).

Dismissal of petition for lack of jurisdiction does not preclude filing in appropriate court. *Harrison v. Speidel*, 244 Ga. 643, 261 S.E.2d 577 (1979).

Effect of filing and dismissal without prejudice of modification petition. — While it is true that O.C.G.A. § 19-6-19 and cases applying that statute hold that filing date, rather than date of any order, controls, this does not mean that mere filing of modification petition, which is subsequently dismissed without prejudice prior to entry of any order thereon, would per se bar filing of subsequent petition within two-year period. Rather, filing date is merely used to compute time interval between viable petition upon which final orders have been entered. A contrary construction would result in a litigant being deprived of the litigant's day in court upon either petition merely because of the litigant's perhaps inadvertent filing of a second petition. *Griffin v. Griffin*, 248 Ga. 743, 285 S.E.2d 710 (1982).

Voluntary dismissal of prior modification petition. — When the first modification action, which was voluntarily dismissed, resulted in significant litigation and in the entry of a temporary, but binding order lowering the husband's alimony obligation, a second modification petition filed by the husband was barred by O.C.G.A. § 19-6-19. *Wilson v. Wilson*, 270 Ga. 479, 512 S.E.2d 255 (1999).

Petition for revision under Uniform Reciprocal Enforcement of Support Act. — Petition for revision cannot be brought under Ga. L. 1977, p. 1253, § 1 (see now O.C.G.A. § 19-6-19) within two years of action under Uniform Reciprocal Enforcement of Support Act (URESA) (see now O.C.G.A. Art. 2, Ch. 11, T. 19) seeking the same relief, but the converse does not hold true since Ga. L. 1977, p. 1253, § 1, by its terms, imposes no limitation upon bringing of subsequent actions under URESA. *Konscol v. Konscol*, 151 Ga. App. 696, 261 S.E.2d 438 (1979), cert. denied, 449 U.S. 875, 101 S. Ct. 218, 66 L. Ed. 2d 97 (1980).

When a party has unsuccessfully brought an action seeking an increased child support under O.C.G.A. Art. 2, Ch. 11, T. 19 (Uniform Reciprocal Enforcement of Support Act) that party may not seek an increase in child support under O.C.G.A. § 19-6-19 within two years. *Ray v. Ray*, 247 Ga. 467, 277 S.E.2d 495 (1981).

Limitation applied when prior order involved change of custody. — Father's action for modification of child support would not lie until two years had passed since the entry of an order on his first petition in which he sought and obtained a change of custody and, although he had also sought an award of child support, he failed to invoke a ruling on the latter issue. *Taylor v. Taylor*, 182 Ga. App. 412, 356 S.E.2d 236 (1987).

Husband was not precluded from filing a complaint for the modification of child support two months after a final divorce decree since the judgment of divorce was not a "final order on a previous petition" for modification. *Thorp v. Thorp*, 258 Ga. 220, 367 S.E.2d 232 (1988); *Gaultney v. Gaultney*, 258 Ga. 602, 372 S.E.2d 814 (1988).

Modification petition filed within two years of divorce decree. — Two-year proscription did not bar the wife's modification petition filed within two years of a divorce decree since the proscription would only apply when a petition for modification had been filed within two years of a previous petition for modification. *McAlpine v. Leveille*, 258 Ga. 422, 369 S.E.2d 907 (1988).

O.C.G.A. § 19-6-19 did not bar a husband's petition for modification when the petition was filed within two years of a consent judgment and decree of divorce entered into after the husband's motion for a new trial was consented to by the parties and granted by the court; the second final judgment of divorce was not a "modification" of the original decree. *Wood v. Wood*, 263 Ga. 566, 436 S.E.2d 478 (1993).

Changes Warranting Modification

Modification of permanent award of child support requires showing of a change in the income and financial status of either former spouse or in the needs of

the child or children; it is not necessary to show both a change in financial status as well as a change in the child's needs. *Wingard v. Paris*, 270 Ga. 439, 511 S.E.2d 167 (1999).

Substantial change in either spouse's income. — Decrease of alimony and child support payments may be warranted, but is not demanded by substantial increase in former wife's income or financial status since the date of the divorce decree or a substantial decrease in the former husband's income or financial status in such period. *Cowan v. Cowan*, 243 Ga. 25, 252 S.E.2d 454 (1979).

Upon change in income and financial status of obligor, child support judgment may be revised. Revision of child support judgment under such circumstances is not, however, mandatory. *Marsh v. Marsh*, 243 Ga. 742, 256 S.E.2d 442 (1979).

Child support requirement bestowed upon a parent did not preclude the parent from seeking downward modification of the parent's support obligation should the parent experience in the future a reduction in income that made the parent's child support payments fall outside the Georgia Child Support Guidelines. *Moon v. Moon*, 277 Ga. 375, 589 S.E.2d 76 (2003).

Child support award may be revised upon change in obligor's ability to pay. *Wright v. Wright*, 246 Ga. 81, 268 S.E.2d 666 (1980).

Ability to pay is function of income and recognized expenses. *Wright v. Wright*, 246 Ga. 81, 268 S.E.2d 666 (1980).

Capital gains properly included in gross income. — When a mother sought to increase the father's child support under earlier provisions of O.C.G.A. § 19-6-19(a) based on his increased income, the trial court properly included capital gains realized by reselling real property in the father's gross income; earlier provisions of O.C.G.A. § 19-6-15 stated that gross income included "all other income" except for public assistance, and 26 U.S.C. § 61(a)(3) included "gains derived from dealings in property" in gross income. *Sharpe v. Perkins*, 284 Ga. App. 376, 644 S.E.2d 178 (2007), cert. denied, 2007 Ga. LEXIS 509 (Ga. 2007).

Changes Warranting Modification (Cont'd)

Determination of change in income or financial status of obligor. — To determine if there has been a change in income and financial status of supporting spouse, a comparison must be made between the supporting spouse's financial status at the time of the original decree and at the time of trial. *Marsh v. Marsh*, 243 Ga. 742, 256 S.E.2d 442 (1979).

Changes in asset valuation. — Increase in value of an asset allocated in a property settlement is not a change in financial status warranting modification of alimony or child support under O.C.G.A. § 19-6-19. *Williams v. Williams*, 268 Ga. 126, 485 S.E.2d 772 (1997).

Increased expenses resulting from remarriage and additional child. — Increased expenses resulting from spouse's new wife and child are not such a change in financial status as would authorize a jury to reduce child support payments a father is obligated to pay. *Wright v. Wright*, 246 Ga. 81, 268 S.E.2d 666 (1980).

Remarriage of former spouse was not sufficient to support modification of divorce decree provisions regarding tax exemptions and responsibility for health care. *Douglas v. Cook*, 266 Ga. 644, 469 S.E.2d 656 (1996).

Because the cost to the husband and the value to the wife of the requirement that he maintain \$100,000 in life insurance for her benefit for 12 years were indefinite when the decree was entered, as the amount of that award depended on how long the husband will live, the award was periodic alimony as a matter of law; and, as permanent periodic alimony, the husband's life insurance obligation terminated upon the wife's remarriage because the divorce decree did not expressly provide otherwise. *White v. Howard*, 295 Ga. 210, 758 S.E.2d 824 (2014).

Award may be increased if income has increased. — If obligor's income has increased from the time of divorce, increased expenses resulting from the spouse's new wife and child will not preclude trier of fact from exercising the court's discretion so as to increase the

child support payments that the spouse is obligated to pay. *Wright v. Wright*, 246 Ga. 81, 268 S.E.2d 666 (1980).

Capital gain derived from child support. — In finding that a mother's financial situation improved for purposes of modifying the child support she received, the trial court did not err in considering a capital gain since the original source of the investment was derived from child support. The income generated was not a direct child support payment but was a return on the investment derived from the child support payments; moreover, there was no merit to the argument that a one-time, non-recurring capital gain could not qualify as gross income in a child support modification action. *Gowins v. Gary*, 288 Ga. App. 409, 654 S.E.2d 162 (2007).

Automatic future modification is valid when a fixed amount of alimony is awarded, and the variable award is contingent upon a specified change in income. *Cabaniss v. Cabaniss*, 251 Ga. 177, 304 S.E.2d 65 (1983).

Automatic future modification is invalid when it is not based upon a specified change in income, but is based upon the passage of time and the possibility of a change in income during that time. *Cabaniss v. Cabaniss*, 251 Ga. 177, 304 S.E.2d 65 (1983).

Appropriate comparison for measuring change is between the relevant factors existing at the time of the original judgment or from the most recent judgment revising child support and the relevant factors existing at the time of the hearing on the current petition for revision. When a petition for revision does not result in a judgment of revision it is not a proper point from which to measure change. *Caldwell v. Caldwell*, 258 Ga. 208, 367 S.E.2d 540 (1988).

Future improvement of an obligor's financial condition as a result of termination of child support obligations is a change in "income" so as to render valid a verdict requiring an automatic future alimony modification. *Wood v. Wood*, 257 Ga. 598, 361 S.E.2d 819 (1987).

Financial improvement of receiving parent. — It was error to modify a child support award of \$28,000 per month

for twins to \$5,000 on the grounds that the award was excessive and that the mother's financial situation had improved. Even if the payment was excessive, there was no proof that the twins' needs had changed; the mere appreciation of the mother's house did not constitute a change in financial circumstances; the mother's unemployment had not changed since the trial court enforced the \$28,000 payment; the mother's receipt of child support could not be treated as a change in her financial condition; and the mother's improved credit rating was not an appropriate consideration unless it was linked to a change of income or financial status. *Gowins v. Gary*, 288 Ga. App. 409, 654 S.E.2d 162 (2007).

Extrajudicial agreement to modify child support invalid. — It is clear that the extrajudicial agreements concerning child support payments entered into by defendant and plaintiff subsequent to the Georgia decree would not be recognized by the courts of this state as a viable modification of defendant's obligation for support payments otherwise established by a judicial decree. *Earley v. Earley*, 165 Ga. App. 483, 300 S.E.2d 814 (1983).

Support for emancipated daughter demonstrated ability to pay. — Virginia court order reducing father's child support payments to zero after finding that the father had no real income was changed less than two years later by the Georgia court because of an improvement in his financial status and ability to pay demonstrated by his having provided financial support for his 21-year-old daughter. *Thomas v. Whaley*, 208 Ga. App. 362, 430 S.E.2d 655 (1993).

Effect of parent's incarceration. — Child support obligor's imprisonment for voluntary criminal acts was not grounds for a downward modification of child support obligations; the parent's motion to decrease or suspend the parent's child support based on the parent's incarceration for drug possession was properly denied. *Staffon v. Staffon*, 277 Ga. 179, 587 S.E.2d 630 (2003).

Inadequate justification for modification. — After a parent agreed to child support in excess of the O.C.G.A. § 19-6-15 support guidelines and did not

subsequently show a reduction in the parent's financial status and income, a downward modification of child support under O.C.G.A. § 19-6-19(a) was properly denied. *Moccia v. Moccia*, 277 Ga. 571, 592 S.E.2d 664 (2004).

Live-in Lover Provision

Classification by O.C.G.A. § 19-6-19(b) is rational and furthers legitimate governmental objectives.

— Classification of former spouses who have elected voluntarily to cohabit with a third party of a different sex in a meretricious relationship is a rational classification which furthers legitimate governmental objectives. *Sims v. Sims*, 245 Ga. 680, 266 S.E.2d 493 (1980).

Law fosters legitimate government objective of encouraging stability of marriage and family. *Sims v. Sims*, 245 Ga. 680, 266 S.E.2d 493 (1980).

Intended scope of subsection (b). — General Assembly intended O.C.G.A. § 19-6-19(b) to include those instances in which persons of the opposite sex dwell together continuously and openly in a relationship similar or akin to marriage (including either sexual intercourse or the sharing of living expenses) albeit they are not husband and wife in contemplation of the law. *Hathcock v. Hathcock*, 249 Ga. 74, 287 S.E.2d 19 (1982).

Applicability of subsection (b). — Subsection (b) of O.C.G.A. § 19-6-19 applies upon proof of sexual intercourse between former spouse and third party although no proof is offered tending to establish that former spouse received from, gave to, or shared with third party, expenses of their cohabitation. Conversely, subsection (b) also applies upon proof that former spouse received from, gave to, or shared with third party, expenses of their cohabitation although no proof is offered tending to establish sexual intercourse between former spouse and third party. *Hathcock v. Hathcock*, 249 Ga. 74, 287 S.E.2d 19 (1982).

Subsection (b) inapplicable to same sex relationship. — O.C.G.A. § 19-6-19(b) does not permit, in accordance with the statute's plain language, the modification of alimony when a former spouse is living in a homosexual meretricious

Live-in Lover Provision (Cont'd)

cious relationship. *Van Dyck v. Van Dyck*, 262 Ga. 720, 425 S.E.2d 853 (1993).

O.C.G.A. § 19-6-19(b) not limited to relationships in which a former spouse derives economic benefit from cohabitation with a third party. *Hathcock v. Hathcock*, 249 Ga. 74, 287 S.E.2d 19 (1982).

Definition of cohabitation in subsection (b) is clear and is not unconstitutional for vagueness. *Hathcock v. Hathcock*, 246 Ga. 233, 271 S.E.2d 147 (1980).

Failure to show continuous and open relationship. — Since the record on appeal reveals no evidence that the appellee and her “live-in lover” dwelled together continuously, the trial court did not err in granting summary judgment to the appellee. *Shapiro v. Shapiro*, 259 Ga. 405, 383 S.E.2d 134 (1989).

O.C.G.A. § 19-6-19(b) plainly requires a two-element relationship. — Relationship must be meretricious and it must be continuous and open. Since the constitutionality of the subsection depends upon the meretricious relationship being one of marriage, it follows that the cohabitation must go beyond periodic, physical interludes. *Reiter v. Reiter*, 258 Ga. 101, 365 S.E.2d 826 (1988).

Relationship failed to meet the standard authorizing a modification of permanent alimony under O.C.G.A. § 19-6-19(b) since, although the evidence supported a finding of periodic sexual encounters, there was no evidence that the parties dwelled together continuously or openly. *Daniels v. Daniels*, 258 Ga. 791, 374 S.E.2d 735 (1989).

“Third party.” — Purpose of the “live-in lover” statute would not be served by interpreting the words “third party” to include the first and second parties. *Upton v. Duck*, 249 Ga. 267, 290 S.E.2d 92 (1982).

Neither party has vested right to continued full alimony while contemporaneously sharing living quarters with another mate. *Morris v. Morris*, 244 Ga. 120, 259 S.E.2d 65 (1979).

Retroactive application of subsection (b). — Alimony judgments entered

prior to effective date of subsection (b) of Ga. L. 1977, p. 1253, § 1 are not immune from modification based upon live-in lover laws. *Morris v. Morris*, 244 Ga. 120, 259 S.E.2d 65 (1979); *Sims v. Sims*, 245 Ga. 680, 266 S.E.2d 493 (1980).

Evidence of “living in” existing at and prior to effective dates of section is admissible. *Sims v. Sims*, 245 Ga. 680, 266 S.E.2d 493 (1980).

Right to terminate payments under subsection (b) in 1975. — Right to terminate alimony payments under subsection (b), having come into existence in 1977, could not have been a “known right” in 1975 when settlement agreement was made part of divorce decree. *Hathcock v. Hathcock*, 246 Ga. 233, 271 S.E.2d 147 (1980).

Termination of periodic alimony not mandated. — O.C.G.A. § 19-6-19(b), which provides that “voluntary cohabitation of such former spouse with a third party in a meretricious relationship shall ... be grounds to modify provisions for periodic payments of permanent alimony,” does not mandate the termination of periodic alimony. *Hurley v. Hurley*, 249 Ga. 220, 290 S.E.2d 70 (1982); *Allen v. Allen*, 265 Ga. 53, 452 S.E.2d 767 (1995).

Finding of a meretricious relationship under O.C.G.A. § 19-6-19(b) does not mandate reduction of periodic alimony, and a jury charge forcing the jury to either reduce or terminate alimony upon such a finding was in error. *Berman v. Berman*, 253 Ga. 298, 319 S.E.2d 846 (1984).

Retroactive modification of alimony based on meretricious relationship. — Evidence that the former wife engaged in a meretricious relationship was not relevant to retroactively excuse the former husband’s failure to pay alimony since the parties’ settlement agreement did not state that alimony would cease upon the commencement of a meretricious relationship by the former wife and, instead, stated that alimony would cease upon the cessation of the former wife’s entitlement to alimony under the statute. *Brown v. Brown*, 269 Ga. 724, 506 S.E.2d 108 (1998).

Agreement of parties to terminate alimony upon cohabitation. — Noth-

ing in O.C.G.A. § 19-6-19 provides that divorcing parties themselves cannot contract for the automatic termination of the alimony obligation of one party upon the cohabitation of the other. *Quillen v. Quillen*, 265 Ga. 779, 462 S.E.2d 750 (1995).

Agreements regarding cohabitation. — Because there was no agreement that husband's alimony obligation would terminate upon wife's cohabitation, the trial court erred by including in the final divorce decree a provision for the prospective termination of alimony in that event. *Metzler v. Metzler*, 267 Ga. 892, 485 S.E.2d 459 (1997).

Future standard of conduct intrusive and unauthorized. — After the trial court found that the former wife was not cohabitating with a third party in a meretricious relationship, but the trial court's order attempted to set forth a future standard of conduct on the part of the former wife which would automatically trigger a modification of alimony, this standard for modification set by the trial court was not only unreasonably intrusive, it was also unauthorized. *Donaldson v. Donaldson*, 262 Ga. 231, 416 S.E.2d 514 (1992).

Application

Modification of child support arising out of a Department of Human Resources review under O.C.G.A. § 19-11-12 invokes the supreme court's divorce and alimony jurisdiction because appeals from orders in proceedings for modification of a child support award which arose from a prior divorce or alimony action, regardless of the code section under which the modification was pursued, are subject to the jurisdiction of the supreme court, and an action for child support modification under § 19-11-12 is neither inconsistent with, nor materially distinguishable from, a modification action under O.C.G.A. § 19-6-19, such that the former, unlike the latter, does not invoke the supreme court's jurisdiction; an award of child support always constitutes alimony if it is made in a divorce decree proceeding, but it may or may not represent alimony outside the divorce context, and the supreme

court has jurisdiction over a case involving an original claim for child support that arose in either a divorce or alimony proceeding. *Spurlock v. Dep't of Human Res.*, 286 Ga. 512, 690 S.E.2d 378 (2010).

Parties cannot by private agreement foreclose court from exercising judgment regarding questions of alimony to be awarded in a divorce decree. It would be anomalous indeed if the parties, by private agreement after decree, could modify the terms of judgment which they had no power to dictate to the court in the first place. If the parties to a divorce decree agree to a modification of alimony, they must present their agreement to the court for the court's approval. *Fuller v. Squires*, 242 Ga. 475, 249 S.E.2d 261 (1978).

Trial court did not improperly attempt to retain jurisdiction. — Trial court did not improperly attempt to retain jurisdiction over post-divorce proceedings by directing the parties to follow an established mechanism to resolve disputes concerning the children, to alternate annual expenses such as the cost of uniforms, or to give the trial court a status report when the youngest child reached the age of 18; the order established permanent awards, and nothing in the language of the status report provision provided that the trial court could issue a modification of custody, visitation, or child support without a petition being properly filed by one of the parties under O.C.G.A. §§ 19-6-19 and 19-9-23. *Facey v. Facey*, 281 Ga. 367, 638 S.E.2d 273 (2006).

Consideration of "compromise" agreement improper. — In a proceeding for modification of child support, the trial court erred in considering evidence of a "compromise" agreement by the parties in calculating the amount of arrearage owed by the father. *Robertson v. Robertson*, 266 Ga. 516, 467 S.E.2d 556 (1996).

Court must approve modification agreement. — Parties to divorce decree agreeing to modification of alimony must present agreement to the court for approval. *McLure v. McLure*, 159 Ga. App. 18, 282 S.E.2d 674 (1981).

Termination of support obligation. — Obligation of father under law to support his children terminates at age 18.

Application (Cont'd)

Jones v. Jones, 244 Ga. 32, 257 S.E.2d 537 (1979).

Extent beyond which court cannot alter voluntary obligation. — Court cannot alter voluntary obligation undertaken by parent beyond the parent's legal obligation. Jones v. Jones, 244 Ga. 32, 257 S.E.2d 537 (1979).

When automatic future modification is valid. — When definite amount of alimony or child support is awarded, automatic future modification is not invalid. Hayes v. Hayes, 248 Ga. 526, 283 S.E.2d 875 (1981).

Automatic adjustments based on changes in Consumer Price Index. — O.C.G.A. § 19-6-19 does not preclude award providing for automatic adjustments based on changes in Consumer Price Index. Hayes v. Hayes, 248 Ga. 526, 283 S.E.2d 875 (1981).

Automatic adjustment provision does not preclude modification. — Automatic adjustment provision does not preclude either party from seeking modification under O.C.G.A. § 19-6-19. Hayes v. Hayes, 248 Ga. 526, 283 S.E.2d 875 (1981).

Provision stating change never be downward. — Provision requiring that an ex-husband's child-support obligation be modified annually based on his annual gross income, providing that the change never be downward, did not improperly prohibit the ex-husband from exercising his right under subsection (a) of O.C.G.A. § 19-6-19 to seek a downward modification of child support based on a change in his financial status. Jarrett v. Jarrett, 259 Ga. 560, 385 S.E.2d 279 (1989).

Retroactive modification. — Effect of a retroactive award of child support in a West German Government judgment is not significantly different from a temporary modification under O.C.G.A. § 19-6-19, since both provide an increased level of support for the period while the proceeding for modification is pending. Knothe v. Rose, 195 Ga. App. 7, 392 S.E.2d 570 (1990).

Credit for social security benefits. — In determining liability for child support payments, credit should be given for

social security benefits received by custodial spouse for the benefit of minor children. Kight v. Kight, 242 Ga. 563, 250 S.E.2d 451 (1978).

Order requiring payment of reasonable medical expenses may be entered in modification proceeding, although there is no such provision in a divorce decree because the essence of such order is that child support merely is being increased in amount, albeit perhaps, in an indefinite amount. Price v. Dawkins, 242 Ga. 41, 247 S.E.2d 844 (1978).

Court may modify group award into per capita award. — When in an alimony modification proceeding brought pursuant to Ga. L. 1977, p. 1253, § 1 it has been shown that there has been a change in income or financial status of a former spouse sufficient to warrant revision of alimony or child support payable to a group, then as an incident of the modification proceeding the court may modify the group award into a per capita award according to the needs of the recipients. Nash v. Nash, 244 Ga. 749, 262 S.E.2d 64 (1979).

Per capita reduction of group award. — Son's selection of the father as custodial parent, when custody had originally been awarded to the mother, is a factor which may be considered in a claim for modification of child support based on changed financial conditions, but the father is not entitled as a matter of right to a per capita reduction of child support awarded to a group of children. Ivester v. Ivester, 242 Ga. 386, 249 S.E.2d 69 (1978).

Distinction between alimony and division of property. — Unless decree or alimony trial transcript shows to the contrary: (a) a decree specifying periodic payments for an uncertain time (e.g., until death or remarriage) with no indication of gross amount is alimony and is revisable; (b) a decree specifying periodic payments for a given time with no indication of gross amount other than by multiplying the amount due by the number of payment periods is alimony and is revisable; (c) a decree specifying periodic payments to be made until a given sum (i.e., an amount stated) has been paid is division of property or payment of corpus and is not revisable. Nash v. Nash, 244 Ga. 749, 262 S.E.2d 64 (1979).

Fact that parties call payments “alimony” for income tax purposes is not controlling. *Hathcock v. Hathcock*, 246 Ga. 233, 271 S.E.2d 147 (1980).

Agreement specifying annual payments for 10 years constituted property settlement. — When other provisions of agreement provided specifically for weekly payments of alimony, payments of \$2,000.00 per year for 10 years irrespective of remarriage or death of either party were a property settlement rather than alimony. *Hathcock v. Hathcock*, 246 Ga. 233, 271 S.E.2d 147 (1980).

Antenuptial agreement unenforceable. — Because an antenuptial agreement failed to disclose a husband’s income and a wife waived the right to alimony as a part of the agreement, the husband’s income was material to the antenuptial agreement and would have been a critical factor in the wife’s decision to waive alimony, and thus a trial court did not abuse the court’s discretion in finding the agreement unenforceable. *Corbett v. Corbett*, 280 Ga. 369, 628 S.E.2d 585 (2006).

Periodic payments over given time as alimony. — Periodic payments over a given time, with no indication of a lump sum payment or in gross payment other than by multiplying amount due by number of times it is to be paid, constitute alimony. *Hathcock v. Hathcock*, 246 Ga. 233, 271 S.E.2d 147 (1980).

Award of use of home as lump-sum alimony. — When a wife was awarded title to the marital home until she remarried, sold the home, or died, the award of the house to the wife was an award of lump sum alimony and was not subject to modification. *Estlund v. Estlund*, 260 Ga. 225, 391 S.E.2d 763 (1990); *McLendon v. McLendon*, 262 Ga. 657, 424 S.E.2d 283 (1993).

Payment in exchange for release from permanent alimony. — When parties in a divorce enter into agreement whereby wife releases husband from permanent alimony payment in exchange for \$15,000 to be paid in periodic installments, such installments are in the nature of a property settlement and not permanent alimony subject to revision under O.C.G.A. § 19-6-19. *McLure v.*

McLure, 159 Ga. App. 18, 282 S.E.2d 674 (1981).

Modification in context of legitimation proceeding. — Even though a petition for modification of child support could be brought in the context of a legitimation proceeding, a showing of changed circumstances is required before an existing award may be modified. *Department of Human Resources v. Jones*, 215 Ga. App. 322, 450 S.E.2d 339 (1994).

No application to lump sum alimony award. — Husband’s obligation to the wife was one for lump sum alimony rather than periodic alimony because the alimony provision stated the exact amount of each payment and the exact number of payments without other limitations, conditions, or statements of intent; thus, O.C.G.A. § 19-6-19 did not apply. The trial court awarded the wife monthly alimony of \$5,000 for the first year, \$4,000 for the following two years, and \$3,000 for the final year. *Patel v. Patel*, 285 Ga. 391, 677 S.E.2d 114 (2009).

Attorney’s Fees

Attorney’s lien not enforceable against child support payments. — Attorney’s charging lien should not be allowed to nullify an award determined to be necessary to assure the support of a child and is not enforceable against child support payments. *Law Office of Tony Center v. Baker*, 185 Ga. App. 809, 366 S.E.2d 167 (1988).

Effect of date of underlying decree. — O.C.G.A. § 19-6-19(d) will be applied to modification petitions filed after the statute’s effective date, without regard to the date of the underlying decree. *Crecelius v. Brooks*, 258 Ga. 372, 369 S.E.2d 743 (1988).

Designation of prevailing party. — Although O.C.G.A. § 19-6-19(d) gives the court discretion whether to award attorney fees to a prevailing party, the statute does not authorize the court to designate who is the prevailing party. That determination is made by the trier of fact. *Shapiro v. Lipman*, 259 Ga. 85, 377 S.E.2d 673 (1989).

Trial court’s award of attorney fees to the wife, based on an erroneous determination that she was the prevailing party,

Attorney's Fees (Cont'd)

did not need to be reversed since the court would have been authorized in the court's discretion to award her fees under O.C.G.A. § 19-6-22. *Shapiro v. Lipman*, 259 Ga. 85, 377 S.E.2d 673 (1989).

Husband was not the prevailing party because the jury's award was less than he had offered in settlement and because the modification would have resulted ultimately in a net loss to the wife. Thus, the husband could not have been awarded attorney's fees. *Keeler v. Keeler*, 263 Ga. 151, 430 S.E.2d 5 (1993).

When the former wife filed a complaint for domestication of a foreign judgment and modification of a child support order and dismissed the action without prejudice, since no trier of fact heard the merits of the claim, the former husband could not acquire prevailing party status, and the trial court erred in awarding attorney's fees to the husband. *Morris v. Morris*, 222 Ga. App. 617, 475 S.E.2d 676 (1996).

Prevailing party is entitled to attorney fees regardless of whether parties ever married. — Even though

O.C.G.A. § 19-6-19(d) uses the term "former spouse," it authorizes an award of attorney fees to a prevailing party in a child support modification action, regardless of whether the child's parents were ever married because, for purposes of O.C.G.A. T. 19, Ch. 6, the term "former spouse" is equated with "parent" when considering issues of child support; accordingly, the trial court did not err in granting a mother who prevailed on her claim for modification of child support an award of attorney fees under O.C.G.A. § 19-6-19(d) even though she and her child's father were never married. *Monroe v. Taylor*, 259 Ga. App. 600, 577 S.E.2d 810 (2003).

Parties' settlement agreement, not § 19-6-19(d), controlled. — Trial court did not exceed the court's discretion in awarding reasonable and appropriate attorney fees to the prevailing spouse as the court's decision was dictated by the parties' settlement agreement, and not O.C.G.A. § 19-6-19(d), as the attorney-fee clause in the settlement agreement made no reference to § 19-6-19(d). *Haley v. Haley*, 282 Ga. 204, 647 S.E.2d 10 (2007).

OPINIONS OF THE ATTORNEY GENERAL

Two-year limitation on filing of modification petitions discussed. See 1980 Op. Att'y Gen. No. U80-46.

Construed with § 19-11-12. — O.C.G.A. § 19-11-12 and the statute's pro-

visions did not prejudice or otherwise affect a right to employ the modification of child support remedy available under O.C.G.A. § 19-6-19. 1990 Op. Att'y Gen. No. U90-24.

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, §§ 704, 729 et seq., 998 et seq.

C.J.S. — 27B C.J.S., Divorce, §§ 367, 376, 402 et seq., 481. 27C C.J.S., Divorce, § 719 et seq.

ALR. — Unchastity of wife as affecting prior separation agreement, 8 ALR 1452.

Decree for alimony in installments as within full faith and credit provision, 41 ALR 1419; 157 ALR 170.

Power, in absence of reservation by statute or decree, to modify provision in decree of divorce or separation as to alimony or separate maintenance, 71 ALR 723; 127 ALR 741.

Validity and enforceability of agreement to pay more or less alimony than that provided for by decree or order, 84 ALR 299.

Divorced wife's failure to comply with order or decree as affecting her right to enforce provision for alimony, 88 ALR 199.

Power of court to relieve husband permanently of duty to pay alimony awarded by decree, 100 ALR 1262.

Alimony as affected by remarriage, 112 ALR 246; 48 ALR2d 270.

Attack on divorce decree by second spouse of party to divorce, 120 ALR 815.

Change of conditions since decree for alimony rendered in another state as

proper matter for consideration in enforcement of local decree based on the decree in the other state, 134 ALR 321.

Propriety and effect of anticipatory provision in decree for alimony in respect of remarriage or other change of circumstances, 155 ALR 609.

Power of court to modify decree for alimony or support as affected by agreement or release executed after entry of decree, 166 ALR 370.

Power of court to modify decree for support, alimony, or the like based on agreement of parties, 166 ALR 675.

Husband's default, contempt, or other misconduct as affecting modification of decree for alimony, separate maintenance, or support, 6 ALR2d 835.

Change in financial condition or needs of husband or wife as ground for modification of decree for alimony or maintenance, 18 ALR2d 10.

Service of notice to modify divorce decree or other judgment as to child's custody upon attorney who represented opposing party, 42 ALR2d 1115.

Necessity of personal service within state upon nonresident spouse as prerequisite of court's power to modify its decree as to alimony or child support in matrimonial action, 62 ALR2d 544.

Obligation under property settlement agreement between spouses as dischargeable in bankruptcy, 74 ALR2d 758.

Change in financial condition or needs of parents or children as ground for modification of decree for child support payments, 89 ALR2d 7.

Divorce and separation: mutual mistake as to tax consequences as ground for relief against property settlement, 39 ALR3d 1376.

Annulment of later marriage as reviving prior husband's obligations under alimony decree or separation agreement, 45 ALR3d 1033.

Retrospective increase in allowance for alimony, separate maintenance, or support, 52 ALR3d 156.

Divorce: power of court to modify decree for alimony or support of spouse which was based on agreement of parties, 61 ALR3d 520.

Divorce: power of court to modify decree for support of child which was based on agreement of parties, 61 ALR3d 657.

Effect, in subsequent proceedings, of paternity findings or implications in divorce or annulment decree or in support or custody order made incidental thereto, 78 ALR3d 846.

Divorced wife's subsequent sexual relations or misconduct as warranting, alone or with other circumstances, modification of alimony decree, 98 ALR3d 453.

Responsibility of noncustodial divorced parent to pay for, or contribute to, costs of child's college education, 99 ALR3d 322.

Laches or acquiescence as defense, so as to bar recovery of arrearages of permanent alimony or child support, 5 ALR4th 1015.

Validity and enforceability of escalation clause in divorce decree relating to alimony and child support, 19 ALR4th 830.

Effect of remarriage of spouses to each other on child custody and support provisions of prior divorce decree, 26 ALR4th 325.

Divorce: excessiveness or adequacy of combined property division and spousal support awards—modern cases, 55 ALR4th 14.

Right to attorneys' fees in proceeding, after absolute divorce, for modification of child custody or support order, 57 ALR4th 710.

Power to modify spousal support award for a limited term, issued in conjunction with divorce, so as to extend the term or make the award permanent, 62 ALR4th 180.

Divorce: voluntary contributions to child's education expenses as factor justifying modification of spousal support award, 63 ALR4th 436.

Loss of income due to incarceration as affecting child support obligation, 27 ALR5th 540.

Alimony as affected by recipient spouse's remarriage in absence of controlling specific statute, 47 ALR5th 129.

Initial award or denial of child custody to homosexual or lesbian parent, 62 ALR5th 591.

Custodial parent's homosexual or lesbian relationship with third person as justifying modification of child custody order, 65 ALR5th 591.

Custodial parent's relocation as grounds for change of custody, 70 ALR5th 377.

Right to credit on child support for health insurance, medical, dental, and orthodontic expenses paid for child's benefit while child is not living with obligor parent, 1 ALR6th 493.

Right to credit on child support for contributions to educational expenses of child while child is not living with obligor parent, 2 ALR6th 439.

Right to credit on child support for contributions to travel expenses of child while child is not living with obligor parent, 3 ALR6th 641.

Right to credit on child support for continued payments to custodial parent for child who has reached majority or otherwise become emancipated, 4 ALR6th 531.

Retirement of husband as change of circumstances warranting modification of divorce decree — Conventional retirement at 65 years of age or older, 11 ALR6th 125.

Retirement of husband as change of circumstances warranting modification of divorce decree — early retirement, 36 ALR6th 1.

19-6-20. Revision of judgment for permanent alimony, generally — Merits not at issue.

In the trial on a petition authorized in subsection (a) of Code Section 19-6-19, the merits of whether a party is entitled to alimony are not an issue. The only issue is whether there has been such a substantial change in the income and financial status of either former spouse, in cases of permanent alimony for the support of a former spouse, as to warrant either a downward or upward revision or modification of the permanent alimony judgment. (Ga. L. 1955, p. 630, § 2; Ga. L. 1977, p. 1253, § 2; Ga. L. 1979, p. 466, § 24; Ga. L. 1986, p. 1259, § 2; Ga. L. 2005, p. 224, § 7/HB 221; Ga. L. 2006, p. 583, § 8/SB 382.)

Editor's notes. — Ga. L. 1986, p. 1259, § 3, not codified by the General Assembly, provided: "This Act shall become effective July 1, 1986. The provisions of this Act shall apply to judgments providing permanent alimony for the support of a child or children rendered on or after July 1, 1986."

Ga. L. 2005, p. 224, § 1/HB 221, not codified by the General Assembly, provides that: "The General Assembly finds and declares that it is important to assess periodically child support guidelines and determine whether existing guidelines continue to be viable and effective or whether they have failed or ceased to accomplish their original policy objectives. The General Assembly further finds that supporting Georgia's children is vitally important to the citizens of Georgia. Therefore, the General Assembly has determined that it is in the best interests of the state and its citizenry to undertake an evaluation of the child support guidelines on a continuing basis. The General Assembly declares that it is important that

all of Georgia's children are provided with adequate financial support whether the children's parents are living together or not living together. The General Assembly finds that both parents have a continuing obligation with respect to providing financial and emotional stability for their child or children. It is the hope of the members of the General Assembly that all parents work together to advance the best interest of their children."

Ga. L. 2006, p. 583, § 10(b)/SB 382, not codified by the General Assembly, provides: "Sections 1 through 7 of this Act shall become effective on January 1, 2007, and shall apply to all pending civil actions on or after January 1, 2007."

Law reviews. — For article discussing Georgia alimony provisions allowing modification of judgments with respect to federal and state constitutional limitations, see 18 Ga. B.J. 153 (1955). For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For article, "The Modification of Judgment for Spousal Alimony and for Child Support Alimony:

Criticism and Suggested Reform,” see 22 Ga. St. B.J. 76 (1985). For article on 2005 amendment of this Code section, see 22 Ga. St. U.L. Rev. 73 (2005).

For note discussing Georgia’s child support laws, their problems, and some proposed solutions, see 11 Ga. L. Rev. 387 (1977).

JUDICIAL DECISIONS

Legislative intent. — General Assembly intended by the enactment of Ga. L. 1955, p. 630, § 2 and other amending legislation to allow an alimony judgment for the support of a child to be revised upon a change in the liable former spouse’s ability to pay. Ability to pay, however, is a function of income and recognized expenses. *Wright v. Wright*, 246 Ga. 81, 268 S.E.2d 666 (1980).

The 1979 amendment, changing “and modification” to “or modification” in the second sentence of O.C.G.A. § 19-6-20 was not intended to expand the scope of modification proceedings. *Fender v. Fender*, 249 Ga. 765, 294 S.E.2d 472 (1982).

O.C.G.A. § 19-6-20 does not preclude adjustment based on changes in Consumer Price Index to award of fixed amount of alimony. *Hayes v. Hayes*, 248 Ga. 526, 283 S.E.2d 875 (1981).

Modification of spouse support judgments only by raising or lowering payments. — Cases holding that judgment for child support may be modified only by raising or lowering amount of payments, and that while periodic payments for child support can be changed from a group award to a per capita award in a modification action, other terms and conditions of the original judgment cannot be changed apply equally to spouse support as well as child support. *Fender v. Fender*, 249 Ga. 765, 294 S.E.2d 472 (1982).

Substantial increase or decrease in

income. — Decrease of alimony and child support may be warranted by substantial increase in former wife’s income or financial status since the date of the divorce decree or a substantial decrease in the former husband’s income or financial status in such period. *Cowan v. Cowan*, 243 Ga. 25, 252 S.E.2d 454 (1979).

Increased expenses resulting from spouse’s new wife and child are not change in financial status as would authorize a jury to reduce the child support payments the father was obligated to pay. *Wright v. Wright*, 246 Ga. 81, 268 S.E.2d 666 (1980).

Increased expenses will not preclude increased order of child support. — When the liable former spouse’s income has increased from the time of the divorce, increased expenses resulting from said spouse’s new wife and child will not preclude the trier of fact from exercising the court’s discretion so as to increase the child support payments that spouse is obligated to pay. *Wright v. Wright*, 246 Ga. 81, 268 S.E.2d 666 (1980).

Evidence of original divorce decree. — Trial court presiding over an action for modification of alimony erred in refusing to allow the introduction into evidence of the original divorce decree. *Cotton v. Cotton*, 272 Ga. 276, 528 S.E.2d 255 (2000).

Cited in *Oliver v. Oliver*, 244 Ga. 20, 257 S.E.2d 527 (1979); *Kaufmann v. Kaufmann*, 245 Ga. 721, 267 S.E.2d 16 (1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, § 1005 et seq.

ALR. — Power, in absence of reservation by statute or decree, to modify provision in decree of divorce or separation as to alimony or separate maintenance, 127 ALR 741.

Change in financial condition or needs

of husband or wife as ground for modification of decree for alimony or maintenance, 18 ALR2d 10.

Change in financial condition or needs of parents or children as ground for modification of decree for child support payments, 89 ALR2d 7.

Retrospective increase in allowance for

alimony, separate maintenance, or support, 52 ALR3d 156.

Divorce: power of court to modify decree for alimony or support of spouse which was based on agreement of parties, 61 ALR3d 520.

Divorce: power of court to modify decree for support of child which was based on agreement of parties, 61 ALR3d 657.

Divorced wife's subsequent sexual rela-

tions or misconduct as warranting, alone or with other circumstances, modification of alimony decree, 98 ALR3d 453.

Death of obligor parent as affecting decree for support of child, 14 ALR5th 557.

Retirement of husband as change of circumstances warranting modification of divorce decree — Conventional retirement at 65 years of age or older, 11 ALR6th 125.

19-6-21. Revision of judgment for permanent alimony — Not available in case of lump sum award.

A petition authorized in subsection (a) of Code Section 19-6-19 can be filed only where a party has been ordered by the final judgment in an alimony or divorce and alimony action to pay permanent alimony in weekly, monthly, annual, or similar periodic payments and not where the former spouse of such party has been given an award from the corpus of the party's estate in lieu of such periodic payment. (Ga. L. 1955, p. 630, § 3; Ga. L. 1979, p. 466, § 25; Ga. L. 2005, p. 224, § 8/HB 221; Ga. L. 2006, p. 583, § 8/SB 382.)

Editor's notes. — Ga. L. 2005, p. 224, § 1/HB 221, not codified by the General Assembly, provides that: "The General Assembly finds and declares that it is important to assess periodically child support guidelines and determine whether existing guidelines continue to be viable and effective or whether they have failed or ceased to accomplish their original policy objectives. The General Assembly further finds that supporting Georgia's children is vitally important to the citizens of Georgia. Therefore, the General Assembly has determined that it is in the best interests of the state and its citizenry to undertake an evaluation of the child support guidelines on a continuing basis. The General Assembly declares that it is important that all of Georgia's children are provided with adequate financial support whether the children's parents are living together or not living together. The General Assembly finds that both parents have a continuing obligation with respect to providing

financial and emotional stability for their child or children. It is the hope of the members of the General Assembly that all parents work together to advance the best interest of their children."

Ga. L. 2006, p. 583, § 10(b)/SB 382, not codified by the General Assembly, provides: "Sections 1 through 7 of this Act shall become effective on January 1, 2007, and shall apply to all pending civil actions on or after January 1, 2007."

Law reviews. — For article discussing Georgia alimony provisions allowing modification of judgments with respect to federal and state constitutional limitations, see 18 Ga. B.J. 153 (1955). For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For article on 2005 amendment of this Code section, see 22 Ga. St. U.L. Rev. 73 (2005).

For note, "The Significance of *Stokes v. Stokes*: An Examination of Property Rights Upon Divorce in Georgia," see 16 Ga. L. Rev. 695 (1982).

JUDICIAL DECISIONS

Periodic payments distinguished from lump sum award. — Unless the

decree or alimony trial transcript shows to the contrary: (a) a decree specifying peri-

odic payments for an uncertain time (e.g., until death or remarriage) with no indication of gross amount is alimony and is revisable; (b) a decree specifying periodic payments for a given time with no indication of gross amount other than by multiplying the amount due by the number of payment periods is alimony and is revisable; (c) a decree specifying periodic payments to be made until a given sum (i.e., an amount stated) has been paid is division of property or payment of corpus and is not revisable. *Nash v. Nash*, 244 Ga. 749, 262 S.E.2d 64 (1979).

In a divorce case when the plain language of the parties' agreement manifests an intent to provide a home for the children, with the custodian making the payments, until such time as both parties agree in writing to sell the home and divide the equity, this is clearly an award of lump sum alimony and is not subject to modification. *Lyons v. Lyons*, 244 Ga. 619, 261 S.E.2d 395 (1979).

One-time payments not subject to modification. — One-time payments, whether alimony, payments of corpus or divisions of separate property of parties, are not subject to revision. *Nash v. Nash*, 244 Ga. 749, 262 S.E.2d 64 (1979).

Exercise of right to petition for modification of child support. — Right to petition for modification of child support belongs to the child or children involved which may be exercised at the election of the mother or other person having legal custody of the children under the terms of the divorce decree. *Crosby v. Crosby*, 249 Ga. 569, 292 S.E.2d 814 (1982).

Children possess right to petition for modification of child support. — Right to petition for modification of child support belongs to the children and cannot be waived by the mother. *Crosby v. Crosby*, 249 Ga. 569, 292 S.E.2d 814 (1982).

Automatic adjustments based on changes in Consumer Price Index. — O.C.G.A. § 19-6-19 does not preclude award providing for automatic adjustments based on changes in Consumer Price Index. *Hayes v. Hayes*, 248 Ga. 526, 283 S.E.2d 875 (1981).

Automatic adjustment provision does not preclude either party from seeking modification. *Hayes v. Hayes*, 248 Ga. 526, 283 S.E.2d 875 (1981).

Dischargeability in bankruptcy. — Bankruptcy Court erred in ruling that the jury award of \$250,000.00 lump sum alimony was in the nature of alimony, maintenance, or support and thus was nondischargeable pursuant to 11 U.S.C. § 523. *Ackley v. Ackley*, 187 Bankr. 24 (N.D. Ga. 1995).

Fact that a lump sum alimony award to a wife was non-modifiable did not negate the possibility that the award was for the wife's maintenance and support; even though a lump sum alimony award was in the "nature" of a property settlement since the evidence showed that the lump sum award was for the wife's maintenance and support, the finding that it was for that purpose, rather than a division of property which was dischargeable in bankruptcy, was affirmed. *Daniel v. Daniel*, 277 Ga. 871, 596 S.E.2d 608 (2004).

No modification of lump sum award. — Trial court did not err in dismissing a former spouse's motion for modification of alimony because the award was a lump sum settlement of property rights not subject to modification under O.C.G.A. § 19-6-19(a) or lump sum alimony not subject to modification under O.C.G.A. § 19-6-21. *Rivera v. Rivera*, 283 Ga. 547, 661 S.E.2d 541 (2008).

Cited in *Oliver v. Oliver*, 244 Ga. 20, 257 S.E.2d 527 (1979); *Kaufmann v. Kaufmann*, 245 Ga. 721, 267 S.E.2d 16 (1980); *Nix v. Nix*, 185 Bankr. 929 (Bankr. N.D. Ga. 1994).

19-6-22. Revision of judgment for permanent alimony — Expenses for defense of litigation.

Where a petition authorized by subsection (a) of Code Section 19-6-19 is filed by a party obligated to pay alimony, the court may require the party to pay the reasonable expenses of litigation as may be incurred by

the party's former spouse on behalf of the former spouse in defense thereof. (Ga. L. 1955, p. 630, § 4; Ga. L. 1979, p. 466, § 26; Ga. L. 2005, p. 224, § 9/HB 221; Ga. L. 2006, p. 583, § 8/SB 382.)

Editor's notes. — Ga. L. 2005, p. 224, § 1/HB 221, not codified by the General Assembly, provides that: "The General Assembly finds and declares that it is important to assess periodically child support guidelines and determine whether existing guidelines continue to be viable and effective or whether they have failed or ceased to accomplish their original policy objectives. The General Assembly further finds that supporting Georgia's children is vitally important to the citizens of Georgia. Therefore, the General Assembly has determined that it is in the best interests of the state and its citizenry to undertake an evaluation of the child support guidelines on a continuing basis. The General Assembly declares that it is important that all of Georgia's children are provided with adequate financial support whether the children's parents are living together or not living together. The General Assembly finds that both parents have a continuing obligation with respect to providing

financial and emotional stability for their child or children. It is the hope of the members of the General Assembly that all parents work together to advance the best interest of their children."

Ga. L. 2006, p. 583, § 10(b)/SB 382, not codified by the General Assembly, provides: "Sections 1 through 7 of this Act shall become effective on January 1, 2007, and shall apply to all pending civil actions on or after January 1, 2007."

Law reviews. — For article discussing Georgia alimony provisions allowing modification of judgments with respect to federal and state constitutional limitations, see 18 Ga. B.J. 153 (1955). For article surveying developments in Georgia domestic relations law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 109 (1981). For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For article on 2005 amendment of this Code section, see 22 Ga. St. U.L. Rev. 73 (2005).

JUDICIAL DECISIONS

Counterclaim is petition for purposes of Ga. L. 1979, p. 466, § 26 and will support a trial court's award of reasonable compensation for those attorney fees incurred solely in defense of the liable former spouse's counterclaim. *Wright v. Wright*, 246 Ga. 81, 268 S.E.2d 666 (1980).

Award of reasonable attorney fees to spouse contesting modification. — Spouse contesting modification sought by one obligated to pay may be awarded reasonable attorney fees during the pendency of the litigation, including an interlocutory award. *Hilsman v. Hilsman*, 245 Ga. 555, 266 S.E.2d 173 (1980).

Discretion of court. — Trial court's discretion in making an award under O.C.G.A. § 19-6-22 is not limited to a consideration of the financial circumstances of the party opposing modification. *Shapiro v. Lipman*, 259 Ga. 85, 377 S.E.2d 673 (1989).

Trial court may grant attorney fees if such fees are determined necessary to

insure a proper defense, and upon consideration of the present financial circumstances of the parties. *Hilsman v. Hilsman*, 245 Ga. 555, 266 S.E.2d 173 (1980).

While an award of attorney fees in a modification action is not mandatory or a condition precedent to bringing an application, the trial judge may in the exercise of judicial discretion, award attorney's fees and expenses of litigation incurred during the pendency of the proceedings. *Hilsman v. Hilsman*, 245 Ga. 555, 266 S.E.2d 173 (1980).

Attorney fees in action for change of custody. — O.C.G.A. § 19-6-22 does not authorize an award of attorney fees for an action for a change of custody. *Haselden v. Haselden*, 255 Ga. 366, 338 S.E.2d 257 (1986); *Owen v. Owen*, 183 Ga. App. 472, 359 S.E.2d 229 (1987).

Cited in *Oliver v. Oliver*, 244 Ga. 20, 257 S.E.2d 527 (1979); *Kaufmann v. Kaufmann*, 245 Ga. 721, 267 S.E.2d 16

(1980); *Wehner v. Parris*, 258 Ga. App. 772, 574 S.E.2d 921 (2002).

RESEARCH REFERENCES

ALR. — Right of former wife to counsel fees upon application after absolute divorce to increase or decrease alimony, 15 ALR2d 1252.

Right to attorneys' fees in proceeding, after absolute divorce, for modification of child custody or support order, 57 ALR4th 710.

19-6-23. Applicability of Code Section 19-6-18 or Code Sections 19-6-19 through 19-6-22 to judgments on or after March 9, 1955.

Code Section 19-6-18 or Code Sections 19-6-19 through 19-6-22, as applicable, shall be effective and shall apply to any judgment of a court providing permanent alimony for support, unless rendered prior to March 9, 1955, in which case Code Section 19-6-24 shall apply. (Ga. L. 1978, p. 2204, § 1; Ga. L. 1979, p. 466, § 28.)

Law reviews. — For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982).

JUDICIAL DECISIONS

Retroactive application of alimony modification statute unconstitutional. — Although Ga. L. 1977, p. 1253, § 1 and Ga. L. 1979, p. 466, § 23 provided that the court could take cognizance of a petition seeking a change of alimony on the basis of a change in the income and financial condition of either spouse (rather than husband only), the retroactive application of the alimony modification statute is unconstitutional. *Sovern v. Sovern*, 156 Ga. App. 752, 275 S.E.2d 791 (1980).

Legislature's intent. — Under O.C.G.A. § 19-6-23, General Assembly expressed the legislature's intention to make curative statute retrospective. *Summerlin v. Summerlin*, 247 Ga. 5, 274 S.E.2d 523 (1981).

Amendments cannot be applied so as to impair alimony agreements. — Despite expressed legislative intent, amendments cannot be applied so as to impair alimony agreements entered into before the amendments, though incorporated into the court's final judgment and

decree of divorce. *Shure v. Shure*, 245 Ga. 36, 262 S.E.2d 800 (1980).

No claim for modification of pre-1977 decree stated. — When the sole ground asserted by the appellant for a modification of alimony was a change in the financial condition of his ex-wife, and the decree was entered in 1968, when the only basis for modification of alimony was a change in the income and financial status of the husband, the appellant's claim for modification failed to state a claim for which relief could be granted. *Sovern v. Sovern*, 156 Ga. App. 752, 275 S.E.2d 791 (1980).

Party in an alimony action in which a final judgment was entered prior to Ga. L. 1977, p. 1253, § 1, amending Ga. L. 1955, p. 630, § 1 (resulting in O.C.G.A. §§ 19-6-18 and 19-6-19) had a vested right in the judgment not being subject to modification because of a change in the income of the wife since the law in effect at the time of the judgment did not permit a modification on such change. *McClain v. McClain*, 241 Ga. 422, 246 S.E.2d 187 (1978).

Trial court did not improperly attempt to retain jurisdiction. — Trial court did not improperly attempt to retain jurisdiction over post-divorce proceedings by directing the parties to follow an established mechanism to resolve disputes concerning the children, to alternate annual expenses such as the cost of uniforms, or to give the trial court a status report when the youngest child reached the age of 18; the order established permanent awards, and nothing in the language of the status

report provision provided that the trial court could issue a modification of custody, visitation, or child support without a petition being properly filed by one of the parties under O.C.G.A. §§ 19-6-19 and 19-9-23. *Facey v. Facey*, 281 Ga. 367, 638 S.E.2d 273 (2006).

Cited in *Oliver v. Oliver*, 244 Ga. 20, 257 S.E.2d 527 (1979); *Morris v. Morris*, 244 Ga. 120, 259 S.E.2d 65 (1979); *Bisno v. Biloon*, 161 Ga. App. 351, 291 S.E.2d 66 (1982).

RESEARCH REFERENCES

ALR. — Divorce: court's authority to institute or increase spousal support award after discharge of prior property award in bankruptcy, 87 ALR4th 353.

19-6-24. Applicability of Code Section 19-6-18 or Code Sections 19-6-19 through 19-6-22 to judgments prior to March 9, 1955.

Code Section 19-6-18 or Code Sections 19-6-19 through 19-6-22, as applicable, shall apply to all judgments for permanent alimony for the support of a wife rendered prior to March 9, 1955, where all the following conditions are met:

(1) Both parties to the case in which the judgment for permanent alimony was rendered consent in writing to the revision, amendment, alteration, settlement, satisfaction, or release thereof;

(2) There are no minor children involved or, if there were minor children at the time the original judgment was rendered, the children are all of age at the time the application is filed;

(3) The judge of the court wherein the original judgment for permanent alimony was rendered approves the revision, amendment, alteration, settlement, satisfaction, or release; and

(4) The consent of the parties, together with the court's approval, is filed with the clerk of the court wherein the original judgment for permanent alimony was rendered. (Ga. L. 1957, p. 94, § 1; Ga. L. 2005, p. 224, § 10/HB 221; Ga. L. 2006, p. 583, § 8/SB 382.)

Editor's notes. — Ga. L. 2005, p. 224, § 1/HB 221, not codified by the General Assembly, provides that: "The General Assembly finds and declares that it is important to assess periodically child support guidelines and determine whether existing guidelines continue to be viable and effective or whether they have failed or

ceased to accomplish their original policy objectives. The General Assembly further finds that supporting Georgia's children is vitally important to the citizens of Georgia. Therefore, the General Assembly has determined that it is in the best interests of the state and its citizenry to undertake an evaluation of the child support guide-

lines on a continuing basis. The General Assembly declares that it is important that all of Georgia's children are provided with adequate financial support whether the children's parents are living together or not living together. The General Assembly finds that both parents have a continuing obligation with respect to providing financial and emotional stability for their child or children. It is the hope of the members of the General Assembly that all

parents work together to advance the best interest of their children."

Ga. L. 2006, p. 583, § 10(b)/SB 382, not codified by the General Assembly, provides: "Sections 1 through 7 of this Act shall become effective on January 1, 2007, and shall apply to all pending civil actions on or after January 1, 2007."

Law reviews. — For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982).

JUDICIAL DECISIONS

General rule applicable prior to 1955 enactment. — General rule applicable to decrees entered prior to enactment of Ga. L. 1955, p. 630, and Ga. L. 1957, p. 94, is that permanent alimony cannot be modified or revised by the trial judge after the final decree has been rendered. *Fricks v. Fricks*, 215 Ga. 137, 109 S.E.2d 596 (1959).

Exception to general rule is allowed, provided: (1) there was no jury trial as to permanent alimony, and the question of permanent alimony was disposed of by agreement of the parties incorporated in the decree and made the judgment of the court; and (2) the power to

change or modify the decree was reserved to the court by consent of the parties. *Fricks v. Fricks*, 215 Ga. 137, 109 S.E.2d 596 (1959).

Cited in *Zuber v. Zuber*, 215 Ga. 314, 110 S.E.2d 370 (1959); *Barrett v. Barrett*, 215 Ga. 697, 113 S.E.2d 118 (1960); *Roberts v. Mandeville*, 217 Ga. 90, 121 S.E.2d 150 (1961); *Deese v. Deese*, 230 Ga. 105, 196 S.E.2d 16 (1973); *Johnson v. Johnson*, 232 Ga. 103, 205 S.E.2d 270 (1974); *Haberman v. Bivens*, 235 Ga. 537, 221 S.E.2d 11 (1975); *Oliver v. Oliver*, 244 Ga. 20, 257 S.E.2d 527 (1979); *Bisno v. Biloon*, 161 Ga. App. 351, 291 S.E.2d 66 (1982).

19-6-25. Revision of permanent alimony for judgments entered prior to March 9, 1955.

When any judgment for permanent alimony rendered prior to March 9, 1955, is revised, amended, altered, settled, satisfied, or released, the same shall not thereafter be subject to revision, except upon the conditions specified in Code Section 19-6-24. (Ga. L. 1957, p. 94, § 2.)

Law reviews. — For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982).

JUDICIAL DECISIONS

Cited in *Fricks v. Fricks*, 215 Ga. 137, 109 S.E.2d 596 (1959); *Zuber v. Zuber*, 215 Ga. 314, 110 S.E.2d 370 (1959); *Roberts v. Mandeville*, 217 Ga. 90, 121 S.E.2d 150 (1961); *Deese v. Deese*, 230 Ga. 105, 196

S.E.2d 16 (1973); *Haberman v. Bivens*, 235 Ga. 537, 221 S.E.2d 11 (1975); *Oliver v. Oliver*, 244 Ga. 20, 257 S.E.2d 527 (1979).

19-6-26. Definitions; jurisdiction.

(a) As used in this Code section, the term:

(1) “Child support order” means a judgment, decree, or order of a court or authorized administrative agency requiring the payment of child support in periodic amounts or in a lump sum and includes (A) a permanent or temporary order and (B) an initial order or a modification of an order.

(2) “Continuing, exclusive jurisdiction” means the authority and jurisdiction of a court to enter or modify a judgment, decree, or order for the payment of child support, as defined in the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. Section 1738B, as amended.

(3) “Foreign child support order” means a judgment, decree, or order of a court or authorized administrative agency of another state requiring the payment of child support in periodic amounts or in a lump sum and includes (A) a permanent or temporary order and (B) an initial order or a modification of an order.

(4) “Modification” means a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to a child support order or foreign child support order.

(5) “Moving party” means the party initiating an action for the modification of a child support order or foreign child support order.

(6) “Nonmoving party” means the party not initiating an action for the modification of a child support order or foreign child support order.

(7) “State” means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian Country as defined in 18 U.S.C. Section 1151.

(b) A court of this state may exercise continuing, exclusive jurisdiction for purposes of entering a child support order if the court has subject matter and personal jurisdiction to make such a child support order, and no previous support order has been entered by a court of competent jurisdiction with respect to the child or children named in the support order.

(c) A court of this state may exercise continuing, exclusive jurisdiction for purposes of entering a modification of a child support order issued by a court of this state if the child or children named in the child support order or any party to the action resides in this state.

(d) A court of this state may exercise continuing, exclusive jurisdiction for purposes of entering a modification of a foreign child support order if:

(1) The court has subject matter and personal jurisdiction over the nonmoving party; and

(2) The court of the state issuing the order sought to be modified no longer has continuing, exclusive jurisdiction to modify said order as defined in the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. Section 1738B, as amended.

(3) The parties file a written consent allowing the court to assume continuing, exclusive jurisdiction. This Code section shall be interpreted to effectuate the provisions of Article 3 of Chapter 11 of this title.

(e) Jurisdiction within this state to enforce, by a contempt proceeding or otherwise, a child support order entered by or registered with a court of this state shall be vested concurrently in the court issuing such order, in the court in the county where the person owing the duty of support may be found or is employed, and for in rem proceedings only, in the court in the county where property may be found which is subject to seizure, sale, foreclosure, or other process for application toward the support obligation. (Ga. L. 1969, p. 98, § 1; Ga. L. 1979, p. 466, § 27; Ga. L. 1997, p. 1613, § 7; Ga. L. 2015, p. 617, § 1/HB 567.)

The 2015 amendment, effective July 1, 2015, in subsection (e), inserted “, by a contempt proceeding or otherwise,” near the beginning, and, in the middle, substituted “order, in” for “order,” and inserted “for in rem proceedings only, in”.

Cross references. — Recognition of foreign money judgments generally, § 9-12-110 et seq.

Law reviews. — For article surveying developments in Georgia domestic relations law from mid-1980 through

mid-1981, see 33 Mercer L. Rev. 109 (1981). For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

For comment on *Connell v. Connell*, 119 Ga. App. 485, 167 S.E.2d 686 (1969), as to enforcement of a foreign modification of a Georgia child support decree, see 21 Mercer L. Rev. 675 (1970).

JUDICIAL DECISIONS

Proper venue for former husband’s proceeding to modify alimony provisions is former wife’s county of residence, rather than where the original alimony judgment had been entered. *Tiller v. Tiller*, 245 Ga. 27, 262 S.E.2d 819 (1980).

Reason underlying enactment of former subsection (b). — Former subsection (b) of Ga. L. 1969, p. 98, § 1 was passed to overrule the decision in *Connell*

v. Connell, 119 Ga. App. 485, 167 S.E.2d 686 (1969) which honored a modification of a Georgia decree for child support by a Florida court under the full faith and credit clause of the United States Constitution. *McGuire v. McGuire*, 228 Ga. 782, 187 S.E.2d 859 (1972).

Limitation upon prohibition against enforcement of foreign modification. — Seemingly absolute prohibi-

tion against enforcement by Georgia courts of foreign judgments modifying Georgia permanent alimony judgments must be construed as being limited to those situations in which the party against whom the permanent alimony judgment was rendered remains domiciled in this state. *Gilbert v. Gilbert*, 245 Ga. 674, 266 S.E.2d 490 (1980).

Jurisdiction over contempt motion. — Trial court erred by dismissing an ex-spouse's motion for contempt for failure to pay child support, which was filed along with her motion to modify the parties' divorce decree because when one court has rendered a divorce decree and a second court later acquires jurisdiction to modify the decree, the second court also has jurisdiction to entertain a motion for contempt of the original decree as a counterclaim to the petition to modify. *Ford v. Hanna*, 292 Ga. 500, 739 S.E.2d 309 (2013).

URESA action not barred by prior decree. — O.C.G.A. § 19-6-26 does not require a trial court to dismiss proceedings under the Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., when a prior support decree is in effect. *State ex rel. McKenna v. McKenna*, 253 Ga. 6, 315 S.E.2d 885 (1984).

Agreement between the parents. — Father could not voluntarily abandon his parental responsibility by contract. *Diegel v. Diegel*, 261 Ga. App. 660, 583 S.E.2d 520 (2003).

Counterclaim for revision of child support in change of custody proceeding. — When plaintiff brings suit for change in custody in county other than county of plaintiff's residence, plaintiff submits to jurisdiction of court in which suit is filed for the purpose of allowing the defendant to file a counterclaim for revision of child support.

Ledford v. Bowers, 248 Ga. 804, 286 S.E.2d 293 (1982).

"Continuing, exclusive jurisdiction" of foreign court. — After a Florida court issued an original custody decree, subsequently issuing a modification, and after one of the "individual contestants" continued to live in Florida and did not consent to the Georgia court's jurisdiction, Florida exercised "continuing, exclusive" jurisdiction, a Georgia county court erred in entering an order domesticating the final divorce decree and increasing the amount of child support, and the superior court should have granted the plaintiff's motion to set aside the order. *Connell v. Woodward*, 235 Ga. App. 751, 509 S.E.2d 647 (1998).

Declaratory judgment appropriate method to determine support obligations. — As a former spouse planned to continue denying the second former spouse's claim of back child support based on the first spouse's understanding of an unclear divorce decree's formula for calculating biennial increases in the first spouse's support obligation, but doing so subjected the first spouse to contempt charges, the first spouse properly filed a declaratory judgment action. *Acevedo v. Kim*, 284 Ga. 629, 669 S.E.2d 127 (2008).

Cited in *McGuire v. McGuire*, 228 Ga. 782, 187 S.E.2d 859 (1972); *Johnson v. Johnson*, 232 Ga. 103, 205 S.E.2d 270 (1974); *Spivey v. Schneider*, 234 Ga. 687, 217 S.E.2d 251 (1975); *Oliver v. Oliver*, 244 Ga. 20, 257 S.E.2d 527 (1979); *Konscol v. Konscol*, 151 Ga. App. 696, 261 S.E.2d 438 (1979); *Bisno v. Biloon*, 161 Ga. App. 351, 291 S.E.2d 66 (1982); *Frasca v. Frasca*, 254 Ga. 532, 330 S.E.2d 889 (1985); *Holler v. Holler*, 257 Ga. 27, 354 S.E.2d 140 (1987); *Kemp v. Sharp*, 261 Ga. 600, 409 S.E.2d 204 (1991); *Mullin v. Roy*, 287 Ga. 810, 700 S.E.2d 370 (2010).

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, §§ 751, 752.

C.J.S. — 27B C.J.S., Divorce, §§ 415, 481 et seq.

ALR. — Decree for alimony rendered in

another state or country (or domestic decree based thereon) as subject to enforcement by equitable remedies or by contempt proceedings, 18 ALR2d 862.

Validity, construction, and application

of full faith and Credit for Child Support Orders Act (FFCCSOA), 28 USCS § 1738B — state cases, 18 ALR6th 97.

19-6-27. Application for permanent alimony or child support after grant of foreign divorce decree; venue; hearing; review; modification.

(a) Whenever, in any foreign country or any other state of the United States, any person obtains a divorce from such person's spouse, which spouse at the time of the filing of the divorce action was a resident of this state, and in the divorce action the spouse was not personally served with petition and process but was served constructively and did not appear, plead, or otherwise waive jurisdiction of the foreign court, the spouse, at any time subsequent to the granting of the foreign divorce decree, may apply to the superior court for an order and judgment for permanent alimony for the support of such spouse and the child or children of the parties, if any. The permanent alimony action shall be filed, pleaded, and tried as if no divorce decree had been entered, even though the foreign decree may be entitled to full faith and credit in dissolving the marriage. If the person who obtained the divorce has become a resident of this state, the action for alimony shall be brought in the county of the person's residence; otherwise, the action shall be brought in the county in which the spouse applying for alimony resides.

(b) The procedure provided for in subsection (a) of this Code section shall not be available for the support of any child or children whose custody and support was legally adjudicated in the foreign court unless custody of the child or children is subsequently changed by a court having jurisdiction of the parties.

(c) A petition brought under this Code section shall be served upon the person who obtained the divorce, as in actions for permanent alimony, and shall be heard by the judge unless a jury trial is demanded by either party to the case. The judgment shall be reviewable as in other cases. The order or judgment shall be subject to modification upon a change of condition, in the same manner that other orders or judgments for permanent alimony are subject to modification. (Ga. L. 1965, p. 263, §§ 1-3; Ga. L. 1979, p. 466, §§ 29-31.)

Law reviews. — For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For annual survey of law of domestic relations, see 38 Mercer L. Rev. 179 (1986).

For comment on *Tobin v. Tobin*, 93 Ga.

App. 568, 92 S.E.2d 304 (1956), holding that it is no defense to an alimony judgment in a divisible divorce that one party obtained the divorce subsequent to the judgment, see 20 Ga. B.J. 118 (1957).

JUDICIAL DECISIONS

Statute is clearly remedial in the statute's purpose and is designed to remedy situations where a husband and father has obtained a divorce in another state, thus severing the marital relationship, which, under the former law, resulted in cutting off the right of the wife to apply for and have granted an enforceable judgment for alimony. Such a statute should be given an equitable and liberal construction to accomplish the statute's beneficent purposes. *Spadea v. Spadea*, 225 Ga. 80, 165 S.E.2d 836 (1969).

Section's intent is to indefeasibly vest right to claim alimony. — It is definitely intent of statute to indefeasibly vest in wives (now either spouse) right to claim alimony and to cause this right to survive any scheme or trick of the husband in obtaining a divorce in another state to defeat her right to assert such claim against him in this state's courts, unhampered by any foreign divorce decree severing the relationship of wife and husband. *Daniel v. Daniel*, 222 Ga. 861, 152 S.E.2d 873 (1967).

Provision not applicable to division of marital assets. — Trial court erred in finding that O.C.G.A. § 19-6-27 applied to a case where plaintiff former husband filed an action in Georgia seeking to domesticate a Texas divorce decree and to

adjudicate the parties' property distribution and defendant wife counterclaimed for breach of contract and for an equitable division of property as the action before the court did not involve alimony or child support, but the equitable division of marital assets, which was not addressed by O.C.G.A. § 19-6-27. *Barolia v. Pirani*, 260 Ga. App. 513, 580 S.E.2d 297 (2003).

Applicability to resident spouse served with out-of-state petition. — O.C.G.A. § 19-6-27 is of no avail to a Georgia resident spouse who is personally served with an out-of-state divorce petition. *Hildebrant v. Hildebrant*, 261 Ga. 603, 409 S.E.2d 206 (1991).

Statutory residency requirement of six months for divorce proceedings has not been extended to alimony proceedings. *Chalfant v. Rains*, 244 Ga. 747, 262 S.E.2d 63 (1979).

Alimony proceeding need not be ancillary to divorce to be valid. *Chalfant v. Rains*, 244 Ga. 747, 262 S.E.2d 63 (1979).

Cited in *Ward v. Ward*, 223 Ga. 868, 159 S.E.2d 81 (1968); *Spadea v. Spadea*, 225 Ga. 80, 165 S.E.2d 836 (1969); *Reno v. Reno*, 249 Ga. 855, 295 S.E.2d 94 (1982); *Page v. Page*, 255 Ga. 145, 335 S.E.2d 865 (1985); *Heath v. Heath*, 257 Ga. 777, 364 S.E.2d 272 (1988).

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, §§ 1071 et seq., 1096 et seq.

C.J.S. — 27C C.J.S., Divorce, §§ 777 et seq., 828 et seq.

ALR. — Foreign divorce as affecting local order previously entered for separate maintenance, 28 ALR2d 1346; 49 ALR3d 1266.

Valid foreign divorce granted upon constructive service as precluding action by

spouse for alimony, support, or maintenance, 28 ALR2d 1378.

Right of nonresident wife to maintain action for separate maintenance or alimony alone against resident husband, 36 ALR2d 1369.

Validity, construction, and application of full faith and Credit for Child Support Orders Act (FFCCSOA), 28 USCS § 1738B — state cases, 18 ALR6th 97.

19-6-28. Enforcement of orders; contempt; service of rule nisi by mail; rule nisi form.

(a) In addition to other powers specified in this chapter, the court shall have the power to subject the respondent to such terms and

conditions as the court may deem proper to assure compliance with its orders and, in particular, shall have the power to punish the respondent who violates any order of the court to the same extent as is provided by law for contempt of the court in any other action or proceeding cognizable by the court. Any proceeding for compliance pursuant to this authority shall be a part of the underlying action, and a motion for such enforcement shall not constitute the filing of a new action or require the payment of a new filing fee.

(b) In any proceeding to enforce a temporary or permanent grant of alimony or child support by attachment for contempt, the petitioner may serve the motion and rule nisi by mailing a copy of the motion and rule nisi by first-class mail, postage prepaid, to the respondent at the respondent’s last known address together with two copies of a notice and acknowledgment conforming substantially to the form specified in subsection (c) of this Code section and a return envelope, postage prepaid, addressed to the sender. If service is perfected by acknowledgment of service in this manner, the petitioner shall file with the court the acknowledgment of the respondent; and such filing shall constitute a return of service. If no acknowledgment of service under this subsection is received by the petitioner within ten days after the date of such mailing, the petitioner shall notify the clerk of court and deposit the costs of service and service of such summons shall be made as provided in Code Section 9-11-4. The costs of such service shall be charged by the clerk of court to the respondent unless the respondent after motion and hearing establishes to the court that there is good reason why such person should not be so charged. A child support contempt motion shall be served upon a respondent with a notice that contains a date certain for hearing which shall be no later than 30 days from the date of service of the motion, unless good cause for a later date is found by the court, in which event the time for a hearing may be extended for up to 30 days.

(c) The form for notice and acknowledgment under subsection (b) of this Code section shall be substantially as follows:

IN THE SUPERIOR COURT OF _____ COUNTY

STATE OF GEORGIA

_____)	
Plaintiff)	
)	
v.	)	Civil action
	)	File no. _____
)	
_____)	
Defendant)	

RULE NISI NOTICE AND
ACKNOWLEDGMENT

To: (insert the name and address of the person to be served)

The enclosed motion and rule nisi are served pursuant to Official Code of Georgia Annotated Section 19-6-28.

You must complete the acknowledgment part of this form and mail one copy of the completed form to the sender within ten days of the date of mailing to you, which date is set out below.

You must sign and date the acknowledgment. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return this form to the sender within ten days, you or the party on whose behalf you are being served will be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law unless good and sufficient cause is shown to the contrary.

If you do complete and mail this form, you or the party on whose behalf you are being served must appear and show cause why you should not be attached for contempt at the time required by the enclosed rule nisi.

I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt will have been mailed on the date set out below.

Signature

Date of mailing

ACKNOWLEDGMENT OF RECEIPT
OF SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the motion and of the rule nisi in the above-captioned manner at (insert address).

Signature

Printed name of signer

Authority to receive
service of process

Date of mailing

(d) Service in accordance with subsections (b) and (c) of this Code section is in addition to any other method of service provided by law. (Code 1981, § 19-6-28, enacted by Ga. L. 1985, p. 785, § 3; Ga. L. 1987, p. 186, § 1; Ga. L. 1997, p. 1613, § 8; Ga. L. 1999, p. 633, § 1.)

Editor’s notes. — As enacted, Ga. L. 1987, p. 186, § 5, not codified by the General Assembly, provided that the amendment of this Code section by that Act would apply to process served on or after July 1, 1987, in both pending and new proceedings. However, Ga. L. 1987, p. 1114, § 2, not codified by the General Assembly, rewrote Ga. L. 1987, p. 186, § 5, to delete the reference to the applica-

bility of the amendment to this Code section by the latter Act.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

For note on 1999 amendment of this Code section, see 16 Ga. St. U.L. Rev. 113 (1999).

JUDICIAL DECISIONS

Contempt finding supported by evidence, but attorney fee reversed. — Trial court properly found a father in willful contempt of court for failure to make child support payments pursuant to the court’s order legitimating the child, upon a mother’s application, as the father’s failure to make those payments was undisputed in the record, the father owned significant assets, and in contemplation of the contempt hearing, the father transferred some of those assets; however, an unsupported attorney-fee award to the mother was reversed, and an evidentiary hearing was ordered on remand. *Webb v. Watkins*, 283 Ga. App. 385, 641 S.E.2d 611 (2007).

Support accrued before agreement incorporated into judgment. — Parent could not be held in contempt for child support that had accrued under a settlement agreement prior to the agreement’s

incorporation into a final judgment; based on the final judgment as well as the obligations set forth in the subsequent clarification order stating that the parent was not responsible for back child support, no clear directive was made as to the parent’s obligation for child support prior to the final judgment. *Gary v. Gowins*, 283 Ga. 433, 658 S.E.2d 575 (2008).

Authority to enforce child support. — Given the court’s continuing, exclusive jurisdiction, a trial court possessed authority to enforce the child support provisions of a divorce decree prospectively and as to past violations. In exercising that authority, the trial court, as a matter of Georgia law, was able to impose contempt sanctions for willful violations of the court’s decree. *Baars v. Freeman*, 288 Ga. 835, 708 S.E.2d 273 (2011).

Cited in *Brown v. King*, 266 Ga. 890, 472 S.E.2d 65 (1996).

RESEARCH REFERENCES

ALR. — Divorce: propriety of using settlement award or order, 72 ALR4th contempt proceeding to enforce property 298.

19-6-28.1. Suspension of, or denial of application or renewal of, license for noncompliance with child support order.

- (a) As used in this Code section, the term:
 - (1) “License” means a certificate, permit, registration, or any other authorization issued by the Department of Public Safety or any other

licensing entity that allows a person to operate a motor vehicle, to engage in a profession, business, or occupation, or to hunt or fish.

(2) “Licensing entity” means any state agency, department, or board of this state which issues or renews any license, certificate, permit, or registration to authorize a person to drive a motor vehicle, to hunt or fish, or to engage in a profession, business, or occupation including those under Article 3 of Chapter 7 of Title 2, the “Georgia Pesticide Use and Application Act of 1976”; Article 13 of Chapter 1 of Title 7, relating to mortgage lenders and mortgage brokers; Chapter 5 of Title 10, the “Georgia Uniform Securities Act of 2008,” relating to securities salespersons and investment adviser representatives; Part 2 of Article 1 of Chapter 6 of Title 12, relating to foresters; Chapter 4 of Title 26, relating to pharmacists; Chapter 23 of Title 33, relating to insurance agents, counselors, and other personnel; Chapter 1 of Title 43, relating to professions and businesses; Chapter 39A of Title 43, relating to real estate appraisers; or Chapter 40 of Title 43, relating to real estate brokers and salespersons.

(b) In any proceeding for enforcement of a judgment or order to pay child support, if the court is satisfied by competent proof that the respondent has accumulated support arrears equivalent to or greater than the current support due for 60 days and that the respondent is licensed to conduct a trade, business, profession, or occupation, licensed to hunt or fish, licensed to drive a motor vehicle, owns a motor vehicle which is registered in this state in his or her name, or is applying for the renewal or issuance of any such license or registration, the court may order the appropriate licensing or registering entity to suspend the license or registration or deny the application for such license and to inform the court of the actions it has taken pursuant to such proceedings. Evidence relating to the ability and willingness of the respondent to comply with an order of child support shall be considered by the court prior to the entry of any order under this Code section.

(c) The court shall inform the respondent that competent proof for purposes of proving to a licensing or registering entity that the respondent is in compliance with the order for child support shall be written proof of payment by cash or a certified check, notice issued by the court, or notice from a child support receiver, if such receiver has been appointed. (Code 1981, § 19-6-28.1, enacted by Ga. L. 1996, p. 453, § 3; Ga. L. 1997, p. 1613, § 9; Ga. L. 1999, p. 81, § 19; Ga. L. 1999, p. 329, § 2; Ga. L. 2008, p. 381, § 10/SB 358.)

Cross references. — Failure to pay child support prohibits licensure as money transmitter or payment instrument seller, § 7-1-693. Failure to pay child support prohibits licensure for cash payment in-

strument, § 7-1-708.1. Denial or suspension of registered forester’s license for noncompliance with child support order, § 12-6-49.1.

Code Commission notes. — Pursuant

to Code Section 28-9-5, in 1996, a period was substituted for a semicolon at the end of paragraph (a)(1).

Law reviews. — For article comment-

ing on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state statutes providing for revocation of driver's license for failure to pay child support, 30 ALR6th 483.

19-6-29. Inclusion of accident and sickness insurance coverage in order for child support; payroll deductions.

(a) In any case before the court involving child support, the court may inquire into the availability of accident and sickness insurance coverage to any person obligated to support and, if such coverage is reasonably available, may include in the order of support provision for such coverage.

(b) Any order of support of a child entered or modified on or after July 1, 1992, which includes provision for accident and sickness insurance may include a provision for payroll deduction of an amount which is sufficient to provide for the payment of premiums of such accident and sickness insurance.

(c) An order for payroll deduction entered pursuant to subsection (b) of this Code section shall be consistent with the provisions of Code Sections 19-6-30 through 19-6-33. (Code 1981, § 19-6-29, enacted by Ga. L. 1985, p. 785, § 3; Ga. L. 1992, p. 1264, § 1.)

19-6-30. Provision for collection by continuing garnishment for support; child support subject to income deduction.

(a) Any order of support of a child entered or modified on or after July 1, 1985, shall contain the following provision:

“Whenever, in violation of the terms of this order there shall have been a failure to make the support payments due hereunder so that the amount unpaid is equal to or greater than the amount payable for one month, the payments required to be made may be collected by the process of continuing garnishment for support.”

(b) Any order of support entered or modified prior to July 1, 1985, shall be construed as a matter of law to contain the provision set forth in subsection (a) of this Code section.

(c) All Title IV-D (child support recovery) cases involving orders of support of a child or spouse entered or modified prior to July 1, 1989, or thereafter shall be subject to income deduction as defined in Code Sections 19-6-31, 19-6-32, and 19-6-33. (Code 1981, § 19-6-30, enacted

by Ga. L. 1985, p. 785, § 3; Ga. L. 1989, p. 861, § 2; Ga. L. 1992, p. 1264, § 2; Ga. L. 1994, p. 1270, § 6.5.)

Cross references. — Continuing garnishment to enforce support obligations, § 18-4-130 et seq.

Law reviews. — For note on 1989

amendment to this Code section, see 6 Ga. St. U.L. Rev. 227 (1989). For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 176 (1994).

JUDICIAL DECISIONS

Enforcement of arrearages. — A 15-month delay in the effective date of an upward modification of child support to allow arrearages to be paid first was improper because O.C.G.A. § 19-6-15 does not authorize a complete delay of an upward modification; the upward modification had to be made under O.C.G.A.

§§ 19-6-15(f)(5)(B)(v) and 19-6-30(a) so as to not create a de facto forgiveness of the payment of the arrearages. *Hampton v. Nesmith*, 294 Ga. App. 514, 669 S.E.2d 489 (2008).

Cited in *Walker v. Walker*, 248 Ga. App. 177, 546 S.E.2d 315 (2001).

RESEARCH REFERENCES

ALR. — Right to credit against child support arrearages for time children spent in custody of noncustodial parent pursuant to visitation or court order, 118 ALR5th 385.

Right to credit on child-support arrearages for money given directly to child, 119 ALR5th 445.

Right to credit against child support arrearages for time child lived with noncustodial parent, other than for visita-

tion or by court order, with approval of custodial parent, 120 ALR5th 229.

Right to credit on child support for contributions to housing costs, utility bills, and other alleged household necessities made for child's benefit while child is not living with obligor parent, 123 ALR5th 565.

Right to credit on child support arrearages for gifts to child, 124 ALR5th 441.

19-6-31. Definitions.

As used in Code Sections 19-6-32 and 19-6-33, the term:

(1) "Accruing on a daily basis" means the amount of support computed by conversion of the periodic amount to an annual sum, divided by 365.

(2) "Court" includes proceedings conducted by an appointed court referee and proceedings conducted pursuant to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," as relates to the enforcement of the duty of support as defined in Chapter 11 of Title 19.

(3) "Department" means the Department of Human Services.

(4) "Family member" means any minor child of the defendant or a spouse or former spouse of the defendant.

(5) "Income" or "earnings" means any periodic form of payment due to an individual, regardless of source, including without limitation

wages, salary, commission, bonus, workers' compensation, disability, payments pursuant to a pension or retirement program, and interest.

(6) "IV-D" means Title IV-D of the federal Social Security Act.

(7) "IV-D agency" means the Child Support Enforcement Agency of the Department of Human Services and its contractors.

(8) "IV-D judgment" means any order or judgment of a court of this state, any order or judgment of a court of another state or any final administrative order issued by another state and transmitted to this state for the purpose of wage deduction pursuant to Code Section 19-6-33, any order of this state entered pursuant to a proceeding under Chapter 10 of Title 19, or any final administrative order for support issued by the department under Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(8.1) "National Medical Support Notice" means a notice as prescribed under 42 U.S.C. Section 666(a)(19), or a substantially similar notice, which is issued and forwarded by the IV-D agency to enforce the medical support provisions of a support order.

(9) "Periodic support" means support required by the terms of a court order or judgment or an administrative order to be paid regularly on a daily, weekly, monthly, or similar specified frequency. (Code 1981, § 19-6-31, enacted by Ga. L. 1989, p. 861, § 3; Ga. L. 1997, p. 1613, § 10; Ga. L. 2002, p. 1247, § 1; Ga. L. 2009, p. 453, § 2-2/HB 228.)

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

For note on 1989 enactment of this Code section, see 6 Ga. St. U.L. Rev. 227 (1989).

19-6-32. Entering income deduction order or medical support notice for award of child support; when order or notice effective; hearing on order.

(a)(1) Except as provided for in paragraph (1) of subsection (a.1) of this Code section, upon the entry of a judgment or order establishing, enforcing, or modifying a child support obligation or spousal support obligation through a court or an administrative process, a separate order for income deduction, if one has not been previously entered, shall be entered. If the obligee is an applicant for child support services under Title IV-D of the federal Social Security Act, the court, referee, or administrative law judge shall furnish copies of the support order and the income deduction order to the IV-D agency.

(2) For all child support orders, and spousal support orders enforced pursuant to subsection (d) of Code Section 19-11-6, the IV-D

agency shall be authorized to issue an order for income deduction without need for any amendment to the order involved or any further action by the court or entity that issued it, provided that an opportunity for a hearing before a court, a referee of the court, or an administrative law judge is afforded. The IV-D agency shall also be authorized to issue a National Medical Support Notice to enforce the medical support provisions of such orders, provided that an opportunity for a hearing pursuant to Code Section 19-11-27 is afforded. Such orders or notices may be issued electronically by the IV-D agency. The IV-D agency shall issue an order for income deduction or, when appropriate, a National Medical Support Notice within two business days after the information regarding a newly hired employee is entered into the centralized employee registry pursuant to Code Section 19-11-9.2 and matched with an obligor in a case being enforced by the IV-D agency.

(3) All child support orders issued or modified before July 1, 1997, which are not otherwise subject to income deduction shall become subject to income deduction upon the accrual of the equivalent of a 30 day arrearage, without the need for an administrative or judicial hearing or order.

(a.1)(1) All child support orders which are initially issued in this state on or after January 1, 1994, and are not at the time of issuance being enforced by the IV-D agency shall provide for the immediate withholding of such support from the income and earnings of the person required by that order to furnish support unless:

(A) The court issuing the order finds there is good cause not to require such immediate withholding; or

(B) A written agreement is reached between both parties which provides for an alternative arrangement.

For purposes of this paragraph, any finding that there is good cause not to require withholding must be based on at least a written determination that implementing wage withholding would not be in the best interest of the child and proof of timely payment of previously ordered support in cases involving modification of support orders.

(2) All child support orders which are not described in subsection (a) of this Code section or in paragraph (1) of this subsection shall, upon petition of either party to revise that order under Code Section 19-6-19 or to enforce that order under Code Section 19-6-28, be revised to include provisions for withholding of such support from the wages of the person required by the order to furnish that support if arrearages equal to one month's support accrue but without the necessity of filing application for services under Code Section 19-11-6.

(3) Copies of income deduction orders issued under this subsection shall be served on the obligee, obligor, and the child support IV-D agency.

(b) The income deduction order shall:

(1) Direct a payor to deduct from all income due and payable to an obligor the amount required by the support order to meet the obligor's support obligation;

(2) State the amount of arrearage accrued, if any, under the support order and direct a payor to withhold an additional amount until the arrearage is paid in full;

(3) Direct a payor not to deduct in excess of the amounts allowed under Section 303(b) of the federal Consumer Credit Protection Act, 15 U.S.C. Section 1673(b), as amended; and

(4) Direct the payor to send income deduction payment including administrative fees authorized by law to the family support registry as provided for in Code Section 19-6-33.1.

(c) Income deduction orders shall be effective immediately unless the court upon good cause shown finds that the income deduction shall be effective upon a delinquency in an amount equal to one month's support or a written agreement is reached between both parties which provides for an alternative arrangement.

(d) The income deduction order shall be effective so long as the order of support upon which it is based is effective or until further order of the court.

(e) When the court orders the income deduction to be effective immediately, the court shall furnish to the obligor a statement of his or her rights, remedies, and duties in regard to the income deduction order. The statement shall state:

(1) All fees or interest which shall be imposed;

(2) The total amount of income to be deducted for each pay period until the arrearage, if any, is paid in full and state the total amount of income to be deducted for each pay period thereafter. The amounts deducted may not be in excess of that allowed under Section 303(b) of the federal Consumer Credit Protection Act, 15 U.S.C. Section 1673(b), as amended;

(3) That the income deduction applies to current and subsequent payors and periods of employment;

(4) That a copy of the income deduction order will be served on the obligor's payor or payors;

(5) That the enforcement of the income deduction order may only be contested on the ground of mistake of fact regarding the amount of support owed pursuant to a support order, the arrearages, or the identity of the obligor; and

(6) That the obligor is required to notify the obligee and, when the obligee is receiving Title IV-D services, the IV-D agency within seven days of changes in the obligor's address and payors and the addresses of his or her payors.

(f) When the income deduction is effective upon a delinquency in an amount equal to one month's support, or when an order for spousal or child support was in effect prior to July 1, 1989, the obligee may enforce the income deduction by serving notice of delinquency on the obligor. The notice of delinquency shall state:

(1) The terms of the support order;

(2) The period of delinquency and the total amount of the delinquency as of the date the notice is mailed;

(3) All fees or interest which may be imposed;

(4) The total amount of income to be deducted for each pay period until the arrearage and all applicable fees and interest are paid in full and the total amount of income to be deducted for each pay period thereafter. The amounts deducted may not be in excess of that allowed under Section 303(b) of the federal Consumer Credit Protection Act, 15 U.S.C. Section 1673(b), as amended;

(5) That a copy of the notice of delinquency will be served on the obligor's payor or payors, together with a copy of the income deduction order. The obligor may apply to the court to contest enforcement of the order once the notice of delinquency has been served. The application shall not affect the enforcement of the income deduction order until the court enters an order granting relief to the obligor;

(6) That the enforcement of the income deduction order may only be contested on the ground of mistake of fact regarding the amount of support owed pursuant to a support order, the arrearages, or the identity of the obligor; and

(7) That the obligor is required to notify the obligee of the obligor's current address and current payors and the address of current payors. All changes shall be reported by the obligor within seven days. If the IV-D agency is enforcing the order, the obligor shall make these notifications to the agency instead of to the obligee.

The failure of the obligor to receive the notice of delinquency does not preclude subsequent service of the income deduction order on the

obligor's payor. A notice of delinquency which fails to state an arrearage does not mean that an arrearage is not owed.

(g) At any time, any party, including the IV-D agency, may apply to the court, referee of the court, or administrative law judge to:

(1) Modify, suspend, or terminate the order for income deduction because of a modification, suspension, or termination of the underlying order for support; or

(2) Modify the amount of income deducted when the arrearage has been paid. (Code 1981, § 19-6-32, enacted by Ga. L. 1989, p. 861, § 3; Ga. L. 1991, p. 94, § 19; Ga. L. 1991, p. 950, § 1; Ga. L. 1993, p. 585, § 1; Ga. L. 1997, p. 1613, § 11; Ga. L. 1999, p. 1237, § 1; Ga. L. 2002, p. 1247, § 2.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2002, "National Medical Support Notice" was substituted for "National Support Medical Notice" in the last sentence of paragraph (a)(2).

Law reviews. — For article commenting on the 1997 amendment of this Code

section, see 14 Ga. St. U.L. Rev. 121 (1997).

For note on 1989 enactment of this Code section, see 6 Ga. St. U.L. Rev. 227 (1989). For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 118 (1993).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 19-6-32 does not violate the separation of powers doctrine. *Georgia Dep't of Human Resources v. Word*, 265 Ga. 461, 458 S.E.2d 110 (1995).

Construction. — Language of O.C.G.A. § 19-6-32 plainly mandates income-deduction orders. *Georgia Dep't of Human Resources v. Pernice*, 260 Ga. 732, 399 S.E.2d 65 (1991).

When the Department of Human Resources obtained a judgment after July 1, 1989, enforcing appellee's obligation to pay child support, the trial court should have entered a separate income deduction order pursuant to O.C.G.A. § 19-6-32(a)(1). *Department of Human Resources v. Chappell*, 211 Ga. App. 834, 440 S.E.2d 722 (1994).

Under O.C.G.A. § 19-6-32(a)(1), when any court order or judgment entered on or after July 1, 1989, establishes support obligations for the first time, or enforces existing obligations, or modifies such obligations, the court "shall" order income deduction pursuant to the procedure established in 1989 if the child support

recovery agency seeks such. *Department of Human Resources v. Offutt*, 217 Ga. App. 823, 459 S.E.2d 597 (1995).

Since the original court order regarding support was entered prior to July 1, 1989, before the advent of statutorily mandated income deduction, under O.C.G.A. § 19-6-32(a)(2), the trial court was authorized to use the court's discretion in determining whether to order income deduction. *Department of Human Resources v. Offutt*, 217 Ga. App. 823, 459 S.E.2d 597 (1995).

When issuance of income deduction order required. — When the Department of Human Resources petitioned to modify a divorce decree so that the former husband's child support payments would be made directly to the child support receiver, the issuance of an income deduction order was required based on the former wife's receipt of public assistance. *Department of Human Resources v. Brandenburg*, 211 Ga. App. 715, 440 S.E.2d 498 (1994), overruled on other grounds, *Department of Human Servs. v. Offutt*, 217 Ga. App. 823, 459 S.E.2d 597 (1995).

“Good cause” for delaying the effective date of an income deduction order is the exception and should be found cautiously and only under narrow circumstances. In no case is the fact that the obligated parent is current in the parent’s

support obligation, in itself, good cause. *Georgia Dep’t of Human Resources v. Word*, 265 Ga. 461, 458 S.E.2d 110 (1995).

Cited in *Department of Human Resources v. Wood*, 219 Ga. App. 778, 466 S.E.2d 663 (1996).

19-6-33. Notice and service of income deduction order; hearing on enforcement of order; discharge of obligor; penalties.

(a) The obligee or his or her agent shall serve an income deduction order and the notice to the payor, and in the case of a delinquency a notice of delinquency, on the obligor’s payor. The obligor must be notified that withholding has commenced and how to contest the withholding.

(b) Service of the initial income deduction order by or upon any person who is a party to a proceeding under this Code section shall be by personal service, by certified mail or statutory overnight delivery, return receipt requested, or by regular mail. Service upon an obligor’s payor or successor payor under this Code section shall be by regular first-class mail.

(c)(1) When the income deduction is effective upon a delinquency in an amount equal to one month’s support, the obligor may apply to the court to contest the enforcement of the income deduction order on the ground of mistake of fact regarding the amount of support owed pursuant to a support order, the amount of arrearage of support, or the identity of the obligor. The obligor shall send a copy of the pleading to the obligee and, if the obligee is receiving IV-D services, to the IV-D agency. The filing of the pleading does not affect the enforcement of an income deduction order unless the court enters an order granting relief to the obligor. The payment of delinquent support by an obligor upon entry of an income deduction order shall not preclude service of the income deduction on the obligor’s payor.

(2) When an obligor requests a hearing to contest enforcement of an income deduction order, the court, referee, or administrative law judge after due notice to all parties and the IV-D agency, if the obligee is receiving IV-D services, shall hear the matter within 30 days after the application is filed and shall not extend the time for hearing unless good cause for a later date is found by the court, in which event the time for a hearing may be extended for up to 30 days. The court, referee, or administrative law judge shall enter an order resolving the matter within ten days after the hearing. A copy of this order shall be served on the parties and the IV-D agency if the obligee is receiving IV-D services.

(d) When a court, court referee, or administrative law judge determines that an income deduction order is proper pursuant to subsection (c) of this Code section, the obligee or his or her agent shall cause a copy of the income deduction order and a notice to payor, and in the case of a delinquency a notice of delinquency, to be served on the obligee's payors. A copy of the notice to the payor, and in the case of a delinquency a notice of delinquency, shall also be furnished to the obligor.

(e) The notice to payor shall contain only information necessary for the payor to comply with the income deduction order. The payor shall have the duties, penalties, and rights specified in the notice. The notice shall:

(1) Require the payor to deduct from the obligor's income the amount specified in the income deduction order, and in the case of a delinquency the amount specified in the notice of delinquency, and to pay that amount to the obligee or to a child support receiver, the IV-D agency, or other designee, as appropriate. The amount actually deducted plus all administrative charges shall not be in excess of the amount allowed under Section 303(b) of the federal Consumer Credit Protection Act, 15 U.S.C. Section 1673(b);

(2) Instruct the payor to implement the income deduction order no later than the first pay period that occurs after 14 days following the date the notice was mailed;

(3) Instruct the payor to forward, within two business days after each payment date, to the family support registry the amount deducted from the obligor's income and a statement as to whether that amount totally or partially satisfies the periodic amount specified in the income deduction order;

(4) Specify that if a payor willfully fails to deduct the proper amount from the obligor's income, the payor is liable for the amount the payor should have deducted, plus costs, interest, and reasonable attorney's fees;

(5) Provide that the payor may collect up to \$25.00 against the obligor's income to reimburse the payor for administrative costs for the first income deduction pursuant to an income deduction order and up to \$3.00 for each deduction thereafter. The payor of income may not deduct a fee for complying with any order or notice for enrollment in a health benefit plan;

(6) State that the income deduction order and the notice to payor, and in the case of a delinquency the notice of delinquency, are binding on the payor until further notice by the obligee, IV-D agency, or the court or until the payor no longer provides income to the obligor;

(7) Instruct the payor that, when the payor no longer provides income to the obligor, the payor shall notify the obligee and shall also

provide the obligor's last known address and the name and address of the obligor's new payor, if known, and that, if the payor willfully violates this provision, the payor is subject to a civil penalty not to exceed \$250.00 for the first violation or \$500.00 for any subsequent violation. If the IV-D agency is enforcing the order, the payor shall make these notifications to the agency instead of to the obligee. Penalties shall be paid to the obligee or the IV-D agency, whichever is enforcing the income deduction order;

(8) State that no payor may discharge an obligor by reason of the fact that income has been subjected to an income deduction order under Code Section 19-6-32 and that a violation of this provision subjects the payor to a civil penalty not to exceed \$250.00 for the first violation or \$500.00 for a subsequent violation. Penalties shall be paid to the obligee or the IV-D agency, whichever is enforcing the income deduction order, if any support is owing. If no support is owing, the penalty shall be paid to the obligor;

(9) Inform the payor that the income deduction order has priority over all other legal processes under state law pertaining to the same income and that payment, as required by the income deduction order, is a complete defense by the payor against any claims of the obligor or his creditors as to the sum paid;

(10) Inform the payor that if the payor receives income deduction orders requiring that the income of two or more obligors be deducted and sent to the same depository, he may combine the amounts paid to the depository in a single payment as long as he identifies that portion of the payment attributable to each obligor; and

(11) Inform the payor that if the payor receives more than one income deduction order against the same obligor, he shall contact the court for further instructions. Upon being so contacted, the court shall allocate amounts available for income deduction giving priority to current child support obligations up to the limits imposed under Section 303(b) of the federal Consumer Credit Protection Act, 15 U.S.C. Section 1673(b).

(f) At any time an income deduction order is being enforced, the obligor may apply to the court for a hearing to contest the continued enforcement of the income deduction order on the same grounds set out in subsection (c) of this Code section, with a copy to the obligee and, in IV-D cases, to the IV-D agency. The application does not affect the continued enforcement of the income deduction order until the court enters an order granting relief to the obligor. The obligee of the IV-D agency is released from liability for improper receipt of moneys pursuant to an income deduction order upon return to the appropriate party of any moneys received.

(g) An obligee, or his agent, shall enforce income deduction orders against an obligor's successor payor who is located in this state in the same manner prescribed in this Code section for the enforcement of an income deduction order against a payor.

(h) The provisions of Article 3 of Chapter 11 of this title, the "Uniform Interstate Family Support Act," apply to all income deduction orders originating in this state and directed to another state. In addition, the provisions of Article 3 of Chapter 11 of this title, the "Uniform Interstate Family Support Act," apply to all income withholding orders originating in another state and directed to this state.

(i) Certified copies of payment records maintained by a child support receiver or the IV-D agency shall, without further proof, be admitted into evidence in any legal proceeding in this state.

(j) No payor shall discharge an obligor by reason of the fact that income has been subjected to an income deduction order under Code Section 19-6-32. A payor who violates this paragraph is subject to a civil penalty not to exceed \$250.00 for the first violation or \$500.00 for any subsequent violation. Penalties shall be paid to the obligee or the IV-D agency, whichever is enforcing the income deduction order, if any support is owing. If no support is owing, the penalty shall be paid to the obligor.

(k) When a payor no longer provides income to an obligor, he shall notify the obligee and, if the obligee is an IV-D applicant, the IV-D agency and shall provide the obligor's last known address and the name and address of the obligor's new payor, if known. A payor who willfully violates this subsection is subject to a civil penalty not to exceed \$250.00 for the first violation or \$500.00 for a subsequent violation. Penalties shall be paid to the obligee or the IV-D agency, whichever is enforcing the income deduction order. (Code 1981, § 19-6-33, enacted by Ga. L. 1989, p. 861, § 3; Ga. L. 1990, p. 8, § 19; Ga. L. 1991, p. 950, § 2; Ga. L. 1993, p. 585, § 2; Ga. L. 1994, p. 1270, § 1; Ga. L. 1997, p. 1613, § 12; Ga. L. 1999, p. 1237, § 2; Ga. L. 2000, p. 1589, § 3; Ga. L. 2002, p. 1247, § 3.)

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

For note on 1989 enactment of this Code

section, see 6 Ga. St. U.L. Rev. 227 (1989). For note on the 1994 amendment of this Code section, see 11 Ga. St. U.L. Rev. 176 (1994).

19-6-33.1. Family support registry.

(a) As used in this Code section, the term:

(1) "Child support enforcement agency" means the Child Support Enforcement Agency of the Department of Human Services and its contractors.

(2) "Family support registry" means a central registry maintained and operated pursuant to subsection (c) of this Code section, which receives, processes, disburses, and maintains a record of the payment of child support, child support when combined with spousal support, child support arrears, or child support debt made pursuant to court or administrative order.

(3) "Income deduction order" means any income deduction order which is made pursuant to Code Section 19-6-32 and which becomes effective upon a delinquency which occurred on or after January 1, 1994, or which became effective immediately without a delinquency on or after January 1, 1994.

(b) Any term used in this Code section and defined in Code Section 19-6-31 shall have the meaning provided for such term in Code Section 19-6-31.

(c) As required by federal law, there shall be established and operated a family support registry pursuant to IV-D regulations and authority and funding provided to the child support enforcement agency. The child support enforcement agency is authorized to establish and maintain or contract for the establishment and maintenance of the family support registry. This registry shall be used for the collection and processing of payments for support orders in all cases which are enforced by the child support enforcement agency and for all other support orders not being enforced by the child support agency which are subject to income deduction order as defined by paragraph (3) of subsection (a) of this Code section.

(d) The child support agency shall as required by federal law redirect payments for support orders in all cases being enforced by the child support agency and for all other support orders not being enforced by the child support agency which are subject to an income deduction order as defined by paragraph (3) of subsection (a) of this Code section. These support payments to a court or receiver or private party by an employer shall be redirected to the family support registry.

(e) In implementing the family support registry, the child support enforcement agency is authorized to:

(1) Receive, process, and disburse payments for child support, child support when combined with spousal support, child support arrears, or child support debt for any order;

(2) Maintain records of any payments collected, processed, and disbursed through the family support registry;

(3) Establish and maintain a separate record for payments made through the registry as a result of a judgment remedy;

(4) Answer inquiries from any parent concerning payments processed through the family support registry; and

(5) Collect a fee for the processing of insufficient funds checks and issue a notice to the originator of any insufficient funds check that no further checks will be accepted from such person and that future payments shall be required to be paid by cash or certified funds.

(f) On or after April 1, 1999, the child support enforcement agency shall begin implementing the family support registry. The commissioner of the department or the commissioner's designee shall notify the court administrator and the chief judge of each judicial circuit when new income deduction orders are to be directed to the family support registry.

(g) Upon implementation of the family support registry in any county or judicial circuit, the following procedures shall be followed in such county or circuit:

(1) All administrative orders and all court orders entered or modified which provide for income deduction orders for support payments for child support, child support when combined with spousal support, child support arrears, or child support debt shall require that such payments be made through the family support registry; and

(2) The child support enforcement agency shall send or cause to be sent a notice by first-class mail directing that all income deduction order payments shall be made to the family support registry. Orders subject to this redirection include: all support orders being enforced by the child support agency and all other orders not being enforced by the child support agency which are subject to an income deduction order as defined in paragraph (3) of subsection (a) of this Code section. The notice shall be sent to the following persons:

(A) Any obligor who is obligated to make payments for support, child support when combined with spousal support, child support arrears, or child support debt under court order or administrative order in a IV-D case where the order does not already specify paying through the family support registry; and

(B) Any employer or other payor of funds who has been deducting income under Code Section 19-6-32.

(h) Any obligor or employer who receives a notice to redirect payments as specified in subsection (g) of this Code section who fails to make the payments to the family support registry and who continues to

make payments to the court or to the IV-D agency shall be sent a second notice to redirect payments. The second notice shall be sent certified mail or statutory overnight delivery, return receipt requested. Such notice shall contain all the information required to be included in the first notice to redirect payments and shall further state that the obligor or employer has failed to make the payments to the correct agency and that the payor or obligor shall redirect the payments to the family support registry at the address indicated in the notice. Failure to make payments to the family support registry after a second notice shall be grounds for contempt.

(i)(1) Any payment required to be made to the family support registry which is received by the court, receiver, or child support enforcement agency shall be forwarded to the family support registry within two business days after receipt. All income deduction payments from employers or such payments forwarded by the court, receiver, or child support enforcement agency shall be identified with the information specified by the family support registry, including but not limited to the court case number, social security number, the county where the case originated, and the name of the obligor. A copy of the notice to redirect payments described in subsection (g) of this Code section shall be mailed to the obligee and the court.

(2) Except as provided by federal law, the family support registry shall distribute all support amounts payable within two business days after receipt from the employer or other payment source.

(j) The department shall coordinate the operation of the family support registry with the state case registry created under Code Section 19-11-39 so as to reduce if not eliminate the need for duplicate reporting and information recording. The department is authorized to enter into cooperative agreements with the courts of the judicial circuits in order to implement the family support registry. The department shall be authorized to establish and collect from the income deduction order obligor or other obligor paying support through the family support registry an administrative fee. The fee shall not exceed \$2.00 per payment or 5 percent of the amount of each payment or the actual cost of processing and distributing the child support from the source to the obligee, whichever is the lesser.

(k) Nothing in this Code section shall allow or require any reduction of child support payments paid to any parent or guardian of a minor child. (Code 1981, § 19-6-33.1, enacted by Ga. L. 1999, p. 1237, § 3; Ga. L. 2000, p. 136, § 19; Ga. L. 2000, p. 1589, § 3; Ga. L. 2009, p. 453, § 2-2/HB 228.)

Code Commission notes. — Pursuant “first-class” was substituted for “first to Code Section 28-9-5, in 1999, class” in paragraph (g)(2) and “subsection

(g)” was substituted for “paragraph (g)” in paragraph (i)(1).

19-6-34. Inclusion of life insurance in order of support.

(a) In any case before the court involving child support, the court may include in the order of support provision for life insurance on the life of either parent or the lives of both parents for the benefit of the minor children. The court may order either parent or both parents to obtain and maintain the life insurance.

(b) The amount of the premium for such life insurance may be considered as a deviation to the presumptive amount of child support pursuant to the provisions of Code Section 19-6-15, provided that the court shall review the amount of the premium for reasonableness under the circumstances of the case and the best interest of the child.

(c) Except as provided in subsection (d) of this Code section, an order for child support shall not require maintenance of life insurance for a child’s benefit after the child reaches the age of majority and shall not require that the proceeds of life insurance be available for the benefit of a child after the child reaches the age of majority.

(d) The trier of fact, in the exercise of sound discretion, may direct either or both parents to maintain life insurance for the benefit of a child who has not previously married or become emancipated, who is enrolled in and attending a secondary school, and who has attained the age of majority before completing his or her secondary school education, provided that maintenance of such life insurance for the benefit of the child shall not be required after a child attains 20 years of age.

(e) Nothing in this Code section shall prevent parents from entering into an agreement for the provision of life insurance that differs from or exceeds the terms of this Code section. (Code 1981, § 19-6-34, enacted by Ga. L. 1995, p. 603, § 3; Ga. L. 2006, p. 583, § 5/SB 382.)

Editor’s notes. — Ga. L. 2006, p. 583, § 10(b)/SB 382, not codified by the General Assembly, provides: “Sections 1 through 7 of this Act shall become effective on January 1, 2007, and shall apply to

all pending civil actions on or after January 1, 2007.”

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 103 (2006).

JUDICIAL DECISIONS

Premium properly included as part of support. — Mother’s premium for life insurance for her two minor children, custody of whom was awarded to the father, was counted as a part of the support ordered pursuant to the provisions of O.C.G.A. § 19-6-15 of the Georgia Child

Support Guidelines. *Moon v. Moon*, 277 Ga. 375, 589 S.E.2d 76 (2003).

Premium excluded from guidelines. — Trial court did not abuse the court’s discretion by declining to consider the cost of the life insurance in calculating a parent’s child support obligation because the

evidence indicated that a parent's company, rather than the parent, paid the premiums on the parent's life insurance policies. *Simmons v. Simmons*, 288 Ga. 670, 706 S.E.2d 456 (2011).

Order that child past age of majority be named beneficiary of life insurance policy improper. — Order requiring the husband to maintain a life insurance policy with the four children of the marriage named as equal beneficiaries was improper because the couple's eldest child had reached the age of majority when the judgment was entered, and there was no evidence of a voluntary obligation by the husband to assume a support obligation that exceeded the husband's legal duty. *Mongerson v. Mongerson*, 285 Ga. 554, 678 S.E.2d 891 (2009), overruled on other grounds, 288 Ga. 670, 706 S.E.2d 456 (2011).

Parent required to maintain life insurance benefiting child. — Trial court

did not abuse the court's discretion in requiring a parent to maintain life insurance for the benefit of the child and by ordering the creation of a trust for any life insurance proceeds; O.C.G.A. § 19-6-34(a) does not limit the value of any life insurance to the future child support obligation of the parent, and the amount is within the trial court's discretion. *Simmons v. Simmons*, 288 Ga. 670, 706 S.E.2d 456 (2011).

Trial court did not err by ordering a husband's child support obligation to be secured by a life insurance policy for the support of the minor children because the trial court had discretion to require a parent, without the parent's agreement, to provide life insurance for the support of minor children pursuant to O.C.G.A. § 19-6-34. *Jarvis v. Jarvis*, 291 Ga. 818, 733 S.E.2d 747 (2012).

19-6-35. Child support obligee and obligor defined.

(a) As used in this Code section, the term:

(1) "Child support obligee" means an individual to whom the payment of a child support obligation is owed and includes a custodial parent or caretaker of a child to whom such support obligation is to be paid or a governmental agency entitled by law to enforce a child support obligation on behalf of such parent, caretaker, or child.

(2) "Child support obligor" means an individual owing a duty of support to a child or children, whether or not such duty is evinced by a judgment, order, or decree.

(b) A child support obligee shall be regarded as a creditor, and a child support obligor shall be regarded as a debtor, as defined in Code Section 18-2-1, for the purposes of attacking as fraudulent a judgment, conveyance, transaction, or other arrangement interfering with the creditor's rights, either at law or in equity. (Code 1981, § 19-6-35, enacted by Ga. L. 1997, p. 1613, § 13.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

JUDICIAL DECISIONS

Cited in *Cavin v. Brown*, 246 Ga. App. 40, 538 S.E.2d 802 (2000).

ARTICLE 2

GEORGIA CHILD SUPPORT COMMISSION

Editor's notes. — Ga. L. 2005, p. 224, § 1/HB 221, not codified by the General Assembly, provides that: "The General Assembly finds and declares that it is important to assess periodically child support guidelines and determine whether existing guidelines continue to be viable and effective or whether they have failed or ceased to accomplish their original policy objectives. The General Assembly further finds that supporting Georgia's children is vitally important to the citizens of Georgia. Therefore, the General Assembly has determined that it is in the best interests of the state and its citizenry to undertake an evaluation of the child support guide-

lines on a continuing basis. The General Assembly declares that it is important that all of Georgia's children are provided with adequate financial support whether the children's parents are living together or not living together. The General Assembly finds that both parents have a continuing obligation with respect to providing financial and emotional stability for their child or children. It is the hope of the members of the General Assembly that all parents work together to advance the best interest of their children."

Law reviews. — For article on 2005 enactment of this article, see 22 Ga. St. U.L. Rev. 73 (2005).

19-6-50. Creation; responsibilities.

There is created the Georgia Child Support Commission for the purpose of studying and collecting information and data relating to awards of child support and to create and revise the child support obligation table. The commission shall be responsible for conducting a comprehensive review of the child support guidelines, economic conditions, and all matters relevant to maintaining effective and efficient child support guidelines and modifying child support orders that will serve the best interest of Georgia's children and take into account the changing dynamics of family life. Further, the commission shall determine whether adjustments are needed to the child support obligation table taking into consideration the guidelines set forth in Code Section 19-6-53. Nothing contained in the commission's report shall be considered to authorize or require a change in the child support obligation table without action by the General Assembly. (Code 1981, § 19-6-50, enacted by Ga. L. 2005, p. 224, § 11/HB 221.)

Law reviews. — For annual survey of domestic relations cases, see 57 Mercer L. Rev. 173 (2005).

19-6-51. Members; terms; chairperson, other officers, and committees; staffing and funding.

(a) The Georgia Child Support Commission shall be composed of 15 members. The Governor shall appoint all of the members as follows:

- (1) Three members who shall be judges in a superior court;

(2) One member who shall be a Justice of the Supreme Court of Georgia or a Judge of the Georgia Court of Appeals or the Justice's or Judge's designee;

(3) Two members of the House of Representatives and two members of the Senate; and

(4) Seven other members.

Each member of the commission shall be appointed to serve for a term of four years or until his or her successor is duly appointed except the members of the General Assembly, who shall serve until completion of their current terms of office. The initial members of the commission appointed pursuant to paragraph (1) of this subsection shall serve for terms of three years. The initial member of the commission appointed pursuant to paragraph (2) of this subsection shall serve for a term of four years. The initial members of the commission appointed pursuant to paragraph (4) of this subsection shall serve for terms of two years. The initial members of the commission shall be appointed not later than May 22, 2005, and shall serve until their terms expire. The succeeding members of the commission shall begin their terms of office on July 1 of the year in which appointed. A member may be appointed to succeed himself or herself on the commission. If a member of the commission is an elected official, he or she shall be removed from the commission if he or she no longer serves as an elected official.

(b) The Governor shall designate the chairperson of the commission. The commission may elect other officers as deemed necessary. The chairperson of the commission may designate and appoint committees from among the membership of the commission as well as appoint other persons to perform such functions as he or she may determine to be necessary as relevant to and consistent with this article. The chairperson shall only vote to break a tie.

(c) The commission shall be attached for administrative purposes only to the Department of Human Services. The Department of Human Services shall provide staff support for the commission. The Department of Human Services shall use any funds specifically appropriated to it to support the work of the commission. (Code 1981, § 19-6-51, enacted by Ga. L. 2005, p. 224, § 11/HB 221; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2010, p. 878, § 19/HB 1387.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2005, “not later than May 22, 2005” was substituted for “within 30 days of the effective date of this Act” in the undesignated paragraph of subsection (a).

19-6-52. Meetings; members' expenses.

(a) The commission shall hold meetings at the call of the chairperson or as called by the Governor. Meetings shall be open to the public.

(b) A quorum for transacting business shall be a majority of the members of the commission.

(c) Any legislative members of the commission shall receive the allowances provided for in Code Section 28-1-8. Citizen members shall receive a daily expense allowance in the amount specified in subsection (b) of Code Section 45-7-21 as well as the mileage or transportation allowance authorized for state employees. Members of the commission who are state officials, other than legislative members, or state employees shall receive no compensation for their services on the commission, but they shall be reimbursed for expenses incurred by them in the performance of their duties as members of the commission in the same manner as they are reimbursed for expenses in their capacities as state officials or state employees. The funds necessary for the reimbursement of the expenses of state officials, other than legislative members, and state employees shall come from funds appropriated to or otherwise available to their respective departments. All other funds necessary to carry out the provisions of this article shall come from funds appropriated to the House of Representatives and the Senate. (Code 1981, § 19-6-52, enacted by Ga. L. 2005, p. 224, § 11/HB 221.)

19-6-53. Duties; powers; authorization to retain professional services.

(a) The commission shall have the following duties:

(1) To study and evaluate the effectiveness and efficiency of Georgia's child support guidelines;

(2) To evaluate and consider the experiences and results in other states which utilize child support guidelines;

(3) To create and recommend to the General Assembly a child support obligation table consistent with Code Section 19-6-15;

(4) To determine periodically, and at least every four years, if the child support obligation table results in appropriate presumptive awards;

(5) To identify and recommend whether and when the child support obligation table or child support guidelines should be modified;

(6) To develop, publish in print or electronically, and update the child support obligation table and worksheets and schedules associated with the use of such table;

(7) To develop or cause to be developed software and a calculator associated with the use of the child support obligation table and child support guidelines and adjust the formula for the calculations of self-employed persons' income pursuant to applicable federal law, if the commission determines that the calculation affects persons paying or receiving child support in this state;

(8) To develop training manuals and information to educate judges, attorneys, and litigants on the use of the child support obligation table and child support guidelines;

(9) To collaborate with the Institute for Continuing Judicial Education, the Institute of Continuing Legal Education, and other agencies for the purpose of training persons who will be utilizing the child support obligation table and child support guidelines;

(10) To make recommendations for proposed legislation;

(11) To study the appellate courts' acceptance of discretionary appeals in domestic relations cases and the formulation of case law in the area of domestic relations;

(12) To study alternative programs, such as mediation, collaborative practice, and pro se assistance programs, in order to reduce litigation in child support and child custody cases; and

(13) To study the impact of having parenting time serve as a deviation to the presumptive amount of child support and make recommendations concerning the utilization of the parenting time adjustment.

(b) The commission shall have the following powers:

(1) To evaluate the child support guidelines in Georgia and any other program or matter relative to child support in Georgia;

(2) To request and receive data from and review the records of appropriate agencies to the greatest extent allowed by state and federal law;

(3) To accept public or private grants, devises, and bequests;

(4) To enter into all contracts or agreements necessary or incidental to the performance of its duties;

(5) To establish rules and procedures for conducting the business of the commission; and

(6) To conduct studies, hold public meetings, collect data, or take any other action the commission deems necessary to fulfill its responsibilities.

(c) The commission shall be authorized to retain the services of auditors, attorneys, financial consultants, child care experts, econo-

mists, and other individuals or firms as determined appropriate by the commission. (Code 1981, § 19-6-53, enacted by Ga. L. 2005, p. 224, § 11/HB 221; Ga. L. 2006, p. 583, § 6/SB 382; Ga. L. 2010, p. 838, § 10/SB 388; Ga. L. 2014, p. 457, § 9/SB 282.)

The 2014 amendment, effective July 1, 2014, in subsection (a), substituted the present provisions of paragraph (a)(3) for the former provisions, which read: “(A) To create and recommend to the General Assembly a child support obligation table consistent with Code Section 19-6-15. Prior to January 1, 2006, the commission shall produce the child support obligation table and provide an explanation of the underlying data and assumptions to the General Assembly by delivering copies to the President Pro Tempore of the Senate and the Speaker of the House of Representatives.

“(B)(i) The child support obligation table shall include deductions from a parent’s gross income for the employee’s share of the contributions for the first 6.2 percent in Federal Insurance Contributions Act (FICA) and 1.45 percent in medicare taxes.

“(ii) FICA tax withholding for high-income persons may vary during the year. Six and two-tenths percent is withheld on the first \$90,000.00 of gross earnings. After the maximum \$5,580.00 is withheld, no additional FICA taxes shall be withheld.

“(iii) Self-employed persons are required by law to pay the full FICA tax of 12.4 percent up to the \$90,000.00 gross earnings limit and the full medicare tax rate of 2.9 percent on all earned income.

“(iv) The percentages and dollar amounts established or referenced in this subparagraph with respect to the payment of self-employment taxes shall be adjusted by the commission, as necessary, as relevant changes occur in the federal tax laws;”; substituted “four years” for “two years” in paragraph (a)(4); and added “and adjust the formula for the calculations of self-employed persons’ income pursuant to applicable federal law, if the commission determines that the calculation affects persons paying or receiving child support in this state” at the end of paragraph (a)(7).

Editor’s notes. — Ga. L. 2006, p. 583, § 10(b)/SB 382, not codified by the General Assembly, provides: “Sections 1 through 7 of this Act shall become effective on January 1, 2007, and shall apply to all pending civil actions on or after January 1, 2007.”

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 103 (2006).

CHAPTER 7

PARENT AND CHILD RELATIONSHIP GENERALLY

Article 1		Sec.	
General Provisions			
Sec.		19-7-23.	"Child born out of wedlock" defined.
19-7-1.	In whom parental power lies; how such power lost; recovery for homicide of child.	19-7-24.	Parents' obligations to child born out of wedlock.
19-7-2.	Parents' obligations to child.	19-7-25.	In whom parental power over child born out of wedlock lies.
19-7-3.	"Grandparent" defined; original actions for visitation rights or intervention; revocation or amendment of visitation rights; appointment of guardian ad litem; mediation; hearing; notification of grandchild's participation in events.	19-7-26.	Mother of child born out of wedlock not to be discriminated against in action to recover for injury or death of the child.
19-7-4.	Criteria for loss of parental custody.	19-7-27.	Hospital program for establishment of paternity.
19-7-5.	Reporting of child abuse; when mandated or authorized; content of report; to whom made; immunity from liability; report based upon privileged communication; penalty for failure to report.	Article 3	
19-7-6.	Reporting of juvenile drug use.	Determination of Paternity	
Article 2		19-7-40.	Jurisdiction; administrative determination of paternity.
Legitimacy		19-7-41.	Service outside state.
19-7-20.	What children are legitimate; disproving legitimacy; legitimation by marriage of parents and recognition of child.	19-7-42.	Venue.
19-7-21.	When children conceived by artificial insemination legitimate.	19-7-43.	Petition; by whom brought; effect of agreement on right to bring petition; stay pending birth of child; court order for blood tests; genetic tests.
19-7-21.1.	"Acknowledgment of legitimation" and "legal father" defined; signing acknowledgment of legitimation; when acknowledgment not recognized; making false statement; rescinding acknowledgment.	19-7-44.	Appointment of guardian ad litem; payment of guardian; notice to natural mother.
19-7-22.	Petition for legitimation of child; requirement that mother be named as a party; court order; effect; claims for custody or visitation; third-party action for legitimation in response to petition to establish paternity.	19-7-45.	Genetic tests.
		19-7-46.	Evidence at trial.
		19-7-46.1.	Name or social security number on birth certificate or other record as evidence of paternity; signed voluntary acknowledgment of paternity.
		19-7-46.2.	Temporary order of support.
		19-7-47.	Civil action; testimony of mother and alleged father; default judgments.
		19-7-48.	Settlement, dismissal, or termination.
		19-7-49.	Decree; jury instructions on test results; costs.
		19-7-50.	Costs.
		19-7-51.	Order of support, visitation privileges, and other provisions.
		19-7-52.	To whom support payments

Sec.		Sec.	
	made; enforcement and modification of orders.	19-7-54.	Motion to set aside determination of paternity.
19-7-53.	Confidentiality of hearings.		

Cross references. — Proceeding against parents for failure to cooperate in educational programs; penalty, § 20-2-766.1.

Law reviews. — For article surveying Georgia cases dealing with domestic relations from June 1977 through May 1978, see 30 Mercer L. Rev. 59 (1978). For article surveying legislative and judicial develop-

ments in Georgia’s divorce, alimony, and child custody laws for 1978-79, see 31 Mercer L. Rev. 75 (1979). For annual survey article on domestic relations, see 50 Mercer L. Rev. 217 (1998).

For note, “Mandatory Child Abuse Reporting Laws in Georgia: Strengthening Protection for Georgia’s Children,” see 31 Ga. St. U.L. Rev. 643 (2015).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Relinquishment of Parental Claim to Child — Adoption Proceedings, 10 POF2d 635.

Husband’s Sterility as Rebutting Presumption of Legitimacy, 14 POF2d 409.

Legitimation of Child by Father Seeking Custody of Child, 14 POF2d 727.

Defense of Paternity Charges, 19 POF2d 1.

Blood Typing, 40 POF2d 1.

Grounds for Termination of Parental Rights, 32 POF3d 83.

Proof of Criminal Identity of Paternity Through Polymerase Chain Reaction (PCR) Testing, 36 POF3d 1.

Custody and Visitation of Children by Gay and Lesbian Parents, 64 POF3d 403.

ALR. — Standing of foster parent to seek termination of rights of foster child’s natural parents, 21 ALR4th 535.

ARTICLE 1

GENERAL PROVISIONS

Cross references. — Inspection of students’ records by parents, § 20-2-720. Li-

ability of parent for acts committed by minor child, §§ 51-2-2, 51-2-3.

19-7-1. In whom parental power lies; how such power lost; recovery for homicide of child.

- (a) Until a child reaches the age of 18 or becomes emancipated, the child shall remain under the control of his or her parents, who are entitled to the child’s services and the proceeds of the child’s labor. In the event that a court has awarded custody of the child to one parent, only the parent who has custody of the child is entitled to the child’s services and the proceeds of the child’s labor.
- (b) Parental power shall be lost by:
- (1) Voluntary contract releasing the right to a third person;
 - (2) Consent to the adoption of the child by a third person;

(3) Failure to provide necessities for the child or abandonment of the child;

(4) Consent to the child's receiving the proceeds of his own labor, which consent shall be revocable at any time;

(5) Consent to the marriage of the child, who thus assumes inconsistent responsibilities;

(6) Cruel treatment of the child;

(7) A superior court order terminating parental rights in an adoption proceeding in accordance with Chapter 8 of this title; or

(8) A superior court order terminating parental rights of the legal father or the biological father who is not the legal father of the child in a petition for legitimation, a petition to establish paternity, a divorce proceeding, or a custody proceeding pursuant to this chapter or Chapter 5, 8, or 9 of this title, provided that such termination is in the best interest of such child; and provided, further, that this paragraph shall not apply to such termination when a child has been adopted or is conceived by artificial insemination as set forth in Code Section 19-7-21 or when an embryo is adopted as set forth in Article 2 of Chapter 8 of this title.

(b.1) Notwithstanding subsections (a) and (b) of this Code section or any other law to the contrary, in any action involving the custody of a child between the parents or either parent and a third party limited to grandparent, great-grandparent, aunt, uncle, great aunt, great uncle, sibling, or adoptive parent, parental power may be lost by the parent, parents, or any other person if the court hearing the issue of custody, in the exercise of its sound discretion and taking into consideration all the circumstances of the case, determines that an award of custody to such third party is for the best interest of the child or children and will best promote their welfare and happiness. There shall be a rebuttable presumption that it is in the best interest of the child or children for custody to be awarded to the parent or parents of such child or children, but this presumption may be overcome by a showing that an award of custody to such third party is in the best interest of the child or children. The sole issue for determination in any such case shall be what is in the best interest of the child or children.

(c)(1) In every case of the homicide of a child, minor or sui juris, there shall be some party entitled to recover the full value of the life of the child, either as provided in this Code section or as provided in Chapter 4 of Title 51.

(2) If the deceased child does not leave a spouse or child, the right of recovery shall be in the parent or parents, if any, given such a right by this paragraph as follows:

(A) If the parents are living together and not divorced, the right shall be in the parents jointly;

(B) If either parent is deceased, the right shall be in the surviving parent; or

(C) If both parents are living but are divorced, separated, or living apart, the right shall be in both parents. However, if the parents are divorced, separated, or living apart and one parent refuses to proceed or cannot be located to proceed to recover for the wrongful death of a child, the other parent shall have the right to contract for representation on behalf of both parents, thereby binding both parents, and the right to proceed on behalf of both parents to recover for the homicide of the child with any ultimate recovery to be shared by the parents as provided in this subsection. Unless a motion is filed as provided in paragraph (6) of this subsection, such a judgment shall be divided equally between the parents by the judgment; and the share of an absent parent shall be held for such time, on such terms, and with such direction for payment if the absent parent is not found as the judgment directs. Payment of a judgment awarded to the parent or parents having the cause of action under this subparagraph or the execution of a release by a parent or parents having a cause of action under this subparagraph shall constitute a full and complete discharge of the judgment debtor or releasee. If, after two years from the date of any recovery, the share of an absent parent has not been paid to the absent parent, the other parent can petition the court for the funds, and the recovery, under appropriate court order, shall be paid over to the parent who initiated the recovery.

(3) The intent of this subsection is to provide a right of recovery in every case of the homicide of a child who does not leave a spouse or child. If, in any case, there is no right of action in a parent or parents under the above rules, the right of recovery shall be determined by Code Section 51-4-5.

(4) In this subsection the terms "homicide" and "full value of the life" shall have the meaning given them in Chapter 4 of Title 51.

(5) In actions for recovery, the fact that the child was born out of wedlock shall be no bar to recovery.

(6) For cases in which the parents of a deceased child are divorced, separated, or living apart, a motion may be filed by either parent prior to trial requesting the judge to apportion fairly any judgment amounts awarded in the case. Where such a motion is filed, a judgment shall not be automatically divided. A postjudgment hearing shall be conducted by the judge at which each parent shall have the opportunity to be heard and to produce evidence regarding that

parent's relationship with the deceased child. The judge shall fairly determine the percentage of the judgment to be awarded to each parent. In making such a determination, the judge shall consider each parent's relationship with the deceased child, including permanent custody, control, and support, as well as any other factors found to be pertinent. The judge's decision shall not be disturbed absent an abuse of discretion. (Orig. Code 1863, § 1744; Code 1868, § 1784; Code 1873, § 1793; Code 1882, § 1793; Civil Code 1895, § 2502; Civil Code 1910, § 3021; Code 1933, § 74-108; Ga. L. 1979, p. 466, § 43; Ga. L. 1980, p. 1154, § 1; Ga. L. 1987, p. 619, § 1; Ga. L. 1988, p. 1720, § 3; Ga. L. 1991, p. 94, § 19; Ga. L. 1996, p. 412, § 1; Ga. L. 2000, p. 1509, § 1; Ga. L. 2006, p. 141, § 4/HB 847; Ga. L. 2010, p. 878, § 19/HB 1387; Ga. L. 2013, p. 294, § 4-22/HB 242; Ga. L. 2014, p. 780, § 1-47/SB 364.)

The 2013 amendment, effective January 1, 2014, deleted "or" at the end of paragraph (b)(5), substituted a semicolon for a period at the end of paragraph (b)(6), and added paragraphs (b)(7) and (b)(8). See editor's note for applicability.

The 2014 amendment, effective April 28, 2014, substituted "Chapter 5" for "Chapter 6" near the middle of paragraph (b)(8).

Cross references. — Grounds for order by juvenile court terminating parental rights, § 15-11-81. Criminal penalty for cruelty to children, § 16-5-70. Parental power over illegitimate child, § 19-7-25. Parents as natural guardians of minor child, § 29-4-2. Age of majority, § 39-1-1.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, a comma was inserted following "sibling" in the first sentence of subsection (b.1).

Editor's notes. — Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before Jan-

uary 1, 2014, and shall not act as an abatement of any such prosecutions."

Law reviews. — For article, "Custody Disputes and the Proposed Model Act," see 2 Ga. L. Rev. 162 (1968). For article, "Trusts for Dependents: Effect of Georgia's Support Obligation on Federal Income Taxation," see 8 Ga. St. B.J. 323 (1972). For article, "The Child as a Party in Interest in Custody Proceedings," see 10 Ga. St. B.J. 577 (1974). For article, "The Origins of the Doctrine of Parens Patriae," see 27 Emory L.J. 195 (1978). For article criticizing parental rights doctrine and advocating best interests of child doctrine in parent-third party custody disputes, see 27 Emory L.J. 209 (1978). For article, "Toward an Economic Theory of the Measurement of Damages in a Wrongful Death Action," see 34 Emory L.J. 295 (1985). For article, "Georgia Inheritance Rights of Children Born Out of Wedlock," see 23 Ga. St. B.J. 28 (1986). For annual survey of recent developments, see 38 Mercer L. Rev. 473 (1986). For annual survey on law of domestic relations, see 42 Mercer L. Rev. 201 (1990). For annual survey article discussing developments in domestic relations law, see 52 Mercer L. Rev. 213 (2000). For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004). For annual survey of domestic relations cases, see 57 Mercer L. Rev. 173 (2005). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 79 (2006). For survey article on domestic relations law, see 59

Mercer L. Rev. 139 (2007). For survey article on domestic relations law, see 60 Mercer L. Rev. 121 (2008). For survey article on trial practice and procedure, see 59 Mercer L. Rev. 423 (2007). For survey article on wills, trusts, guardianships, and fiduciary administration, see 59 Mercer L. Rev. 447 (2007). For annual survey on domestic relations law, see 64 Mercer L. Rev. 121 (2012). For annual survey on domestic relations, see 65 Mercer L. Rev. 107 (2013).

For review of 1996 domestic relations legislation, see 13 Ga. St. U.L. Rev. 155 (1996). For note, “Not Just For Kids: Why Georgia’s Statutory Disinheritance of Deadbeat Parents Should Extend to Intestate Adults,” see 43 Ga. L. Rev. 867 (2009).

For comment on *Wright v. Wright*, 85 Ga. App. 721, 70 S.E.2d 152 (1952), see 15 Ga. B.J. 83 (1952). For comment on *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100 (1955), holding that plaintiff who alleged that injuries she received while one and one-half months pregnant, later caused the death of the unborn child had stated a cause of action and could maintain a suit for the wrongful death of the child, see 18 Ga. B.J. 98 (1955). For comment on *Buttrum v. Buttrum*, 98 Ga. App. 226, 105 S.E.2d 510 (1958), holding that an

unemancipated minor child may maintain an action in tort against a parent for personal injuries provided that it is a willful and malicious act so cruel as to constitute forfeiture of parental authority, see 21 Ga. B.J. 559 (1959). For comment on consideration of loss of companionship in determining damages for death of a child, in light of *Lockhart v. Besel*, 426 P.2d 605 (Wash. 1967), see 19 Mercer L. Rev. 266 (1968). For comment discussing trend toward allowance of a wrongful death action for death of an unborn child, see 1 Ga. St. B.J. 508 (1968). For comment on *Bodrey v. Cape*, 120 Ga. App. 859, 172 S.E.2d 643 (1969), see 7 Ga. St. B.J. 256 (1970). For comment on *Barnwell v. Cordle*, 438 F.2d 236 (5th Cir. 1971), refusing to apply doctrine of parental immunity to suit brought by minor against father’s estate, see 8 Ga. St. B.J. 544 (1972). For comment discussing doctrine of substituted judgment and constitutional underpinnings of a qualified right to refuse medical treatment asserted for an incompetent, in light of *Superintendent of Belcherton State School v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977), see 27 Emory L.J. 425 (1978). For comment on “Grandparents’ Visitation Rights in Georgia,” see 29 Emory L.J. 1083 (1980).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

CONTRACTUAL RELINQUISHMENT OF PARENTAL RIGHTS

FAILURE TO PROVIDE NECESSARIES OR ABANDONMENT

PROCEEDS OF CHILD’S LABOR

UNFITNESS OF PARENT

EMANCIPATION OF MINOR

CUSTODY

- 1. IN GENERAL
- 2. CUSTODY RIGHTS AS BETWEEN PARENTS
- 3. CUSTODY RIGHTS AS BETWEEN PARENTS AND THIRD PARTIES

TORT RECOVERY

- 1. INTRAFAMILY IMMUNITY
- 2. RECOVERY AGAINST THIRD PERSONS
- 3. AMOUNTS RECOVERABLE

DECISIONS UNDER FORMER CODE 1933, § 105-1307

- 1. IN GENERAL
- 2. PLEADINGS
- 3. APPLICATION

General Consideration

Statute did not purport to deal with subject of adoption. *Glendinning v. McComas*, 188 Ga. 345, 3 S.E.2d 562 (1939); *Wheeler v. Little*, 113 Ga. App. 106, 147 S.E.2d 352 (1966).

Statute inapplicable following death of parents. — Superior court erred in granting an aunt and uncle custody of minor children because the court lacked subject matter jurisdiction to consider the petition for custody since a probate court had exclusive jurisdiction to issue and revoke letters of testamentary guardianship, and O.C.G.A. § 29-2-4(b) mandated the issuance of letters of testamentary guardianship to the brother of the children's father without notice and a hearing and without consideration of the children's best interests; O.C.G.A. § 19-7-1 was inapplicable because the statute was limited to a custody action between a parent and specified relatives, and the children's parents were deceased. *Zinkhan v. Bruce*, 305 Ga. App. 510, 699 S.E.2d 833 (2010).

Construction with Workers' Compensation Act. — Workers' Compensation Act, O.C.G.A. § 34-9-1 et seq., does not unconstitutionally conflict with the statutory right of a non-dependent parent to recover for an adult's child death while on the job. *Barzey v. City of Cuthbert*, 295 Ga. 641, 763 S.E.2d 447 (2014).

Legislative intent. — It was certain that the legislature intended that there be a monetary recovery in all instances of the homicide of a child, whether the child was a minor or an adult. *Carringer v. Rodgers*, 276 Ga. 359, 578 S.E.2d 841 (2003).

Legislature intends that there always be a right of recovery in the case of the homicide of a child, and because the spouse-murderer is precluded from this right of recovery, the parent has standing to bring a cause of action for the wrongful death of a child in order to recover for the full value of the child's life. *Carringer v. Rodgers*, 331 F.3d 844 (11th Cir. 2003).

Former Code 1933, §§ 49-102 and 74-108 (see now O.C.G.A. §§ 29-4-2 and 19-7-1, respectively) must be construed together. *McCallum v. Bryant*, 212 Ga. 348, 92 S.E.2d 531 (1956).

O.C.G.A. § 19-7-1(b.1) did not give grandparents the right to intervene in adoption proceedings brought by third parties since the parents had voluntarily surrendered their parental rights and agreed to the adoption. *Baum v. Moore*, 230 Ga. App. 255, 496 S.E.2d 307 (1998).

Guardian appointment under § 29-4-4. — No guardian can be appointed under former Civil Code 1910, § 3035 (see now O.C.G.A. § 29-4-4) unless the parents' rights were voluntarily relinquished or forfeited in accordance with the provisions of former Code 1933, § 74-108 (see now O.C.G.A. § 19-7-1). *Robison v. Robison*, 29 Ga. App. 521, 116 S.E. 19 (1923).

Forfeiture of parents' rights must be declared in regular proceedings, authorized by law, with notice to parent. *Robison v. Robison*, 29 Ga. App. 521, 116 S.E. 19 (1923).

For discussion of ways in which parental control may be alienated. — See *Morris v. Grant*, 196 Ga. 692, 27 S.E.2d 295 (1943).

Termination of parental authority. — Parent's authority over child is terminated at parent's death. *Barnwell v. Cordle*, 438 F.2d 236 (5th Cir. 1971).

Cruel treatment of child by parent. — Parent may lose right to control and custody by cruel treatment of child. *Mills v. Mills*, 218 Ga. 686, 130 S.E.2d 221 (1963).

Evidence as to cruel treatment. — Evidence is insufficient to justify termination of parental rights under O.C.G.A. § 19-7-1(b)(6) when evidence of cruel treatment consists of one unverified episode in the past. *Hays v. Jeng*, 184 Ga. App. 157, 360 S.E.2d 913 (1987).

When parent kills mother and maternal grandmother, the parent loses all parental rights and has no parental rights to award custody to the parent's sister, and such a contract is therefore invalid. *George v. Anderson*, 135 Ga. App. 273, 217 S.E.2d 609 (1975).

Child's better financial, educational, or moral advantages elsewhere. — Court cannot terminate parental rights because child might have better financial, educational, or moral advantages elsewhere. *Carvalho v. Lewis*, 247

Ga. 94, 274 S.E.2d 471 (1981).

Grandparents' rights. — Since the intervention of grandparents into a custody proceeding and an order granting them temporary custody had already occurred, the later adult adoption of the child's father did not extinguish the legal status that the grandparents held; the trial court's subsequent order dismissing the intervention of the grandparents, and setting aside the award of temporary custody to them was reversed. *Walls v. Walls*, 278 Ga. 206, 599 S.E.2d 173 (2004).

Under O.C.G.A. § 19-7-1(b.1), grandparents were entitled to custody of their two grandchildren given the children's special needs due to autism and developmental delays and the parents' denial of the children's problems and inability to care for the children. *Whitehead v. Myers (In the Interest of D. W.)*, 311 Ga. App. 680, 716 S.E.2d 785 (2011).

Error in procedures involving bifurcation. — In a suit brought by a biological father to recover one-half of the proceeds of a settlement of a wrongful death action arising out of the death of a son, which the father brought against that child's mother and others, the trial court abused the court's discretion in bifurcating the trial in the manner chosen since the trial court did not follow any of the procedures set forth in O.C.G.A. § 51-12-5.1 regarding punitive damages; secondly, the manner of bifurcation unfairly limited the father's right of cross-examination regarding post-death facts involving allegations by the father that the child's mother and the others took steps to conceal the recovery and to otherwise defraud the father. *Bolden v. Ruppenthal*, 286 Ga. App. 800, 650 S.E.2d 331 (2007), cert. denied, 2007 Ga. LEXIS 756 (Ga. 2007).

Third party acquiring parental powers upon forfeiture by parent retains such power until child's majority, although conditions might arise which would authorize annulment of the contract. *Carswell, Moxley & Son v. Harrison*, 33 Ga. App. 140, 126 S.E. 293 (1924).

Effect of relinquishment of parental rights upon minor's right to contract. — Relinquishment of all parental rights and control does not give minor

right to contract generally. *Wickham v. Torley*, 136 Ga. 594, 71 S.E. 881, 36 L.R.A. (n.s.) 57 (1911).

Effect of marriage upon child's emancipation. — Marriage just as effectively emancipates a child as arrival at majority does. Child is, after such time, to be considered as an adult. *Irby v. State*, 57 Ga. App. 717, 196 S.E. 101 (1938).

Cited in *Hargrove v. Turner*, 112 Ga. 134, 37 S.E. 89, 81 Am. St. R. 24 (1900); *Culberson v. Alabama Constr. Co.*, 127 Ga. 599, 56 S.E. 765, 9 L.R.A. (n.s.) 411, 9 Ann. Cas. 507 (1907); *Jones v. McCowen*, 34 Ga. App. 801, 131 S.E. 290 (1926); *Thompson v. Georgia Ry. & Power Co.*, 163 Ga. 598, 136 S.E. 895 (1927); *Proctor v. Proctor*, 164 Ga. 721, 139 S.E. 531 (1927); *Dial v. Reid*, 166 Ga. 245, 142 S.E. 881 (1928); *Hooten v. Hooten*, 168 Ga. 86, 147 S.E. 373 (1929); *Scott v. Scott*, 169 Ga. 290, 150 S.E. 154 (1929); *Kite v. Brooks*, 51 Ga. App. 531, 181 S.E. 107 (1935); *De Loach v. Waters*, 54 Ga. App. 386, 188 S.E. 58 (1936); *Harwell v. Gay*, 186 Ga. 80, 196 S.E. 758 (1938); *McComas v. Glendinning*, 59 Ga. App. 234, 200 S.E. 304 (1938); *Baldwin v. Davis*, 188 Ga. 587, 4 S.E.2d 458 (1939); *Willingham v. Willingham*, 192 Ga. 405, 15 S.E.2d 514 (1941); *Durden v. Johnson*, 194 Ga. 689, 22 S.E.2d 514 (1942); *Bond v. Norwood*, 195 Ga. 383, 24 S.E.2d 289 (1943); *Bailey v. Warlick*, 196 Ga. 642, 27 S.E.2d 322 (1943); *Brackett v. Glaze*, 72 Ga. App. 314, 33 S.E.2d 733 (1945); *Kehely v. Kehely*, 200 Ga. 41, 36 S.E.2d 155 (1945); *Phillips v. Phillips*, 203 Ga. 106, 45 S.E.2d 621 (1947); *Skinner v. Skinner*, 204 Ga. 635, 51 S.E.2d 420 (1949); *Cons v. Wipert*, 207 Ga. 621, 63 S.E.2d 370 (1951); *Carnes v. Carnes*, 208 Ga. 649, 68 S.E.2d 579 (1952); *Garden City Cab Co. v. Ransom*, 86 Ga. App. 247, 71 S.E.2d 443 (1952); *Hedquist v. Gottke*, 209 Ga. 681, 75 S.E.2d 18 (1953); *Altree v. Head*, 90 Ga. App. 601, 83 S.E.2d 683 (1954); *Hansen v. Carpenter*, 211 Ga. 785, 89 S.E.2d 196 (1955); *Boge v. McCollum*, 212 Ga. 214, 91 S.E.2d 619 (1956); *McCallum v. Bryant*, 212 Ga. 348, 92 S.E.2d 531 (1956); *McCallum v. Bryant*, 93 Ga. App. 214, 91 S.E.2d 194 (1956); *Stuckey v. Jones*, 212 Ga. 495, 93 S.E.2d 719 (1956); *Bridgman v. Elders*, 213 Ga. 257, 98 S.E.2d 547 (1957); *Thompson v.*

General Consideration (Cont'd)

Thompson, 214 Ga. 618, 106 S.E.2d 788 (1959); Blakemore v. Blakemore, 217 Ga. 174, 121 S.E.2d 642 (1961); Blood v. Earnest, 217 Ga. 642, 123 S.E.2d 913 (1962); Adams v. State, 218 Ga. 130, 126 S.E.2d 624 (1962); Jordan v. Jordan, 218 Ga. 246, 127 S.E.2d 301 (1962); Cohen v. Sapp, 110 Ga. App. 413, 138 S.E.2d 749 (1964); Queen v. Ballew, 221 Ga. 1, 142 S.E.2d 841 (1965); Peck v. Shierling, 222 Ga. 60, 148 S.E.2d 491 (1966); Georgia Mut. Ins. Co. v. Nix, 113 Ga. App. 735, 149 S.E.2d 494 (1966); James v. Bowen, 224 Ga. 289, 161 S.E.2d 277 (1968); Ulm v. Westbrook, 230 Ga. 133, 196 S.E.2d 128 (1973); Ball v. State, 137 Ga. App. 333, 223 S.E.2d 743 (1976); Sanchez v. Walker County Dep't of Family & Children Servs., 237 Ga. 406, 229 S.E.2d 66 (1976); Quilloin v. Walcott, 238 Ga. 230, 232 S.E.2d 246 (1977); Conroy v. Jones, 238 Ga. 321, 232 S.E.2d 917 (1977); Derby v. Kim, 238 Ga. 429, 233 S.E.2d 156 (1977); Cox v. Mills, 238 Ga. 374, 233 S.E.2d 353 (1977); Skipper v. Smith, 239 Ga. 854, 238 S.E.2d 917 (1977); Whiteside v. Dickerson, 240 Ga. 54, 239 S.E.2d 377 (1977); Burton v. Daniel, 240 Ga. 805, 242 S.E.2d 586 (1978); Higbee v. Tuck, 242 Ga. 376, 249 S.E.2d 62 (1978); Fleming v. Reeves, 243 Ga. 411, 254 S.E.2d 362 (1979); Smith v. Houston, 244 Ga. 113, 259 S.E.2d 93 (1979); Bryant v. Wigley, 246 Ga. 155, 269 S.E.2d 418 (1980); Lewis v. Lewis, 154 Ga. App. 853, 269 S.E.2d 919 (1980); Hicks v. Fulton County Dep't of Family & Children Servs., 155 Ga. App. 1, 270 S.E.2d 254 (1980); McDaniel v. Bliss, 156 Ga. App. 166, 274 S.E.2d 138 (1980); Wright v. Hanson, 248 Ga. 523, 283 S.E.2d 882 (1981); Spires v. Lance, 167 Ga. App. 331, 306 S.E.2d 317 (1983); Edenfield v. Jackson, 251 Ga. 491, 306 S.E.2d 911 (1983); Reliance Ins. Co. v. Bridges, 168 Ga. App. 874, 311 S.E.2d 193 (1983); Sims v. Sims, 171 Ga. App. 99, 318 S.E.2d 805 (1984); Sutter v. Turner, 172 Ga. App. 777, 325 S.E.2d 384 (1984); In re M.A.F., 254 Ga. 748, 334 S.E.2d 668 (1985); In re A.W., 198 Ga. App. 391, 401 S.E.2d 560 (1991); Queen v. Carey, 210 Ga. App. 41, 435 S.E.2d 264 (1993); Stegman v. Horton Homes, Inc., 845 F. Supp. 1571 (M.D. Ga. 1994); Grantham v. Grantham,

224 Ga. App. 1, 479 S.E.2d 370 (1996); Stalvey v. Bates, 251 Ga. App. 895, 555 S.E.2d 477 (2001); Mason v. Ford Motor Co., 307 F.3d 1271 (11th Cir. 2002); In re Adoption of D.J.F.M., 284 Ga. App. 420, 643 S.E.2d 879 (2007); Morris v. Morris, 309 Ga. App. 387, 710 S.E.2d 601 (2011).

Contractual Relinquishment of Parental Rights

Parental consent required for contractual relinquishment of parental rights. — One parent cannot contract away custody of child to third party without other parent's consent. Foltz v. Foltz, 238 Ga. 193, 232 S.E.2d 66 (1977).

Since legal right to minor child was in mother, the court erred in granting custody to third parties on the ground that the father, who was first awarded custody but was deceased at the time of the mother's action for custody of the child, had given the child to third parties, that they had the child since, and were fit and proper parties to have custody, as custody could only be taken from the parent having the legal right thereto by showing that she had lost her parental rights under the statute, or by clear and satisfactory proof, that she was an unfit person to have custody. Peck v. Shierling, 222 Ga. 60, 148 S.E.2d 491 (1966), later appeal, 223 Ga. 1, 152 S.E.2d 868 (1967).

When mother gives away child and father acquiesces. — If mother gives her infant child to another, who takes and cares for the infant, and the father acquiesces in this disposition of the child, he is bound by the disposition. Eaves v. Fears, 131 Ga. 820, 64 S.E. 269 (1909); Manning v. Crawford, 8 Ga. App. 835, 70 S.E. 959 (1911).

Father's transfer of parental authority if wife is dead. — Ordinarily, a father may transfer and assign his parental authority if wife is dead. Lucas v. Smith, 201 Ga. 834, 41 S.E.2d 527 (1947).

Voluntary contract releasing parental rights must be clear, definite, and unambiguous. — When it is insisted that a parent has relinquished right to custody and control of minor child to third person by voluntary contract, a clear and strong case must be made, and terms of contract, to have effect of depriving

parent of control, should be clear, definite, and unambiguous. *Waldrup v. Crane*, 203 Ga. 388, 46 S.E.2d 919 (1948); *Rawdin v. Conner*, 210 Ga. 508, 81 S.E.2d 461 (1954); *Southern Ry. v. Neeley*, 101 Ga. App. 488, 114 S.E.2d 283 (1960).

While it is true that parental control may be lost by voluntary contract, terms of such contract must be clear, definite, and unambiguous. *Sailors v. Spainhour*, 98 Ga. App. 475, 106 S.E.2d 82 (1958).

Terms of contract must be definite and unambiguous and established by clear and satisfactory proof. *Shaddrix v. Womack*, 231 Ga. 628, 203 S.E.2d 225 (1974).

O.C.G.A. § 19-7-1 provides that parental power may be lost by voluntary contract, but the evidence must establish the clear, definite, and unambiguous terms of such a contract before a relinquishment of parental rights will be found. *Blackburn v. Blackburn*, 168 Ga. App. 66, 308 S.E.2d 193 (1983).

Contract by which parents lose control of minor child must be clear, definite, and certain. *Miller v. Wallace*, 76 Ga. 479, 2 Am. St. R. 48 (1886); *Looney v. Martin*, 123 Ga. 209, 51 S.E. 304 (1905); *Richards v. McHan*, 129 Ga. 275, 58 S.E. 839 (1907); *Manning v. Crawford*, 8 Ga. App. 835, 70 S.E. 959 (1911); *Broxton v. Fairfax*, 149 Ga. 122, 99 S.E. 292 (1919); *Saxon v. Brantley*, 174 Ga. 641, 163 S.E. 504 (1932).

It is not essential that evidence as to contract shall be undisputed. *Miller v. Wallace*, 76 Ga. 479, 2 Am. St. R. 48 (1886); *Looney v. Martin*, 123 Ga. 209, 51 S.E. 304 (1905); *Richards v. McHan*, 129 Ga. 275, 58 S.E. 839 (1907); *Manning v. Crawford*, 8 Ga. App. 835, 70 S.E. 959 (1911); *Broxton v. Fairfax*, 149 Ga. 122, 99 S.E. 292 (1919).

Parents' consent to adoption of child by sister has effect of transferring parental rights. *Jordan v. Smith*, 5 Ga. App. 559, 63 S.E. 595 (1909).

Consent to adoption cannot be revoked as a matter of right. — Parental power shall be lost by consenting to adoption of child by third person and such consent may not be revoked as a matter of right. *Smith v. Munday*, 228 Ga. 411, 185 S.E.2d 905 (1971).

Release of parental authority to another is not revocable absent some sufficient legal reason; a mere change in mind on the part of the parent consenting is not such legal cause as will revoke consent. *Sessions v. Oliver*, 204 Ga. 425, 50 S.E.2d 54 (1948).

Custodial parents do not have to prove mother unfit. — In an action by mother to set aside and/or vacate an order granting permanent custody of her minor child to her aunt and uncle, since the mother had surrendered parental rights by voluntary contract, the aunt and uncle were not required to plead and prove that she was an unfit parent. *Faulkenberry v. Elkins*, 213 Ga. App. 472, 445 S.E.2d 283 (1994).

Giving child to another who thereafter provides support and maintenance. — Gift of child by plaintiff mother to defendants and their acceptance, followed by their personal care of child and their expenditures for the child's support and maintenance, may constitute a relinquishment contract binding on the plaintiff. *Bogus v. Smith*, 219 Ga. 493, 133 S.E.2d 13 (1963).

Evidence sufficient to establish binding contract. — Documents executed by the biological mother granting "custody" of her child to the petitioner and allowing the petitioner to take her child for medical treatment were, alone, insufficient to establish a contract for the relinquishment of parental rights; however, this evidence, along with other evidence showing the biological mother's desire to sever the parental relation and throw off all obligations growing out of that relation, was more than sufficient to establish a binding relinquishment contract. *In re A.M.Y.*, 189 Ga. App. 847, 377 S.E.2d 893 (1989).

Agreement giving father custody is not relinquishment of mother's rights. — Custody agreement under which father is to have custody of child with right of mother to visit child at any time she desires and to have child visit her at any time and to have child in her home for visits does not amount to a relinquishment of the mother's rights to a third person within the meaning of the statute. *Land v. Wrobel*, 220 Ga. 260, 138 S.E.2d 315 (1964).

Contractual Relinquishment of Parental Rights (Cont'd)

Father's acquiescence in divorce decree awarding mother custody. — Acquiescence of father in divorce decree placing custody of child in mother would not serve as contract releasing right of parental power to third persons, nor could such evidence be used to show abandonment. *Howell v. Gossett*, 234 Ga. 145, 214 S.E.2d 882 (1975).

Contract of separation does not release parental rights. *McCarter v. McCarter*, 10 Ga. App. 754, 74 S.E. 308 (1912).

Relinquishment of rights acquired by grandparents. — Just as contract by which parent relinquishes rights to custody of child to grandparents must be clearly and unmistakably shown, so with equal clearness and certainty it must be made to appear that grandparents surrendered rights thus acquired. *Cannady v. Yawn*, 193 Ga. 270, 18 S.E.2d 461 (1942).

Contract relinquishing parental rights entered into after abandonment. — Mother who left newborn child covered with dirt and straw in woods had abandoned child prior to making of contract relied upon by plaintiff grandmother in seeking custody of the child, and the trial court did not err in awarding custody of the child to the defendants. *Benjamin v. Bush*, 208 Ga. 453, 67 S.E.2d 476 (1951).

Surrender of parental rights invalidated by failure of intended adoption. — When an intended adoption fails due to a lack of compliance with the adoption statutes, an alleged surrender of parental rights will not then be upheld under O.C.G.A. § 19-7-1(b)(1) as such a procedure would tend to vitiate the policies underlying the adoption statutes. *Johnson v. Smith*, 251 Ga. 1, 302 S.E.2d 542 (1983).

Guardianship represented to be temporary. — Parental rights are not voluntarily relinquished when guardianship at the time of the guardianship's creation was intended to be, or was represented to be, temporary in nature. *Hays v. Jeng*, 184 Ga. App. 157, 360 S.E.2d 913 (1987).

Best interests analysis required. — Trial court erroneously found that the

court had no discretion to consider whether the parties' agreement, voluntarily terminating the father's parental rights under O.C.G.A. § 19-7-1 as part of the divorce settlement, was in the best interests of the child; the trial court, which had authority under O.C.G.A. § 19-9-5(b) to reject a custody agreement as being against the child's best interests and which had authority under O.C.G.A. § 15-11-94(a) to ascertain whether a voluntary termination was in the child's best interests, was to reject the agreement if it was not in the child's best interests. *Taylor v. Taylor*, 280 Ga. 88, 623 S.E.2d 477 (2005).

Failure to Provide Necessaries or Abandonment

Parental power is lost by failure to provide necessaries for child. *Wigley v. Mobley*, 101 Ga. 124, 28 S.E. 640 (1897).

Restoration of lost parental power. — Parental power lost by failure to provide necessaries for child is restored by reconciliation and resumption of parental control. *Wigley v. Mobley*, 101 Ga. 124, 28 S.E. 640 (1897).

"Necessities of life" defined. — Phrase "the necessities of life" includes something more than mere food, clothing, and shelter. It includes, in addition to those elements, at least, provision for adequate medical attention reasonably necessary to restore a broken and diseased body to wholeness and to health. Failure to procure such medical attention when needed by a child, and when such failure is caused, not by ignorance, but by indifference, neglect, or negligence of the parent having custody, may amount to failure to provide necessities of life such as would authorize a finding that the parent has lost parental control as provided in statute. *West v. West*, 228 Ga. 397, 185 S.E.2d 763 (1971).

Forfeiture of parental rights for failure to support minor child. — Parent who willfully fails to support minor child forfeits parental rights, an incident of which is authority to object to adoption of child by another. *Sale v. Leachman*, 218 Ga. 834, 131 S.E.2d 185 (1963).

"Paltry" contribution not considered abandonment. — Mother who saw

her daughter four times over a four-year period, telephoned her mother-in-law's residence where her daughter often lived a total of 60 times, and telephoned her daughter's father's residence five times, although her contribution to her daughter may have been "paltry," did not abandon her daughter prior to her death; thus, the mother had not forfeited her parental rights and was the proper party to bring an action for her daughter's death when the daughter's father had also died in the same car accident which killed the daughter. *Jahn v. Wilson Freight Lines*, 793 F. Supp. 1083 (M.D. Ga. 1992), *aff'd*, 12 F.3d 219 (11th Cir. 1993).

Abandonment. — Parental right of custody and control may be lost by abandonment. *Benjamin v. Bush*, 208 Ga. 453, 67 S.E.2d 476 (1951).

Father lacked standing to recover for the child's wrongful death pursuant to O.C.G.A. §§ 19-7-1(c) and 51-4-4 as the father abandoned the child pursuant to O.C.G.A. § 19-7-1(b)(3); the father never supported the child, nor did the father ever visit the child in the many years after the child's hospitalization in infancy, there was no evidence that the father attempted to learn where the child resided in order to initiate visitation or support, and the father was obligated under O.C.G.A. § 19-7-2 to support the child, even though the divorce decree did not require it. *Baker v. Sweat*, 281 Ga. App. 863, 637 S.E.2d 474 (2006).

Proof required to show failure to provide necessities or abandonment.

— Loss of custody for failure to provide necessities requires clear and strong case. *Brown v. Newsome*, 192 Ga. 43, 14 S.E.2d 470 (1941); *Hill v. Rivers*, 200 Ga. 354, 37 S.E.2d 386 (1946); *Roebuck v. Calhoun*, 201 Ga. 496, 40 S.E.2d 142 (1946); *McClain v. Smith*, 207 Ga. 641, 63 S.E.2d 663 (1951); *Hale v. Henderson*, 210 Ga. 273, 79 S.E.2d 804 (1954); *Locke v. Grimes*, 211 Ga. 447, 86 S.E.2d 303 (1955).

When mother of child is dead, father has *prima facie* right of custody, and in order to sustain contention that he has lost his parental power by reason of failure to provide necessities for his child or by abandonment of his family, a clear and

strong case must be made. *Chambers v. Lee*, 215 Ga. 629, 112 S.E.2d 614 (1960).

Various expressions used to describe standard for finding abandonment or unfitness, "clear and strong," "clear and satisfactory," "substantial and convincing," and "clear and convincing" mean the same thing. *Miele v. Gregory*, 248 Ga. 93, 281 S.E.2d 565 (1981).

In order to find an abandonment, there must be sufficient evidence of an actual desertion, accompanied by the intention to sever entirely, as far as possible to do so, the parental relation, throw off all obligations growing out of the relationship, and forego all parental duties and claims. *In re S.H.*, 181 Ga. App. 438, 352 S.E.2d 621 (1987); *Hays v. Jeng*, 184 Ga. App. 157, 360 S.E.2d 913 (1987).

Mere delivery of custody of child to another is not sufficient to constitute abandonment. *Shaddrix v. Womack*, 231 Ga. 628, 203 S.E.2d 225 (1974).

Mother's surrender of physical custody of children to father. — Contention of father in suit by divorced wife for failure to pay alimony that she had abandoned the children by surrendering physical custody of children to him cannot be sustained, for reason that mother did not have custodial possession of children by reason of parental relation, but by reason of court decree. *Swain v. Wells*, 210 Ga. 394, 80 S.E.2d 321 (1954).

Mother relinquished her right to custody of her children by allowing paternal grandparents to have physical custody of the children over a period of several years and by failing during that period of time to provide necessary support for the children. *Tyner v. Tyner*, 170 Ga. App. 877, 318 S.E.2d 675 (1984).

When consent to adoption does not constitute abandonment. — Parents' consent to adoption of their child by third parties and delivery of child to the parties who keep, maintain, and support child without aid or assistance from natural parents, did not constitute abandonment of child within meaning of paragraph (b)(3) when, prior to final order of adoption, parents withdrew consent to adoption and reasserted rights to custody as natural parents. *Wheeler v. Howard*, 212 Ga. 553, 93 S.E.2d 723 (1956).

Failure to Provide Necessaries or Abandonment (Cont'd)

Long separation from child and remarriage constituted abandonment.

— When record shows separation of mother from father and child for a long period of years, and a divorce proceeding in which custody of child was given to father by voluntary action of mother, she stating that she could not control him, and her subsequent remarriage, this amounted to a forfeiture or abandonment of the child, and the father had right to give custody of child to third party. *Raily v. Smith*, 202 Ga. 185, 42 S.E.2d 491 (1947).

Failure to provide support for minor in another's custody. — Mere failure of parent to provide support for minor child when in possession or custody of other parent, a grandparent, or other person, when no support is requested or needed, is not such failure to provide necessities or such abandonment as will amount to relinquishment of the right to parental custody and control. *Rawdin v. Conner*, 210 Ga. 508, 81 S.E.2d 461 (1954); *McMillan v. McMillan*, 224 Ga. 790, 164 S.E.2d 839 (1968); *Shaddrix v. Womack*, 231 Ga. 628, 203 S.E.2d 225 (1974); *Howell v. Gossett*, 234 Ga. 145, 214 S.E.2d 882 (1975).

Right to recover for death of child by non-involved parent. — When a father and daughter died in the same car accident and the father had sole custody of the daughter at the time of her death, and no court ever required the mother to pay child support, even if the mother did not provide support for her daughter, her failure did not result in the loss of her parental rights and the mother had the right to recover for the wrongful death of her daughter. *Jahn v. Wilson Freight Lines*, 793 F. Supp. 1083 (M.D. Ga. 1992), *aff'd*, 12 F.3d 219 (11th Cir. 1993).

Proceeds of Child's Labor

Case law establishing action for loss of minor's services. — While case law in Georgia allows a cause of action for the parent's recovery for the loss of services of a minor child when such loss is caused by a negligent act, this is also reinforced by O.C.G.A. § 19-7-1(a), which

provides that, until the age of majority, the child shall be under the control of the parents, "who are entitled to his services and the proceeds of his labor." *Ireland Elec. Corp. v. Georgia Hwy. Express, Inc.*, 166 Ga. App. 150, 303 S.E.2d 497 (1983).

Presumption that parent is entitled to child's earnings must be overcome by proof of manumission. *Evans v. Caldwell*, 52 Ga. App. 475, 184 S.E. 440 (1936), *aff'd*, 184 Ga. 203, 190 S.E. 582 (1937).

Allowing child to receive proceeds of own labor amounts to emancipation. *Coleman v. Dublin Coca-Cola Bottling Co.*, 47 Ga. App. 369, 170 S.E. 549 (1933); *Evans v. Caldwell*, 52 Ga. App. 475, 184 S.E. 440 (1936), *aff'd*, 184 Ga. 203, 190 S.E. 582 (1937).

Working minor not necessarily manumitted. — Even when a parent should allow a child to engage in a particular employment and retain for the child the wages for the child's services rendered while so engaged, it by no means follows that the minor has been manumitted for the whole period of the minor's minority. *Hunt v. State*, 8 Ga. App. 374, 69 S.E. 42 (1910).

When emancipation may be only temporary and subject to revocation. — Emancipation may be only temporary by parent's express or implied consent, which consent may be revoked at any time for a particular employment, in which event it does not follow that the minor has been manumitted by the parent for the whole period of the minor's minority. *Evans v. Caldwell*, 52 Ga. App. 475, 184 S.E. 440 (1936), *aff'd*, 184 Ga. 203, 190 S.E. 582 (1937).

Parental consent may be express or implied. — Parent's consent to child's receipt of proceeds of own labor may be express or implied. *Baldwin v. Davis*, 188 Ga. 587, 4 S.E.2d 458 (1939).

Proof of parental consent. — Minor may prove conversations with mother relative to minor's receiving proceeds of own labor. *Coleman v. Dublin Coca-Cola Bottling Co.*, 47 Ga. App. 369, 170 S.E. 549 (1933).

Minor's assignment of wages to third person. — Minor cannot defeat parent's right to minor's wages by assigning those wages to a third person. South-

ern Ry. v. King Bros. & Co., 136 Ga. 173, 70 S.E. 1109 (1911).

Employer's burden of showing advances to minor were for necessities.

— Unless parental power has been lost or relinquished, a parent is entitled to value of services of the minor child, whether the contract for services is made by a parent or by the minor; and even as to advances or payments made by an employer to a minor for necessities, the burden is upon the employer to show that such were really necessary. *Royal v. Grant*, 5 Ga. App. 643, 63 S.E. 708 (1909).

Levy upon child's earnings. — Earnings which child is allowed to retain cannot be levied on as property of parent. *Ehrlich & Co. v. King*, 34 Ga. App. 787, 131 S.E. 524 (1926).

Parent loses right to proceeds of child's labor by abandonment. *Southern Ry. v. Flemister*, 120 Ga. 524, 48 S.E. 160 (1904); *Newton v. Cooper*, 13 Ga. App. 458, 79 S.E. 356 (1913).

Child who marries assumes inconsistent responsibilities which entitle the child to proceeds of own labor, and the child's parent is under no legal obligation to support the child. *Thompson v. Georgia Ry. & Power Co.*, 163 Ga. 598, 136 S.E. 895 (1927).

Unfitness of Parent

Determination of unfitness must be based on parent's present condition. *Bozeman v. Williams*, 248 Ga. 606, 285 S.E.2d 9 (1981).

Evidence adduced to prove parental unfitness must pertain to present rather than past misconduct. *In re M.M.A.*, 166 Ga. App. 620, 305 S.E.2d 139 (1983).

Method of depriving natural parent of child custody other than those enumerated in this statute was upon clear and satisfactory showing that parent was an unfit person to have such custody. *Patman v. Patman*, 231 Ga. 657, 203 S.E.2d 486 (1974).

Legal and parental right to custody is subject to challenge on ground of unfitness for trust. *Peck v. Shierling*, 222 Ga. 60, 148 S.E.2d 491 (1966), later appeal, 223 Ga. 1, 152 S.E.2d 868 (1967).

Finding of unfitness must be supported by clear and convincing evidence.

Mathis v. Nicholson, 244 Ga. 106, 259 S.E.2d 55 (1979); *Bozeman v. Williams*, 248 Ga. 606, 285 S.E.2d 9 (1981); *In re M.M.A.*, 166 Ga. App. 620, 305 S.E.2d 139 (1983).

Challenge to fitness must be by clear and satisfactory proofs, and for grave and substantial cause. *Perkins v. Courson*, 219 Ga. 611, 135 S.E.2d 388 (1964); *Peck v. Shierling*, 222 Ga. 60, 148 S.E.2d 491 (1966), later appeal, 223 Ga. 1, 152 S.E.2d 868 (1967).

Proof required to sustain challenge to parent's fitness. — Parent's prima facie right of custody of infant, when resisted upon ground of unfitness or other cause, must be established by clear and satisfactory proof. *Hill v. Rivers*, 200 Ga. 354, 37 S.E.2d 386 (1946).

Right to custody may be lost on ground of unfitness only if it is shown by clear and satisfactory proof that circumstances of case justify court in acting for best interest and welfare of child. *Bowman v. Bowman*, 234 Ga. 348, 216 S.E.2d 103 (1975).

Unfitness justifies court in acting for child's best interest. — Parent may lose right to custody if found to be unfit. Unfitness of parent should be shown by clear and convincing evidence that circumstances of case justify court in acting for best interest and welfare of child. *White v. Bryan*, 236 Ga. 349, 223 S.E.2d 710 (1976); *Childs v. Childs*, 237 Ga. 177, 227 S.E.2d 49 (1976), later appeal, 239 Ga. 304, 236 S.E.2d 646 (1977).

That child might have better financial, educational, or moral advantages elsewhere is insufficient. *Peck v. Shierling*, 222 Ga. 60, 148 S.E.2d 491 (1966), later appeal, 223 Ga. 1, 152 S.E.2d 868 (1967).

Parental fitness. — Fitness was not necessarily synonymous with absence of conduct penalized by former Code 1933, §§ 74-108-74-110 (see now O.C.G.A. §§ 19-7-1 and 19-7-4). Fact that parent had not forfeited or relinquished parental right by any of the modes of these sections did not establish parent as fit. *Perkins v. Courson*, 219 Ga. 611, 135 S.E.2d 388 (1964).

When appellate court will not upset finding that parent is unfit. — When controlling issue was whether or not the

Unfitness of Parent (Cont'd)

petitioners lost the right of parental power and control, evidence was in sharp conflict, and the trial judge resolved that conflict against the parent petitioners and awarded custody of the child to the respondent, the appellate court would not say that judge of the court below abused the judge's discretion. *Byers v. Loftis*, 208 Ga. 398, 67 S.E.2d 118 (1951).

When evidence amply authorizes, although it does not demand, finding that parent is not a fit and proper person to have custody of children and that it is in best interests and welfare of children that they be awarded to other person, appellate court will not substitute the court's judgment for that of trial judge, absent abuse of legal discretion. *Adams v. Kirkland*, 218 Ga. 512, 128 S.E.2d 730 (1962).

When the trial court makes a finding of parental unfitness, the appellate courts will ordinarily not interfere with that finding, absent an abuse of discretion. In *re M.M.A.*, 166 Ga. App. 620, 305 S.E.2d 139 (1983).

Emancipation of Minor

There are several ways for a minor to become emancipated. First, marriage emancipates. Additionally, emancipation may be shown by one of the grounds set out in O.C.G.A. § 19-7-1. *Street v. Cobb County Sch. Dist.*, 520 F. Supp. 1170 (N.D. Ga. 1981).

Unemancipated minors are subject to power of parent or guardian, but emancipated minors are not. *Street v. Cobb County Sch. Dist.*, 520 F. Supp. 1170 (N.D. Ga. 1981).

Custody**1. In General**

Clear and strong case must exist to justify disturbing natural ties between parent and child. *Woods v. Martin*, 212 Ga. 405, 93 S.E.2d 339 (1956).

Probate letters of guardianship did not impact jurisdiction. — Paternal grandmother's letters of temporary guardianship that were issued by a pro-

bate court did not foreclose a maternal grandmother's filing of a petition for permanent custody, and did not serve as a tool to dismiss the ongoing custody proceeding; the letters had no impact on the trial court's jurisdiction to entertain the custody petition. *Barfield v. Butterworth*, 323 Ga. App. 156, 746 S.E.2d 819 (2013).

Circumstances under which court may sever parent-child custodial relationship. — Only under compelling circumstances, established by clear and convincing proof, may court sever parent-child custodial relationship. *Carvalho v. Lewis*, 247 Ga. 94, 274 S.E.2d 471 (1981); *Blackburn v. Blackburn*, 249 Ga. 689, 292 S.E.2d 821 (1982).

Parent was entitled to custody and control of children until majority unless such power was forfeited as prescribed by statute. *Gaskins v. Beasley*, 216 Ga. 19, 114 S.E.2d 373 (1960).

Abandonment is a statutory ground for forfeiture of parental right to custody and control of minor child. *Miele v. Gregory*, 248 Ga. 93, 281 S.E.2d 565 (1981).

Parental right to custody subservient to child's safety. — Legal right of parent to custody of child is subservient to child's interest or safety, and to duty of state to protect the state's citizens of whatever age. *Hill v. Rivers*, 200 Ga. 354, 37 S.E.2d 386 (1946).

Forfeiture of parental rights not prerequisite to change of custody award. — In order to change award of custody, trial court does not necessarily have to find that legal custodian has forfeited parental rights under former Code 1933, §§ 74-108 - 74-110 (see now O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4), but must find either that the original custodian was no longer able or suited to retain custody, or that the conditions and the circumstances surrounding the child have so changed that the child's welfare would be enhanced by modifying the original judgment. *Bell v. Bell*, 154 Ga. App. 290, 267 S.E.2d 894 (1980).

To change award of custody does not require finding that legal custodian has forfeited parental rights under former Code 1933, §§ 74-108 - 74-110 (see now O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4).

Dearman v. Rhoden, 235 Ga. 457, 219 S.E.2d 704 (1975).

When parent may lose right to custody. — Parent may lose right to custody only if one of the conditions specified in former Code 1933, §§ 74-108-74-110 (see now O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4) was found to exist, or, in exceptional cases, if the parent was found to be unfit. *Byers v. Loftis*, 208 Ga. 398, 67 S.E.2d 118 (1951); *Bowman v. Bowman*, 234 Ga. 348, 216 S.E.2d 103 (1975); *Childs v. Childs*, 237 Ga. 177, 227 S.E.2d 49 (1976), later appeal, 239 Ga. 304, 236 S.E.2d 646 (1977); *Mathis v. Nicholson*, 244 Ga. 106, 259 S.E.2d 55 (1979); *Larson v. Gambrell*, 157 Ga. App. 193, 276 S.E.2d 686 (1981).

Parental right to custody may be lost in habeas proceeding if one of conditions specified in O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4 is found to exist, or if parent is found to be unfit. *Miele v. Gregory*, 248 Ga. 93, 281 S.E.2d 565 (1981).

Right to custody may be lost by voluntary contract. — Right to custody may be lost under O.C.G.A. § 19-7-1 if the parent has forfeited his or her right to parental powers by releasing this right to a third person by voluntary contract. This voluntary contractual release of custody must be clear, definite, and unambiguous. *Bozeman v. Williams*, 248 Ga. 606, 285 S.E.2d 9 (1981).

Voluntary consent to adoption and subsequent failure to provide necessities forfeits right of custody. *Sessions v. Oliver*, 204 Ga. 425, 50 S.E.2d 54 (1948).

When parent must be made party to proceeding. — Parent must be made party to proceeding to remove parent as natural guardian of child, and parent must be served with notice, otherwise the proceeding is void as depriving the parent of parental control without due process of law, and after the parent has been removed and there is no longer a natural guardian, the judge of probate court's jurisdiction to appoint arises. *Whitlock v. Barrett*, 158 Ga. App. 100, 279 S.E.2d 244 (1981).

Effect of legitimation upon parent's standing as to custody. — Upon legitimation, father stands in same position as any other parent as to custody being sub-

ject to challenge for good and legal cause. *Sims v. Pope*, 228 Ga. 289, 185 S.E.2d 80 (1971).

Child's legitimization does not immunize father from challenges to custody. — Legitimization of child does not ipso facto immunize father from challenges to custody upon proper showing that children should be removed from his custody. *Sims v. Pope*, 228 Ga. 289, 185 S.E.2d 80 (1971).

Person to whom parent relinquishes child, if suitable to have custody, is entitled thereto. *Saxon v. Brantley*, 174 Ga. 641, 163 S.E. 504 (1932).

Evidence of past unfitness, standing alone, is insufficient to terminate the rights of a parent in his natural child; clear and convincing evidence of present unfitness is required. *Blackburn v. Blackburn*, 249 Ga. 689, 292 S.E.2d 821 (1982).

Review of custody award in divorce action. — On appeal in an action for divorce, the court will affirm the award of custody if there exists "any evidence" in the record to support the trial court's decision. *Blackburn v. Blackburn*, 249 Ga. 689, 292 S.E.2d 821 (1982).

On review of an award of custody to a third party, the reviewing court is to defer to the lower court in the area of factfinding and should affirm unless the "rational factfinder" test of *Blackburn v. Blackburn*, 249 Ga. 689, 292 S.E.2d 821 (1982) is not met. *In re B.D.C.*, 256 Ga. 511, 350 S.E.2d 444 (1986); *In re S.H.*, 181 Ga. App. 438, 352 S.E.2d 621 (1987).

Review of award to third party. — On review, the award of custody to a third party will be affirmed only if there is "reasonable evidence" to support the award. *Blackburn v. Blackburn*, 249 Ga. 689, 292 S.E.2d 821 (1982).

Custody dispute if neither relative is a parent. — O.C.G.A. § 19-7-1(b.1) did not apply in a custody dispute between a grandmother and an uncle of the child. *Stills v. Johnson*, 272 Ga. 645, 533 S.E.2d 695 (2000).

Voluntary release of parental power. — In a custody dispute between the paternal grandmother and the maternal uncle of a child, where neither relative is a parent as defined by Georgia law, and

Custody (Cont'd)**1. In General (Cont'd)**

the child's parent has transferred "parental power" to the grandmother pursuant to O.C.G.A. § 19-7-1(b)(1), custody is to be governed by the standard of best interest of the child. *Stills v. Johnson*, 272 Ga. 645, 533 S.E.2d 695 (2000).

2. Custody Rights as Between Parents

When court may determine which parent is more suitable. — Only in custody disputes between parents may court determine which party is more suitable to be awarded custody, this being the so-called "best interest of child" test. *Carvalho v. Lewis*, 247 Ga. 94, 274 S.E.2d 471 (1981).

In dispute between two "fit" parents, child's best interests control. — When case involves two "fit" parents, the law contemplates that child be awarded to parent in whose custody the child's best interests will be served. *Larson v. Gambrell*, 157 Ga. App. 193, 276 S.E.2d 686 (1981).

Upon forfeiture by mother of prima facie right of custody, such right inures to father. *Hill v. Rivers*, 200 Ga. 354, 37 S.E.2d 386 (1946).

Father's forfeiture of custody vests custody in mother. — Upon forfeiture of custody by father, who had been awarded custody by divorce decree, prima facie right of custody automatically and immediately vests in mother. *Sessions v. Oliver*, 204 Ga. 425, 50 S.E.2d 54 (1948).

Forfeiture of custody by parent's actions. — Right of custody pursuant to divorce decree may be forfeited by parent's actions subsequent to rendition of decree. *Sessions v. Oliver*, 204 Ga. 425, 50 S.E.2d 54 (1948).

When parent having custody dies. — When parent having custody dies, legal custody reverts to other parent unless the other parent had lost parental rights as provided under former Code 1933, § 74-108, or was shown to be presently unfit. *Porter v. Johnson*, 242 Ga. 188, 249 S.E.2d 608 (1978).

On death of parent having custody of child under divorce decree, right to cus-

tody automatically inures to surviving parent. *Raily v. Smith*, 202 Ga. 185, 42 S.E.2d 491 (1947).

In suit by father for custody of child against child's stepfather, the mother having died, prima facie right to custody is in father, and should not be overturned absent strong case as to welfare of child so as to authorize award of child to stepfather. *Chapin v. Cummings*, 191 Ga. 408, 12 S.E.2d 312 (1940).

On death of parent having custody of child under divorce decree, right to custody automatically inures to surviving parent. *Raily v. Smith*, 202 Ga. 185, 42 S.E.2d 491 (1947).

When parent having custody dies, legal custody reverts to other parent unless the other parent had lost parental rights as provided under former Code 1933, § 74-108, or was shown to be presently unfit. *Porter v. Johnson*, 242 Ga. 188, 249 S.E.2d 608 (1978).

Upon death of mother having lawful custody, prima facie right of custody inures to father. In such circumstances, the father's right to custody could only be lost upon one of the grounds enumerated in former Code 1933, §§ 74-108 - 74-110 (see now O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4). *Hill v. Rivers*, 200 Ga. 354, 37 S.E.2d 386 (1946); *Baynes v. Cowart*, 209 Ga. 376, 72 S.E.2d 716 (1952); *Hale v. Henderson*, 210 Ga. 273, 79 S.E.2d 804 (1954); *Jackson v. Dunn*, 158 Ga. App. 194, 279 S.E.2d 514 (1981).

Surviving parent is prima facie entitled to custody of his or her child. *Miele v. Gregory*, 248 Ga. 93, 281 S.E.2d 565 (1981).

Abandonment must be shown by more than a preponderance of the evidence. When mother of child is dead, father has prima facie right of custody, and in order to sustain contention that he has lost parental power by reason of failure to provide necessities for his child or by abandonment of his family, a clear and strong case must be made. *Miele v. Gregory*, 248 Ga. 93, 281 S.E.2d 565 (1981).

Adopting parent on equal footing as biological. — Reading O.C.G.A. § 19-7-1(b.1) in pari materia with the Georgia statutes granting adoptive parents rights and obligations equal to those

of a biological parent, the Supreme Court of Georgia concludes that for a court to award custody to an adoptive parent over a biological parent, only the statutory showing is required. *Hastings v. Hastings*, 291 Ga. 782, 732 S.E.2d 272 (2012).

3. Custody Rights as Between Parents and Third Parties

Findings required. — Trial court's order awarding custody of a child to the maternal grandmother apparently based on the best interests of the child and unfitness of the mother was remanded because the order did not contain findings to substantiate these potentially conflicting conclusions of law. *Grantham v. Grantham*, 269 Ga. 413, 499 S.E.2d 67 (1998).

Appellate court reversed the trial court's judgment awarding custody of a father's daughters to the daughters' grandmother because the trial court did not find that awarding custody to the father, who legitimized his daughters after he learned that their mother had died, would harm the children physically or emotionally. *Jones v. Burks*, 267 Ga. App. 390, 599 S.E.2d 322 (2004).

When right to custody cannot be legally challenged by third persons. — Unless parental control has been lost by one or more of the ways prescribed by statute, parent's prima facie right to custody and control of minor child as against claims of third persons was not subject to legal challenge. *Waldrup v. Crane*, 203 Ga. 388, 46 S.E.2d 919 (1948); *Woods v. Martin*, 212 Ga. 405, 93 S.E.2d 339 (1956); *Mills v. Mills*, 218 Ga. 686, 130 S.E.2d 221 (1963).

O.C.G.A. § 19-7-1(b.1) is constitutional as applied to custody disputes between a noncustodial parent and a third party, and the best interest standard means that the third party has to prove by clear and convincing evidence that the child would suffer physical or emotional harm if custody were awarded to the biological parent, and once the showing is made, the third party has to show that a custody award to the third party would promote the child's welfare and happiness. *Clark v. Wade*, 273 Ga. 587, 544 S.E.2d 99 (2001).

As between natural parents and strangers, prima facie right to custody is in parents. *Rodale v. Grimes*, 211 Ga. 674, 87 S.E.2d 857 (1955).

Parent should not be deprived of custody absent strong evidence indicating child's welfare demands it; but on the other hand, child should not be arbitrarily required to remain under intolerable custody and control of unfit person, even the father. *Harper v. Ballensinger*, 121 Ga. App. 390, 174 S.E.2d 182, rev'd in part on other grounds, 226 Ga. 828, 177 S.E.2d 693 (1970).

Natural parent prevails over third party unless parent has lost parental rights or is unfit. — In contest between parent and third party over custody of child, unless parental control has been lost, parent has prima facie right of custody. *Dornburg v. McKellar*, 204 Ga. 189, 48 S.E.2d 820 (1948); *West v. West*, 228 Ga. 397, 185 S.E.2d 763 (1971).

Mother within definition of former Code 1933, § 74-203 (see now O.C.G.A. § 19-7-25) cannot be denied custody of child at habeas corpus proceeding against third parties unless it was shown that parental power was lost under provisions of former Code 1933, §§ 74-108 - 74-110 (see now O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4), or that the parent was shown to be unfit. *Pettiford v. Mott*, 230 Ga. 692, 198 S.E.2d 662 (1973).

In dispute between natural parent and third party, court must award custody of child to parent unless parent has lost parental prerogatives or was unfit. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 547 F.2d 835 (5th Cir. 1977), rev'd on other grounds en banc, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910, 98 S. Ct. 3103, 57 L. Ed. 2d 1141 (1978).

In contest between parent and third party over custody of child, parent may lose the right to custody only if one of the conditions specified in O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4 is found to exist, or, in exceptional cases, if parent is found to be unfit. *Bozeman v. Williams*, 248 Ga. 606, 285 S.E.2d 9 (1981).

As between natural parent and third party (grandparent), parent can be deprived of custody only if one of the condi-

Custody (Cont'd)**3. Custody Rights as Between Parents and Third Parties (Cont'd)**

tions specified in O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4 or one of the other legal grounds (O.C.G.A. §§ 15-11-2(8) and 15-11-81) is found to exist by clear and convincing evidence. *Brant v. Bazemore*, 159 Ga. App. 659, 284 S.E.2d 674 (1981).

For a third party to prevail in obtaining custody in a contest with the surviving parent, clear and convincing evidence that the parent has lost the right to parental custody and control by abandonment or some other legal ground must be presented. *In re S.H.*, 181 Ga. App. 438, 352 S.E.2d 621 (1987).

When a third party sues the custodial parent to obtain custody of a child and to terminate the parent's custodial rights to the child, the parent is entitled to custody of the child unless the third party shows by "clear and convincing evidence" that the parent is unfit or otherwise not entitled to custody under O.C.G.A. §§ 19-7-1 and 19-7-4. *Heath v. McGuire*, 167 Ga. App. 489, 306 S.E.2d 741 (1983); *In re C.T.L.*, 182 Ga. App. 845, 357 S.E.2d 298 (1987); *Larson v. Larson*, 192 Ga. App. 163, 384 S.E.2d 193 (1989).

Presumption of parental custody does not apply when parent is found unfit. — Although O.C.G.A. § 19-7-1(b.1) establishes a rebuttable presumption that parental custody is always in the child's best interest, thus favoring the biological parent over a third party, the presumption does not apply in favor of a parent who has already been found to be unfit by the juvenile court. *In re J. N.*, 302 Ga. App. 631, 691 S.E.2d 396 (2010).

Dispute between parent and third party. — In custody dispute between parent and third party, trial court must first make determination as to whether parent has lost his or her rights under O.C.G.A. § 19-7-1 or that parent is unfit pursuant to case law. *Carvalho v. Lewis*, 247 Ga. 94, 274 S.E.2d 471 (1981).

Since a previous visitation order related to the grandparent's right to visitation, not custody, and the legal issues to be decided varied, the trial court properly determined that *res judicata* did not bar

the grandparents' petition for custody under the Uniform Child Jurisdiction and Custody Act, O.C.G.A. § 19-9-40 et seq.; the Act does not provide that the judgment is conclusive as to all issues which could have been put in issue. *Scott v. Scott*, 311 Ga. App. 726, 716 S.E.2d 809 (2011).

Custody dispute following murder of one parent by other parent. — Trial court erroneously concluded that grandparents' petition seeking custody of a mother's children failed to state a claim because the custody petition gave fair notice that the grandparents sought custody of the child under O.C.G.A. §§ 19-7-1(b.1) and 19-9-2 based upon the mother's alleged murder of the father; those allegations were sufficient to survive a motion to dismiss. *Scott v. Scott*, 311 Ga. App. 726, 716 S.E.2d 809 (2011).

In a Georgia action to modify an Alaska child custody determination, which was entered pursuant to an agreement of the parties, the Georgia trial court did not apply the correct best interest of the child standard of proof under O.C.G.A. § 19-7-1(b.1), and instead erroneously placed the Durden standard of proof on the mother. The Durden standard did not apply because there had not been a permanent award of custody to a third party made pursuant to an evidentiary hearing with specific findings by clear and convincing evidence of present parental unfitness. *Lopez v. Olson*, 314 Ga. App. 533, 724 S.E.2d 837 (2012).

Although implicit in the trial court's order is a finding that the children would suffer harm in the custody of the father, it was not apparent whether the trial court made the requisite determination that the children would suffer either physical harm or significant, long-term emotional harm as required and it was also unclear whether the trial court considered the four factors set forth in *Clark v. Wade*, 273 Ga. 587 (2001) with regard to custody determinations in cases in which certain third-party relatives seek custody from parents. *Floyd v. Gibson*, 331 Ga. App. 301, 771 S.E.2d 12 (2015).

Award of joint custody to third party. — Georgia law does not preclude an award of joint custody to a third party

by the trial court upon the consent of the parent to such an arrangement or upon a waiver by such parent of constitutionally protected parental rights, provided that the trial court determines that the award is in the best interest of the child. *Weiss v. Varnadore*, 246 Ga. App. 654, 541 S.E.2d 448 (2000).

Because the trial court applied the correct legal standard in O.C.G.A. § 19-7-1(b.1) in finding that the natural parent presumption was rebutted and that awarding custody to the grandparents was in the child's best interests, and because the grandparents were properly permitted to intervene under O.C.G.A. § 9-11-24(a)(2), the mother was not entitled to appellate relief. *Trotter v. Ayres*, 315 Ga. App. 7, 726 S.E.2d 424 (2012), cert. denied, No. S12C1206, 2012 Ga. LEXIS 666 (Ga. 2012).

First question is whether parental control lost. — In contest between parent and third party over custody of minor child, first question to be determined is whether or not parental control has been lost. *Morris v. Grant*, 196 Ga. 692, 27 S.E.2d 295 (1943); *Dornberg v. McKellar*, 204 Ga. 289, 48 S.E.2d 820 (1948); *Byers v. Loftis*, 208 Ga. 398, 67 S.E.2d 118 (1951); *Morrison v. Morrison*, 212 Ga. 48, 90 S.E.2d 402 (1955); *West v. West*, 228 Ga. 397, 185 S.E.2d 763 (1971).

Differing standards in visitation and custody issues. — Trial court properly determined that collateral estoppel did not bar the grandparents' petition for custody of a mother's children because different issues were actually and necessarily decided in the grandparents' visitation action; in the visitation action, the issues were harm to the child if visitation was not granted and whether visitation would be in the best interest of the children, and in the custody action, the issues were whether the children would suffer physical or emotional harm if custody remained with the mother. *Scott v. Scott*, 311 Ga. App. 726, 716 S.E.2d 809 (2011).

Standard is child's best interest when deciding between grandparents. — Maternal grandmother's petition for custody over a child, which also involved the paternal grandmother due to her intervention in the matter after secur-

ing letters of temporary guardianship, involved a determination as to what was in the child's best interest. *Barfield v. Butterworth*, 323 Ga. App. 156, 746 S.E.2d 819 (2013).

Placement with grandparents inappropriate. — Superior court erred in granting permanent custody of the mother's three minor children to their maternal grandparents because the children would not suffer physical or significant, long-term emotional harm if custody was awarded to the mother, and the grandparents failed to present sufficient evidence to overcome the mother's presumptive right to custody of the children as the mother had a job and was entitled to a share of the monthly income earned by the family partnership; the mother received treatment for a bipolar disorder; the mother had maintained a strong bond with the children; and there was no evidence that the mother would fail to address the children's psychological issues or fail to provide the type of environment the children needed. *Strickland v. Strickland*, 330 Ga. App. 879, 769 S.E.2d 607 (2015).

Legal father without custody rights. — Because the juvenile court erred in the court's application of O.C.G.A. § 19-7-1(b.1), as a child's legal father was not one of the limited number of related third parties who could seek custody from a legal parent, and in light of the superior court's grant of a legitimation petition to the child's biological father, which the legal father did not challenge by way of an appeal, the legal father lacked standing to challenge the biological father's custody under present Georgia law, and therefore no longer had rights to the custody of the child. *In the Interest of C.L.*, 284 Ga. App. 674, 644 S.E.2d 530 (2007).

Natural parents will be awarded custody unless present unfitness is established by clear and convincing evidence at hearing on permanent custody. Only then is trial court authorized to consider award of custody to third parties. *Childs v. Childs*, 237 Ga. 177, 227 S.E.2d 49 (1976), later appeal, 239 Ga. 304, 236 S.E.2d 646 (1977).

When surviving parent sues to obtain custody of his or her minor child from

Custody (Cont'd)**3. Custody Rights as Between Parents and Third Parties (Cont'd)**

third party who has physical, but not legal, custody of child, parent is entitled to custody unless it is shown by clear and convincing evidence that parent has lost parent's right to parental custody and control by abandonment of child or other legal ground. *Miele v. Gregory*, 248 Ga. 93, 281 S.E.2d 565 (1981).

When duty and control is lost or alienated to a third person by any of the means recognized by law, then such third person stands in loco parentis to the child, and parental power remains in the third party until the child reaches majority, unless the third party loses or forfeits the right to custody or becomes unfit for retaining custody. *In re M.A.F.*, 254 Ga. 748, 334 S.E.2d 668 (1985).

Presumption that it is in child's best interest to be with parent. — While in child custody case welfare of child is always the law's paramount concern, the law presumes that it is in child's best interest to be with his parent if parent is not unfit to be child's custodian. *Larson v. Gambrell*, 157 Ga. App. 193, 276 S.E.2d 686 (1981).

When presumption must be rebutted. — Before custody of child may be awarded to third party, presumption that it will be in child's best interest to be with parent must be rebutted by clear and convincing evidence showing that parent is unfit to be awarded custody. *Larson v. Gambrell*, 157 Ga. App. 193, 276 S.E.2d 686 (1981).

When contemplating taking custody of a minor child from the child's parent or parents and awarding custody to a third party, the court must initially face the presumption, firmly embedded in the law, that it is in the child's best interest to be with the child's natural parent or parents. In order for this presumption to be overcome, there must be a clear and convincing showing that the child is abandoned, deprived, or abused, or that the parent is unfit to receive or retain custody. *In re M.M.A.*, 166 Ga. App. 620, 305 S.E.2d 139 (1983).

Discretion exercised in favor of party having legal right. — Discretion

vested in trial judge with respect to award of custody of minor children ought to be exercised in favor of party having legal right, unless circumstances of case and precedents established would justify court, acting for welfare of child, in refusing it. *Lucas v. Smith*, 201 Ga. 834, 41 S.E.2d 527 (1947).

Trial court was vested with discretion in determining to whom custody shall be given. Such discretion should be governed by rules of law, and be exercised in favor of party having prima facie legal right to custody of child unless evidence showed that such person had lost right to custody through one of the ways recognized in former Code 1933, §§ 74-108-74-110 (see now O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4), or through unfitness. *Triplett v. Elder*, 234 Ga. 243, 215 S.E.2d 247 (1975).

One with legal right prevails if other factors equal. — In contest between two parties, both of whom are fit and proper persons, the one having the legal right should prevail. *Saxon v. Brantley*, 174 Ga. 641, 163 S.E. 504 (1932); *Camp v. Bookman*, 204 Ga. 670, 51 S.E.2d 391 (1949).

When neither party has legal right, one having strongest moral claims should prevail. *Camp v. Bookman*, 204 Ga. 670, 51 S.E.2d 391 (1949).

Regardless of parties, welfare of child is controlling factor. *Camp v. Bookman*, 204 Ga. 670, 51 S.E.2d 391 (1949).

Expert opinion of psychologist weighed in considerations. — There was a real threat of emotional harm to a child if the child were returned to the mother based on testimony of the guardian ad litem, who conferred with a psychologist; the child would suffer emotional harm if returned to the mother and the child would continue to need psychological treatment until adulthood; the latter prognosis applied even if the child remained with the grandmother, but it was a reasonable inference that the child's need for long term psychological therapy would be even greater if custody were transferred to the mother. *Lively v. Bowen*, 272 Ga. App. 479, 612 S.E.2d 625 (2005).

Court's discretion when parental rights have been lost. — While former

Code 1933, § 50-121 (see now O.C.G.A. § 9-14-2) stated that court may exercise discretion as to whom custody shall be given, that section can apply only when the parent had lost the right of control and custody. *Morris v. Grant*, 196 Ga. 692, 27 S.E.2d 295 (1943); *Baynes v. Cowart*, 209 Ga. 376, 72 S.E.2d 716 (1952); *Woods v. Martin*, 212 Ga. 405, 93 S.E.2d 339 (1956).

If either parent is a proper and suitable person and has not surrendered his or her parental right of custody, it is an abuse of discretion to award minor child to third parties over claim of such parent. *Camp v. Bookman*, 204 Ga. 670, 51 S.E.2d 391 (1949).

Trial court is vested with discretion in determining to whom child's custody shall be given. Such discretion should be governed by rules of law, and be exercised in favor of party having prima facie legal right to custody of child unless evidence showed that such person had lost right to custody through one of the ways recognized in former Code 1933, §§ 74-108 - 74-110 (see now O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4), or through unfitness. *Williams v. Ferrell*, 231 Ga. 470, 202 S.E.2d 427 (1973).

No discretion to award custody to stepfather. — It was error for a trial court to award a child's legal and physical custody to the child's stepfather because: (1) the child's mother was permitted to exercise all parental power over the child since the child's father had not legitimated the child under O.C.G.A. § 19-7-22; (2) the stepfather had not adopted the child; and (3) as a result, the stepfather did not have the same status as any of the nonparents specified in O.C.G.A. § 19-7-1(b.1), leaving the trial court with no discretion to award the child's custody to the stepfather. *Phillips v. Phillips*, 316 Ga. App. 829, 730 S.E.2d 548 (2012).

Contest between father of illegitimate child and third persons to whom mother relinquished control. See *Day v. Hatton*, 210 Ga. 749, 83 S.E.2d 6 (1954).

Parent's ability to raise child may not be compared to superior fitness of third person; that ability must be examined in a scrutinous, abstract light. *Carvalho v. Lewis*, 247 Ga. 94, 274 S.E.2d 471 (1981).

Father's youth and poor work habits. — Court's finding that the father is too young to care for the children and that he is "somewhat delinquent in his work habits" cannot be said to constitute "grave and substantial cause" for awarding custody to the third party on the ground of unfitness. *Bowman v. Bowman*, 234 Ga. 348, 216 S.E.2d 103 (1975).

Award of custody to person who had cared for child. — In habeas corpus proceedings brought by parents, the trial court did not abuse the court's discretion in awarding custody of ten-year-old child to party who had cared for her since age of 11 months without remuneration. *Byers v. Loftis*, 208 Ga. 398, 67 S.E.2d 118 (1951).

Effect of changed circumstances on award of child custody to third person in habeas proceeding. See *Moody v. Pike*, 200 Ga. 243, 36 S.E.2d 752 (1946).

Application of best interests standard error in third party suit. — When a third party sues the natural custodial parent for custody of the child, the trial court errs in applying the "best interests of the child" standard. In such a case, the parent is entitled to custody of the child unless the third party shows by "clear and convincing evidence" that the parent is unfit or otherwise not entitled to custody under O.C.G.A. §§ 19-7-1 and 19-7-4. In re *J.C.P.*, 167 Ga. App. 572, 307 S.E.2d 1 (1983). But see In re *A.W.*, 240 Ga. App. 259, 523 S.E.2d 88 (1999).

Possibility that a child may receive superior influences or amenities in third-party custody is insufficient to justify taking the child from the child's natural parents. In re *M.M.A.*, 166 Ga. App. 620, 305 S.E.2d 139 (1983).

Effect of awarding permanent custody to third party. — When a parent was a party to a proceeding in which his or her right to custody was lost and custody was permanently awarded to a third party, the third party, and not the parent, has a prima facie right to custody. *Durden v. Barron*, 249 Ga. 686, 290 S.E.2d 923 (1982).

When a third party has been awarded permanent custody of a child in a court proceeding to which the parent was a party, the parent may not obtain custody by showing a change of conditions affect-

Custody (Cont'd)**3. Custody Rights as Between Parents and Third Parties (Cont'd)**

ing the welfare of the child. *Durden v. Barron*, 249 Ga. 686, 290 S.E.2d 923 (1982).

Surviving parent who had failed to provide necessities. — When the father had both negligently and willfully failed to fulfill his statutory duty to provide “the necessities” for his minor children but no proceeding to establish abandonment, unfitness, or forfeiture of rights was instituted prior to the mother’s death, the statutory provision of O.C.G.A. § 19-9-2, which gives custody to the surviving parent absent a contrary judicial holding based on strong, clear, and convincing evidence, was probably operative at the time of the mother’s death, and the father at that time became, and continued to be, the children’s legal custodian. *Harper v. Landers*, 180 Ga. App. 154, 348 S.E.2d 698 (1986).

Opportunity to question guardian ad litem during custody proceeding. — Trial court erred in depriving one parent and grandparent of the opportunity to question the guardian ad litem regarding the results of an investigation as the burden was theirs to establish that the child would be harmed if returned to the other parent and that it was in the best interest of the child to remain with the grandparent. Thus, the trial court’s order deprived them of the opportunity to establish facts in support of their position that the child should remain in the grandparent’s custody. *Simmons v. Williams*, 290 Ga. App. 644, 660 S.E.2d 435 (2008).

Failure to make finding of harm in custody dispute between father and grandparent. — In a custody dispute between a child’s father and grandmother, it was error under O.C.G.A. § 19-7-1(b.1) to award custody to the grandmother without finding that custody in the father would cause physical or long-term emotional harm to the child. The trial court’s conclusory statement that in the court’s experience, a move from Georgia would be detrimental to the child was insufficient to justify the denial of parental custody. *Galtieri v. O’Dell*, 295 Ga. App. 797, 673 S.E.2d 300 (2009).

Placement with grandparents appropriate. — There was clear and convincing evidence that a child would suffer physical and emotional harm if placed with either biological parent, as required by O.C.G.A. § 19-7-1(b.1), based on the presence of drugs, alcohol, violence, arrests in the home, and the mother’s failure to send the child to kindergarten, allowing placement of the child with the child’s grandparents. *Harris v. Snelgrove*, 290 Ga. 181, 718 S.E.2d 300 (2011).

Joint placement with grandparents and father appropriate. — Award of custody to the father and the paternal grandparents was supported by evidence that the child had significant mental health issues, many of which were the result of the high conflict between the mother and the father, and that the mother promoted the conflict by the mother’s efforts to alienate the child from the father and the father’s family, the mother failed to set limits or discipline the child, and the mother failed to recognize or deal with the child’s disruptive behavior. *Mauldin v. Mauldin*, 322 Ga. App. 507, 745 S.E.2d 754 (2013).

Tort Recovery**1. Intrafamily Immunity**

Immunity from tort liability was personal to parent and may not be relied on by another as shield to avoid liability. *Barnwell v. Cordle*, 438 F.2d 236 (5th Cir. 1971).

Policies underlying parental tort immunity. — Unemancipated minor cannot maintain action against parent for personal injuries caused by latter’s negligence on principal ground that maintenance of such action would be unduly detrimental to authority and obligations of parent with respect to parent’s children as expressly provided for in positive statutory law of Georgia, but also on grounds of preventing fraud, harassment, and preserving financial integrity of the family. *Barnwell v. Cordle*, 438 F.2d 236 (5th Cir. 1971).

Parent’s tort immunity was not absolute, but was limited by public policy regarding parental authority. *Barnwell v. Cordle*, 438 F.2d 236 (5th Cir. 1971).

Statute contained dividing line between liability and no liability in tort cases; if parent should so violate parent's obligations as to work a forfeiture of parent's right of control, as by cruelty or otherwise, and child sustained injury thereby, child may maintain action against parent for legal wrong thus committed. *Bulloch v. Bulloch*, 45 Ga. App. 1, 163 S.E. 708 (1932).

When child may sue parent for injury. — While unemancipated minor child has no cause of action against parent for simple negligence, such child may maintain action for personal injury against parent for willful or malicious act, provided it is such an act of cruelty as to authorize forfeiture of parental authority. *Wright v. Wright*, 85 Ga. App. 721, 70 S.E.2d 152 (1952).

Unemancipated minor may recover from father for personal injuries sustained in automobile accident caused by father's drunkenness. *Barnwell v. Cordle*, 438 F.2d 236 (5th Cir. 1971).

No tort immunity runs to parent of adult child who lives in home of parents because there is no legal obligation resting upon parents to support a child after the child reaches majority, nor is there any legal obligation resting upon a child, after reaching majority, to remain in parents' home and perform, in return for care and attention given by them, the duties usually performed by a child who is unemancipated. *Barnwell v. Cordle*, 438 F.2d 236 (5th Cir. 1971).

Parent's immunity from tort liability to children does not survive parent's death, because parental immunity in Georgia is firmly bottomed on authority of parent over child, and whenever parental authority is terminated, whether as a result of malicious and willful conduct by parent amounting to a forfeiture of that authority, or by natural and orderly loss of authority that takes place when child reaches adulthood, even when child continues to live in parents' household, parental immunity ends with it. *Barnwell v. Cordle*, 438 F.2d 236 (5th Cir. 1971).

Parent driving under the influence. — While a mother was driving under the influence of alcohol at the time of the automobile accident in which her son was

injured, she did not commit a malicious or willful act of such cruelty so as to authorize forfeiture of parental authority; accordingly, pursuant to O.C.G.A. § 19-7-1, neither the son nor the father were entitled to relief. *Donegan v. Davis*, 310 Ga. App. 446, 714 S.E.2d 49 (2011).

No tort immunity for personal representative of deceased parent or child. — Tort immunity between parent and child does not extend to personal representative of deceased parent or child. *Barnwell v. Cordle*, 438 F.2d 236 (5th Cir. 1971).

Reason for termination of intrafamily tort immunity upon death of protected person is that death terminates family relationship and there is no longer a relationship in which state or public policy has an interest. *Barnwell v. Cordle*, 438 F.2d 236 (5th Cir. 1971).

2. Recovery Against Third Persons

Right of action for negligent homicide, or wrongful death, of child is vested in parents. *Harden v. United States*, 485 F. Supp. 380 (S.D. Ga. 1980), rev'd in part on other grounds, 688 F.2d 1025 (5th Cir. 1982).

Trial court erred in granting summary judgment to a decedent's father in a legal malpractice claim against the estate attorneys and attorneys who prosecuted a wrongful death action on behalf of the decedent's estate as the attorneys owed no duty to the father, there was no attorney-client relationship between the father and the attorneys because the estate administrator had hired the attorneys, and the father was not an intended third-party beneficiary that could sue, but rather was possibly just an incidental third-party beneficiary; the wrongful death statute, O.C.G.A. § 19-7-1(c)(2), put the duty on the father to apportion the wrongful death award, as the attorney would have committed malpractice by acting in the father's interests since the client was the mother and the decedent's half-brother, who was the estate administrator. *Rhone v. Bolden*, 270 Ga. App. 712, 608 S.E.2d 22 (2004).

Parents' wrongful death claim failed. — Parents' wrongful death claim under O.C.G.A. § 19-7-1 pertaining to an

Tort Recovery (Cont'd)**2. Recovery Against Third****Persons (Cont'd)**

unclipped rear seat failed on summary judgment because the unclipped seat did not contribute to their child's fatal skull fracture, and there was thus no evidence showing proximate causation under O.C.G.A. § 51-1-11(b)(1) between the unclipped seat and the child's death; the parents also did not assert a survival action in order to permit recovery for pain and suffering in that such damages were not permitted under O.C.G.A. §§ 19-7-1 and 51-4-1. *Davenport v. Ford Motor Co.*, No. 1:05-cv-3047-WSD, 2007 U.S. Dist. LEXIS 91245 (N.D. Ga. Dec. 11, 2007).

Legislative intent. — Legislature intended to protect the right of both parents, regardless of their marital status, to a cause of action for the wrongful death of their child. *Belco Elec., Inc. v. Bush*, 204 Ga. App. 811, 420 S.E.2d 602 (1992).

Regardless of a mother and son's relative financial situations and any question of dependency at the time of the son's death or in the future, it could not be credibly argued that an aging parent losing an adult child was not damaging to the social and economic order, a primary concern of the wrongful death laws, nor was such an argument in concert with the express legislative directive of a recovery in all instances of the homicide of a child under O.C.G.A. § 19-7-1(c). *Carringer v. Rodgers*, 276 Ga. 359, 578 S.E.2d 841 (2003).

Construction with O.C.G.A. § 51-1-18(a). — Trial court erroneously denied a motion to dismiss a personal injury action filed by two parents against two social hosts, arising out of the death of the parents' 20-year-old daughter, which alleged that the social hosts served the daughter alcohol, and the daughter died when the daughter drunkenly drove into a tree after leaving the social hosts' home, as the action was barred due to the fact that the daughter had already reached the age of majority at the time of the accident. *Penny v. McBride*, 282 Ga. App. 590, 639 S.E.2d 561 (2006), cert. denied, 2007 Ga. LEXIS 223 (Ga. 2007).

Intent was not to have wrongdoer spouse profit from wrongs. — In enact-

ing the Wrongful Death Act, O.C.G.A. § 51-4-1 et seq., the legislature authorized recovery for the homicide of a child and unquestionably did not intend that a wrongdoer should be able to profit from wrongdoing. Since the surviving spouse would have to sue themselves to recover for their own negligence, a legal impossibility, and a result in plain contravention of the legislative purpose of the wrongful death statute, it was proper to allow the decedent's parent to proceed on behalf of the decedent against the spouse. *Belluso v. Tant*, 258 Ga. App. 453, 574 S.E.2d 595 (2002).

Right to recover for the wrongful death of a child, who dies without leaving a spouse or child, is a single cause of action vested jointly in the parents of the deceased if they are married and living together, and if both parents are living but are divorced, separated, or living apart, the right shall be in both parents. *Belco Elec., Inc. v. Bush*, 204 Ga. App. 811, 420 S.E.2d 602 (1992).

Trial court properly ordered a new trial limited to the issue of a father's damages in a medical malpractice action for the wrongful death of a child as the parents were living together and were not divorced; the father could sue the doctor for one-half of the full value of the deceased child's life and regardless of the doctor's degree of negligence in relation to the mother's, the father could recover the father's entire loss from the doctor, and whether to allow the doctor to enforce a right of contribution from the mother was a matter addressing itself to the discretion of the trial court. *Roberts v. Aderhold*, 273 Ga. App. 642, 615 S.E.2d 761 (2005).

Rights of divorced parent in wrongful death. — Because divorced mother did not bring the action on behalf of both parents, divorced father had the right to intervene pursuant to O.C.G.A. § 19-7-1(c)(2)(C) and protect whatever interest he had in the recovery. *Hulsey v. Hulsey*, 212 Ga. App. 269, 441 S.E.2d 477 (1994).

Only instances in which the statute specifically authorizes a divorced parent to proceed without the other is when the other parent cannot be located or if that parent refuses to proceed. *Hulsey v.*

Hulsey, 212 Ga. App. 269, 441 S.E.2d 477 (1994).

Trial court did not err in awarding 95 percent of the settlement proceeds for a son's wrongful death to his surviving mother and 5 percent to his surviving father when the evidence showed that the father failed to maintain any significant contact with the son in the 17 years that elapsed between the parents' divorce and when the son was killed in an automobile accident at age 20. *Hall v. Bailey*, 253 Ga. App. 595, 560 S.E.2d 76 (2002).

Temporary guardianship did not result in forfeiture or right to wrongful death action. — Mother did not forfeit her right to maintain a wrongful death action by executing a temporary guardianship. *Uniroyal Goodrich Tire Co. v. Adams*, 221 Ga. App. 705, 472 S.E.2d 518 (1996).

Recovery for wrongful death in Georgia is limited to the full value of the life without deduction for necessary or personal expenses of the decedent and does not include recovery for mental anguish or emotional distress. *Ob-Gyn Assocs. v. Littleton*, 259 Ga. 663, 386 S.E.2d 146 (1989), overruled on other grounds, *Lee v. State Farm Mut. Ins. Co.*, 272 Ga. 583, 533 S.E.2d 82 (2000), overruled on other grounds, *Shores v. Modern Transp. Servs.*, 262 Ga. App. 293, 585 S.E.2d 664 (2003).

O.C.G.A. § 19-7-1 provides that parents of a deceased child shall be entitled to recover the full value of the life of the child; parents do not have an independent right of action to recover for their own emotional distress and mental suffering. *Crockett v. Norfolk S. Ry.*, 95 F. Supp. 2d 1353 (N.D. Ga. 2000), *aff'd*, 239 F.3d 370, (11th Cir. 2000).

Impact of parent's contributory negligence. — Trial court properly ordered a new trial limited to the issue of a father's damages in a medical malpractice action for the wrongful death of a child because the jury verdict "in favor of the plaintiffs," necessarily reflected either a jury finding that the mother's contributory negligence barred a recovery by the father, which was contrary to the law, or that the father was not injured by the child's death, which was contrary to the

evidence. *Roberts v. Aderhold*, 273 Ga. App. 642, 615 S.E.2d 761 (2005).

Trial court properly denied a mother's motion for a new trial after a verdict in favor of the parents in a medical malpractice action for the wrongful death of a child as the jury was authorized to find that even though a doctor was negligent, the mother's contributory negligence was equal to or greater than that of the doctor and thus defeated the mother's right of recovery; the parents claimed that the child was stillborn due to the mother's gestational diabetes and the doctor claimed that the mother was negligent in failing to advise the doctor of the mother's family history of diabetes and in failing to follow the doctor's medical instructions. *Roberts v. Aderhold*, 273 Ga. App. 642, 615 S.E.2d 761 (2005).

No forfeiture of parental rights thus recovery allowed. — Despite evidence of a parent's cruel treatment of the parent's decedent son, the trial court erred in finding that the parent forfeited parental rights, and thus lost the status as a parent and, in so doing, lost the right to recover as an heir of the decedent's estate as the loss of parental power did not necessarily result in a parent's loss of a right to inherit as an heir from the estate of that parent's child, short of having the parent's rights terminated prior to the child's death; hence, summary judgment against the parent on the issue was reversed. *Blackstone v. Blackstone*, 282 Ga. App. 515, 639 S.E.2d 369 (2006).

Parent cannot sue for tort to child absent direct pecuniary injury. — Parent cannot maintain action for wrong done to minor child unless parent has incurred some direct pecuniary injury therefrom, in consequence of loss of service, or necessary expenses incurred thereby. *Southern Ry. v. Neeley*, 101 Ga. App. 488, 114 S.E.2d 283 (1960).

Action for loss of child's services. — To recover for loss of services of minor child, it is not essential that the child should be actually rendering services to parent at time of injury; the parent's right to services which child is capable of rendering is sufficient to support action. *Evans v. Caldwell*, 52 Ga. App. 475, 184 S.E. 440 (1936), *aff'd*, 184 Ga. 203, 190 S.E. 582 (1937).

Tort Recovery (Cont'd)**2. Recovery Against Third****Persons (Cont'd)**

Loss of services may be awarded as part of the full value of a deceased child's life. *South Fulton Medical Ctr. Inc. v. Poe*, 224 Ga. App. 107, 480 S.E.2d 40 (1996).

Parent may recover medical, funeral, and burial expenses. — In tort action for loss of services, when mother has lawful custody of minor child, trial judge erred in striking portions of complaint seeking recovery for loss of services and for medical, funeral, and burial expenses. *Peppers v. Smith*, 151 Ga. App. 680, 261 S.E.2d 427 (1979).

Action for medical and funeral expenses of a child may be brought by either parent, and it is a question of fact as to which parent has actually incurred such expenses. *Atkinson v. Atkinson*, 249 Ga. 247, 290 S.E.2d 423 (1982).

In a wrongful death action brought by the father of the decedent, who died leaving no surviving wife or children, the interests of the plaintiff's ex-wife, the decedent's mother, who was initially unwilling to participate in the case, were already represented by the father. The fact that she was not a named party neither impaired her ability to protect her interests nor subjected either party to inconsistent or multiple obligations. Therefore, the father failed to establish that joinder was compulsory under the Federal Rules of Civil Procedure. *Barron v. Spectrum Emergency Care, Inc.*, 619 F. Supp. 1011 (N.D. Ga. 1985).

Parent forfeits wrongful death settlement right through failure to pay support. — Parent of a child who is the victim of homicide may forfeit his or her right to participate in the proceeds of a wrongful death settlement through failure to pay support during the child's life. A prior adjudication of abandonment or termination of parental rights is not a prerequisite to a finding that a parent has forfeited his or her right to participate in the proceeds of a settlement for wrongful death of the parent's child. *Ramos v. Ramos*, 173 Ga. App. 30, 325 S.E.2d 415 (1984).

Parent's wrongful death settlement right not forfeited by minimal support. — Divorced father did not forfeit his right to share with his former wife in the proceeds of a settlement in an action for the wrongful death of his child, when, although his contribution of support to the child may have been paltry, his parental rights had not been terminated. *Dove v. Carver*, 197 Ga. App. 733, 399 S.E.2d 216 (1990).

Father must have provided support to recover for child's death. — For a biological father to participate in a recovery based upon the wrongful death of his child born out of wedlock, he must have provided reasonable financial support during the lifetime of the child. *Sapp v. Solomon*, 252 Ga. 532, 314 S.E.2d 878 (1984).

Father was not entitled to proceeds from settlement of wrongful death suit by the child's mother since, under the standards of O.C.G.A. § 19-7-1(c)(6), the trial court determined that he lacked any meaningful relationship with the child as shown by evidence concerning custody, control, and lack of support, and the poor example he set. *Richardson v. Barber*, 241 Ga. App. 254, 527 S.E.2d 8 (1999).

Wrongful death action not barred by prior personal injury recovery. — Fact that there had been a prior recovery for a child's personal injury claim and the father's claim for medical and rehabilitation expenses did not extinguish the right of the father to pursue a wrongful death action arising from the subsequent death of the child allegedly due to the original injuries. *Winding River Village Condominium Ass'n v. Barnett*, 218 Ga. App. 35, 459 S.E.2d 569 (1995).

Parent's right survives to representative of parent's estate. — An existing right of action by a parent to recover for the homicide of a child will survive to the representative of the parent's estate regardless of whether the action was filed during the parent's lifetime. *Caylor v. Potts*, 183 Ga. App. 133, 358 S.E.2d 291 (1987), overruled on other grounds, *Hosley v. Davidson*, 211 Ga. App. 529, 439 S.E.2d 742 (1993).

Representative of a parent's estate is not authorized to bring an action for

wrongful death of the parent's minor child if there is a surviving parent or other person entitled to bring the action. *Hosley v. Davidson*, 211 Ga. App. 529, 439 S.E.2d 742 (1993).

Right of administrator of unborn child's estate. — Administrator of the estate of an unborn child had standing to bring a wrongful death action on behalf of the child since it was shown that the mother of the child died in the accident and the identity of the father was unknown. *Reese v. United States*, 930 F. Supp. 1537 (S.D. Ga. 1995).

Posthumous child in wrongful death action. — Decedent's posthumous, out-of-wedlock child was entitled to pursue a wrongful death claim under O.C.G.A. § 51-4-2 to the exclusion of the decedent's parents. Under the statute pertaining to descent and distribution, O.C.G.A. § 53-2-1(a)(1), the posthumous child qualified as the decedent's child and to ignore the laws of descent and distribution would run counter to the essence of a wrongful death claim; simply because the decedent's parents wished to share in any award did not render an inequitable result in light of the priority ordinarily given to children by O.C.G.A. § 19-7-1(c)(2). *deVente v. Flora*, 300 Ga. App. 10, 684 S.E.2d 91 (2009).

Punitive damages are not available in a wrongful death claim since O.C.G.A. § 51-4-1(1), to the extent the statute permits recovery of more than the actual loss to the survivor, is itself punitive. *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470 (1984).

When parent cannot recover for value of minor's services. — Parent loses right to sue for and recover for value of minor child's services by voluntarily releasing parental control to third person, or by failing to provide for his or her maintenance. *Southern Ry. v. Flemister*, 120 Ga. 524, 48 S.E. 160 (1904).

When evidence shows emancipation by both parents, child possesses sole right of recovery for personal damages. *Coleman v. Dublin Coca-Cola Bottling Co.*, 47 Ga. App. 369, 170 S.E. 549 (1933).

Child may recover against parent's employer under respondeat superior doctrine. — Unemancipated child may

recover against parent's employer for injuries sustained by child due to negligence of parent while acting within service of employer, although the child could not recover from the parent. *Barnwell v. Cordle*, 438 F.2d 236 (5th Cir. 1971).

In a suit brought by parents against the mother's employer for the wrongful death of twin infant girls, allegations of contributory negligence or assumption of the risk by the mother would not defeat recovery for the father. *Fulford v. ITT Rayonier, Inc.*, 676 F. Supp. 252 (S.D. Ga. 1987).

Suit against husband's estate by wife's parents. — Interspousal immunity doctrine was not a bar to a wrongful death action brought against the estate of a deceased husband by the parents of the wife who died with her husband in the crash of a plane piloted by the husband. *Trust Co. Bank v. Thornton*, 186 Ga. App. 706, 368 S.E.2d 158 (1988), cert. vacated, 258 Ga. 543, 373 S.E.2d 512 (1988).

Under the Wrongful Death Act, O.C.G.A. § 51-4-1 et seq., and O.C.G.A. § 19-7-1(c), the parent of a decedent child who was murdered by his surviving spouse had standing to bring a cause of action for the wrongful death of the child against the murdering spouse and/or another individual or entity proximately causing the child's death; the parent could recover for the full value of the life of the child. *Carringer v. Rodgers*, 276 Ga. 359, 578 S.E.2d 841 (2003).

Relationship with grandparents considered in apportioning settlement. — In an action arising from the death of a child of divorced parents, it was not error for the court to consider the relationship of the child with his maternal grandmother in apportioning the settlement. *Wymbs v. Stokes*, 236 Ga. App. 742, 512 S.E.2d 669 (1999).

Attorney's fees when divorced parents represented separately. — Since each parent was represented by independent counsel, and the mother's attorney was only entitled to recover fees based on the overall settlement proceeds that were procured for that attorney's client, the attorney fees award for the mother's counsel should have only been \$ 65,000 (i.e., 40% of \$ 162,500). *Weathers v. City of*

Tort Recovery (Cont'd)**2. Recovery Against Third Persons (Cont'd)**

Hinesville, 260 Ga. App. 6, 578 S.E.2d 477 (2003).

Recoupment of attorney's fees. — Trial court committed plain error in denying a client's motion for recoupment of attorney fees from a former attorney, as such was solely based on a contingent fee agreement, the client's maintained an interest in any recovery in the pending wrongful death suit under O.C.G.A. § 19-7-1(c)(2)(C) despite the client's withdrawal from the suit, and the attorney was entitled to a reasonable fee in quantum meruit. *Amstead v. McFarland*, 279 Ga. App. 765, 632 S.E.2d 707 (2006).

3. Amounts Recoverable

Uneven apportionment between parents upheld. — Trial court did not abuse the court's discretion in apportioning wrongful death settlement proceeds concerning a father and mother's deceased child, granting the father only 20 percent of the proceeds, as the trial court did not abuse the court's discretion in finding that, during a significant portion of the child's life, the father was incarcerated, used methamphetamine, and the mother had primary custody and control of the child; moreover, although the trial court did not specifically enumerate every factor upon which the court based the court's decision, there was no requirement that the court do so. *Brewer v. Harvey*, 278 Ga. App. 503, 629 S.E.2d 497 (2006).

Decisions Under Former Code 1933, § 105-1307**1. In General**

Basis for right of recovery granted. — This right of action is founded on premise that deceased would have been entitled to action against wrongdoer if death had not ensued, based on breach of duty owed to deceased at time of injury. *Caskey v. Underwood*, 89 Ga. App. 418, 79 S.E.2d 558 (1953).

Right of action for negligent homicide or wrongful death of child is

vested in parents. *Harden v. United States*, 485 F. Supp. 380 (S.D. Ga. 1980), rev'd in part on other grounds, 688 F.2d 1025 (5th Cir. 1982).

Section confers property right upon parents. — Right of action which vests under former Code 1933, § 105-1307 in parents for recovery of monetary compensation for homicide of minor child was a property right. *Blue Ridge Park Nurseries v. Owen*, 41 Ga. App. 98, 152 S.E. 485 (1930).

Former Code 1933, § 105-1307 did not authorize action by wife against husband for wrongful death of child. *Harrell v. Gardner*, 115 Ga. App. 171, 154 S.E.2d 265 (1967); *Walker v. Walker*, 122 Ga. App. 545, 178 S.E.2d 46 (1970).

When child had married but was not survived by spouse or children, parent may recover. — When parental bond has previously been severed by marriage of deceased but she was not survived by husband or children, her mother is entitled to sue for full value of her life. *Royal Crown Bottling Co. v. Bell*, 100 Ga. App. 438, 111 S.E.2d 734 (1959).

Foster mother cannot, in individual capacity, maintain suit for damages for death of foster son. *Smith v. Jones*, 72 Ga. App. 638, 34 S.E.2d 623 (1945).

Father who has not legitimated a child cannot maintain wrongful death action. *Parham v. Hughes*, 441 U.S. 347, 99 S. Ct. 1742, 60 L. Ed. 2d 269 (1979).

Georgia wrongful death statute does not violate U.S. Const., amend. 14 (equal protection clause) as to fathers of illegitimate children. *Hughes v. Parham*, 241 Ga. 198, 243 S.E.2d 867 (1978), aff'd, 441 U.S. 347, 99 S. Ct. 1742, 60 L. Ed. 2d 269 (1979).

Fetus becomes a child when it is "quick" or capable of moving in mother's womb. *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100 (1955).

Suit may be maintained by mother for loss of child that was "quick" in her womb at time of homicide. *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100 (1955).

Whether unborn child was "quick" not "viable" is test. — Cause of action will not arise if child was not "quick" at

the time of the child's death. It is not necessary for child to be "viable" provided the child was "quick", that is, able to move in the mother's womb. *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100 (1955).

Upon death of parent suing, temporary administrator may become party plaintiff. — Upon death of mother suing for negligent homicide of her child, temporary administrator of her estate may be made party plaintiff to action. *Roadway Express, Inc. v. Jackson*, 77 Ga. App. 341, 48 S.E.2d 691 (1948).

2. Pleadings

Parent must affirmatively plead facts bringing case within section. — At common law, action for damages on account of death of human being would not lie; therefore, former Code 1933, § 105-1307 was in derogation of common law, and unless mother, suing for death of her son sui juris, affirmatively pleads facts essential to bring herself within provisions of act, she is not entitled to maintain suit. *Clements v. Pollard*, 53 Ga. App. 544, 186 S.E. 587 (1936).

Former Code 1933, § 105-1307 was in derogation of common law, and plaintiff suing thereunder must affirmatively plead facts essential to bring herself within the law's provisions. *Garden City Cab Co. v. Ransom*, 86 Ga. App. 247, 71 S.E.2d 443 (1952).

Petition omitting such allegations may be amended. — When petition failed to set out cause of action only in omitting allegation that plaintiff's son, who was unmarried and for whose homicide plaintiff was suing to recover, left no children, judgment sustaining demurrer (now motion to dismiss) to petition would be affirmed, but with direction that plaintiff be allowed to amend petition by supplying such necessary omitted allegation. *Helton v. Western & A.R.R.*, 67 Ga. App. 23, 19 S.E.2d 312 (1942).

It must appear from petition that child left no wife or children of his own. — Mother has no right to sue for death of her son when he leaves a wife or child, and, when she does so sue, it must affirmatively appear from petition that he left no wife or child, or the suit is subject to dismissal. *Clements v. Pollard*, 53 Ga.

App. 544, 186 S.E. 587 (1936).

Parent may recover hospital, medical, and funeral expenses. — Mother who is sole surviving parent of minor child whose death is caused by negligence of mother may recover for hospital, medical, and funeral expenses resulting therefrom. *Saunds v. Forsythe*, 112 Ga. App. 269, 144 S.E.2d 926 (1965).

Measure of damages is not dependent upon expectancy of parent. — Right of action accrues to mother who was in life when child died, and measure of damages is full value of life of such child. The measure of damages, therefore, is not dependent upon expectancy of mother. The amount that may be recovered in action of this kind, as well as the person who may sue, is determined by statute as of date of death of child, and if action survives to administrator it would seem to do so for all purposes. *Roadway Express, Inc. v. Jackson*, 77 Ga. App. 341, 48 S.E.2d 691 (1948).

Parent cannot recover for own mental or physical suffering. — Georgia law does not make basis of recovery for wrongful death mental or physical suffering of person bringing action. The action to recover damages on account of negligent homicide is not an action seeking to recover for mental pain and suffering. *Hudson v. Cole*, 102 Ga. App. 300, 115 S.E.2d 825 (1960).

Emotional upset of person bringing action was no part of measure of damages under former Code 1933, § 105-1307, which clearly stated that mother or father shall be entitled to recover full value of life of child, which full value was defined in former Code, §§ 105-1301 and 105-1308 (see now O.C.G.A. § 51-4-1) in economic terms, but not in terms of emotion. *Hudson v. Cole*, 102 Ga. App. 300, 115 S.E.2d 825 (1960).

Considerations in ascertaining full value of child's life. — When there is no evidence whatever on earnings or earning capacity, and when such evidence is not necessary to recovery, and when jury has not been instructed by trial court to determine full value of life of deceased child based on what she would have earned during her life expectancy, it is not error for trial court to charge only former Code

Decisions Under Former Code 1933,

§ 105-1307 (Cont'd)

2. Pleadings (Cont'd)

1933, §§ 105-1307, 105-1309, and 105-1310 (see now O.C.G.A. §§ 51-4-4 and 51-4-5), and thus leave full value of life of child to enlightened conscience of an impartial jury, based on evidence of child's age, precocity, services rendered up to time of death, circumstances of family, and from experience and knowledge of human affairs on part of jury. *Collins v. McPherson*, 91 Ga. App. 347, 85 S.E.2d 552 (1954).

Evidence of future earnings unnecessary if there is no selection of vocation. — In case of parent suing for death of minor child, it is not necessary for evidence to show what future earnings might be in cases when there is no selection of vocation or other facts from which future earnings can be determined. *Collins v. McPherson*, 91 Ga. App. 347, 85 S.E.2d 552 (1954).

When question of damages left to judgment, experience, and conscience of jury. — In cases of infants of tender years, it is impossible to give exact evidence of pecuniary value of probable loss, and question of damages or loss is left to sound judgment, experience, and conscience of jury without any exact proof thereof. The enlightened conscience of a jury means also the jury's informed conscience. *Seaboard Coast Line R.R. v. Duncan*, 123 Ga. App. 479, 181 S.E.2d 535 (1971).

Awards under section need not be reduced to present value. — In both compensatory and penal elements of verdict in wrongful death of minor child case, jury is guided by the jury's discretion in assessing amount and not by pecuniary loss to plaintiff. This being so, Court of

Appeals will not hold that such amount, when assessed, will be such a future benefit as must be reduced to present cash value before the amount can legally be awarded. *Collins v. McPherson*, 91 Ga. App. 347, 85 S.E.2d 552 (1954).

3. Application

Contributory negligence of parent as bar to recovery for wrongful death of child. — Failure of mother, at time and place which she knew were dangerous, to have three year old child where she could control and direct child's movements was, as a matter of law, such lack of ordinary care as would prevent recovery for her own benefit for death of child, even conceding that defendant company was negligent. *Woodham v. Powell*, 61 Ga. App. 760, 7 S.E.2d 573 (1940).

Negligence of person having custody with parent's consent is attributed to parent. — When parent who brings suit gave consent to another to exercise custody over child, then negligence of custodian is attributed to parent so as to bar recovery. *Herring v. R.L. Mathis Certified Dairy Co.*, 118 Ga. App. 132, 162 S.E.2d 863 (1968), rev'd in part on other grounds, 225 Ga. 67, 166 S.E.2d 89 (1969), appeal dismissed, 400 U.S. 922, 91 S. Ct. 192, 27 L. Ed. 2d 183 (1970).

Availability of workers' compensation precludes recovery under section. — Action by parent for homicide of minor child is statutory in origin, and may be maintained only within purview of legislative grant, and if the plaintiff's decedent is an employee of the defendant within the purview of the Workers' Compensation Act, all other rights and remedies of the plaintiff are excluded. *AMOCO v. McCluskey*, 116 Ga. App. 706, 158 S.E.2d 431 (1967), rev'd on other grounds, 224 Ga. 253, 161 S.E.2d 271 (1968).

OPINIONS OF THE ATTORNEY GENERAL

When parent surrenders control to third party, minor remains unemancipated. — Emancipation occurs when parent surrenders parental control of minor child; however, when parent voluntarily surrenders control to third party, there is a substitution of parental

control, and minor continues unemancipated as to one to whom minor's custody and control is transferred. 1980 Op. Att'y Gen. No. 80-152.

Domicile of minor is that of minor's parents, but this can be altered when usual parental authority and control over

minor is ended by voluntary or involuntary relinquishment. 1981 Op. Att'y Gen. No. U81-5.

Change of child's domicile for school purposes. — Domicile of child for school purposes can be altered by voluntary relinquishment of parental authority

if proper legal action has been taken or circumstances are present which secure to person with whom child is residing some legal obligation as to the child's welfare and education. 1970 Op. Att'y Gen. No. U70-8.

RESEARCH REFERENCES

Am. Jur. 2d. — 22A Am. Jur. 2d, Death, § 4. 59 Am. Jur. 2d, Parent and Child, §§ 34, 35, 37 et seq., 99. 67A C.J.S., Parent and Child, §§ 19, 23, 24, 53, 137.

Am. Jur. Pleading and Practice Forms. — 19 Am. Jur. Pleading and Practice Forms, Parent and Child, § 153.

ALR. — Liability for or on account of services rendered under erroneous impression as to parentage induced by fraud or mistake, 33 ALR 681.

What items of damage on account of personal injury to infant belong to him and what to parent, 37 ALR 11; 32 ALR2d 1060.

Attempt to bastardize child as affecting right to custody of the child, 37 ALR 531.

Liability of parent for necessities furnished to adult child, 42 ALR 150.

Abandonment of adopted child, 44 ALR 820.

On whose behalf may action be maintained for the wrongful death of adopted child, 56 ALR 1349.

Liability of infant for necessities where he lives with his parents, 70 ALR 572.

Relationship of parent and child between tort-feasor and person by whom or for whose benefit death action is brought as affecting right to maintain action under death statute, 119 ALR 1394.

Right of parent to recover for injury to or death of minor child as affected by award of custody of child to another, 147 ALR 482.

By and in whose name suit to annul infant's marriage must be brought, 150 ALR 609.

Right of natural parent, or other person whose consent is necessary to adoption of child, to withdraw consent previously given, 156 ALR 1011.

Effect of existence of nearer related but nondependent member upon right to sue under death statute in behalf of more

remotely related but dependent member of same class, 162 ALR 704.

Marriage of child, or probability of marriage, as affecting right or measure of recovery by parents in death action, 7 ALR2d 1380.

Measure and elements of damages for personal injury resulting in death of infant, 14 ALR2d 485; 45 ALR4th 234; 77 ALR4th 411.

Liability of parent or person in loco parentis for personal tort against minor child, 19 ALR2d 423; 41 ALR3d 904; 6 ALR4th 1066.

Liability of landowner for injury to or death of child caused by cave-in or landslide, 28 ALR2d 195.

Liability of landowner for injury to or death of child resulting from piled or stacked lumber or other building materials, 28 ALR2d 218.

What constitutes abandonment or desertion of child by its parent or parents within purview of adoption laws, 35 ALR2d 662; 78 ALR3d 712.

Consent of natural parents as essential to adoption where parents are divorced, 47 ALR2d 824.

Parents' rights with respect to clothing, books, toys, and the like purchased for, or furnished to, child, 61 ALR2d 1270.

Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis, 89 ALR2d 396.

Nature of care contemplated by statute imposing general duty to care for indigent relatives, 92 ALR2d 348.

Award of custody of child where contest is between child's father and grandparent, 25 ALR3d 7.

Spouse's or parent's right to recover punitive damages in connection with recovery of damages for medical expenses or loss of services or consortium arising from

personal injury to other spouse or to child, 25 ALR3d 1416.

Uninsured motorist clause: coverage of claim for wrongful death of insured, 26 ALR3d 935.

Extraterritorial effect of valid award of custody of child of divorced parents, in absence of substantial change in circumstances, 35 ALR3d 520.

Parent's desertion, abandonment, or failure to support minor child as affecting right or measure of recovery for wrongful death of child, 53 ALR3d 566.

Physical abuse of child by parent as ground for termination of parent's right to child, 53 ALR3d 605.

Sexual abuse of child by parent as ground for termination of parent's right to child, 58 ALR3d 1074.

Death action by or in favor of parent against unemancipated child, 62 ALR3d 1299.

Remarriage of surviving parent as affecting action for wrongful death of child, 69 ALR3d 1038.

Right of natural parent to withdraw valid consent to adoption of child, 74 ALR3d 421.

Mistake or want of understanding as ground for revocation of consent to adoption or of agreement releasing infant to adoption placement agency, 74 ALR3d 489.

What constitutes "duress" in obtaining parent's consent to adoption of child or surrender of child to adoption agency, 74 ALR3d 527.

Power of parent to have mentally defective child sterilized, 74 ALR3d 1224.

Parent's involuntary confinement, or failure to care for child as result thereof, as evincing neglect, unfitness, or the like in dependency or divestiture proceeding, 79 ALR3d 417.

Right of indigent parent to appointed counsel in proceeding for involuntary termination of parental rights, 80 ALR3d 1141.

Right to maintain action or to recover damages for death of unborn child, 84 ALR3d 411.

Liability for child's personal injuries or death resulting from tort committed against child's mother before child was conceived, 91 ALR3d 316.

Liability for injury to or death of child from electric wire encountered while climbing tree, 91 ALR3d 616.

Parent's obligation to support unmarried minor child who refuses to live with parent, 98 ALR3d 334.

Standing of foster parent to seek termination of rights of foster child's natural parents, 21 ALR4th 535.

Validity and application of statute allowing endangered child to be temporarily removed from parental custody, 38 ALR4th 756.

Construction and effect of statutes which make parent, custodian, or other person signing minor's application for vehicle operator's license liable for licensee's negligence or willful misconduct, 45 ALR4th 87.

Recovery of damages for grief or mental anguish resulting from death of child — modern cases, 45 ALR4th 234.

Excessive and adequacy of damages for personal injuries resulting in death of minor, 49 ALR4th 1076.

Sexual child abuser's civil liability to child's parent, 54 ALR4th 93.

Parent's right to recover for loss of consortium in connection with injury to child, 54 ALR4th 112.

Excessiveness or adequacy of damages awarded for parents' noneconomic loss caused by personal injury or death of child, 61 ALR4th 413.

Validity and construction of surrogate parenting agreement, 77 ALR4th 70.

Recovery of damages for loss of consortium resulting from death of child—modern status, 77 ALR4th 411.

Rights and obligations resulting from human artificial insemination, 83 ALR4th 295.

Continuity of residence as factor in contest between parent and nonparent for custody of child who has been residing with nonparent—modern status, 15 ALR5th 692.

Right of putative father to visitation with child born out of wedlock, 58 ALR5th 669.

Child custody and visitation rights arising from same-sex relationship, 80 ALR5th 1.

Natural parent's indigence as precluding finding that failure to support child

waived requirement of consent to adoption — general principles, 82 ALR5th 443.

Natural parent's indigence as precluding finding that failure to support child waived requirement of consent to adop-

tion — factors other than employment status, 84 ALR5th 191.

Who, other than parent, may recover for loss of consortium on death of minor child, 84 ALR5th 687.

19-7-2. Parents' obligations to child.

It is the joint and several duty of each parent to provide for the maintenance, protection, and education of his or her child until the child reaches the age of majority, dies, marries, or becomes emancipated, whichever first occurs, except as otherwise authorized and ordered pursuant to subsection (e) of Code Section 19-6-15 and except to the extent that the duty of the parents is otherwise or further defined by court order. (Orig. Code 1863, § 1743; Code 1868, § 1783; Code 1873, § 1792; Code 1882, § 1792; Civil Code 1895, § 2501; Civil Code 1910, § 3020; Code 1933, § 74-105; Ga. L. 1979, p. 466, § 41; Ga. L. 1992, p. 1833, § 2; Ga. L. 2005, p. 224, § 12/HB 221; Ga. L. 2006, p. 583, § 7/SB 382.)

Cross references. — Parents' obligation to illegitimate child, § 19-7-24. Responsibility of parent or guardian for enrolling child in school, § 20-2-690. Duty of support owed by parent of pauper, § 36-12-3.

Editor's notes. — Ga. L. 2005, p. 224, § 1/HB 221, not codified by the General Assembly, provides that: "The General Assembly finds and declares that it is important to assess periodically child support guidelines and determine whether existing guidelines continue to be viable and effective or whether they have failed or ceased to accomplish their original policy objectives. The General Assembly further finds that supporting Georgia's children is vitally important to the citizens of Georgia. Therefore, the General Assembly has determined that it is in the best interests of the state and its citizenry to undertake an evaluation of the child support guidelines on a continuing basis. The General Assembly declares that it is important that all of Georgia's children are provided with adequate financial support whether the children's parents are living together or not living together. The General Assembly finds that both parents have a continuing obligation with respect to providing financial and emotional stability for their child or children. It is the hope of the

members of the General Assembly that all parents work together to advance the best interest of their children."

Ga. L. 2006, p. 583, § 10/SB 382, not codified by the General Assembly, provides that: "Sections 1 through 7 of this Act shall become effective on January 1, 2007, and shall apply to all pending civil actions on or after January 1, 2007."

Law reviews. — For article, "Trusts for Dependents: Effect of Georgia's Support Obligation on Federal Income Taxation," see 8 Ga. St. B.J. 323 (1972). For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For article on 2005 amendment of this Code section, see 22 Ga. St. U.L. Rev. 73 (2005). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 103 (2006).

For note discussing Georgia's child support laws, their problems, and some proposed solutions, see 11 Ga. L. Rev. 387 (1977). For note, "The Economics of Divorce in Georgia: Toward a Partnership Model of Marriage," see 12 Ga. L. Rev. 640 (1978). For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 234 (1992).

For comment on *Wallace v. Wallace*, 221 Ga. 510, 145 S.E.2d 546 (1965), see 3 Ga. St. B.J. 219 (1966). For comment on

Bateman v. Bateman, 224 Ga. 20, 159 S.E.2d 387 (1968), see 5 Ga. St. B.J. 263 (1968).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

EFFECT OF DIVORCE

APPLICATION

1. IN GENERAL
2. EDUCATION
3. MEDICAL CARE AND EXPENSES
4. PROPERTY

General Consideration

Parental duty of support and maintenance. — There is imposed upon parents the natural duty to support and maintain their children. *Pettigrew v. Williams*, 65 Ga. App. 576, 16 S.E.2d 120 (1941).

Trial court's determination to terminate a father's parental rights was supported by clear and convincing evidence pursuant to O.C.G.A. § 15-11-94(b)(4)(C)(ii)-(iii) since he had a history of alcohol and drug abuse, admitted that he needed financial help to support his children, had not offered any support during the period that they were in temporary custody as required by O.C.G.A. § 19-7-2, and failed to achieve any of the goals of the agency's case plan for him. *In the Interest of D.L.*, 268 Ga. App. 360, 601 S.E.2d 714 (2004).

Parent had a statutory duty to support the parent's children, with or without a court order, and an order terminating a father's parental rights was supported by, among other things, a lack of evidence that the father had provided any support for the child. *In the Interest of M.L.S.*, 273 Ga. App. 554, 615 S.E.2d 615 (2005).

Parental duty exists, even though children have property of their own. — It is the duty of a parent, having ability to do so, to support, educate, and maintain the parent's minor children, although children may have property of their own. *Nunn v. Burger*, 76 Ga. 705 (1886); *Pettigrew v. Williams*, 65 Ga. App. 576, 16 S.E.2d 120 (1941).

In case of inability of parent to provide for children from the parent's own

means, the ordinary (now judge of probate court) may grant an order allowing use of estate in the parent's hands as guardian of the parent's child. *Prime v. Mapp*, 80 Ga. 137, 5 S.E. 66 (1888); *Crawford v. Broomhead*, 97 Ga. 614, 25 S.E. 487 (1895).

When situation and circumstances of parent are such that parent is not financially able to properly support and educate children, allowance for that purpose may be made from children's estate, but regard should be had to circumstances of particular case, and such allowance to parent may, in a proper case, be made either as provision for future or as reimbursement for past expenditures. *Pettigrew v. Williams*, 65 Ga. App. 576, 16 S.E.2d 120 (1941).

Duration of parental duty to support. — Parent is obligated to support child until the child reaches majority or becomes emancipated. *Walsh v. Walsh*, 240 Ga. 154, 240 S.E.2d 702 (1977).

When a West German judgment imposed child support until the children completed college, and there was no evidence concerning a statutory termination date under West German law, the issue of when the child support payments will be terminated remained for determination, and was not ripe for review. *Knothe v. Rose*, 195 Ga. App. 7, 392 S.E.2d 570 (1990).

Parent is not required to support child after the child reaches majority. *Tilly v. Canedy*, 217 Ga. 63, 121 S.E.2d 144 (1961); *Newton v. Newton*, 222 Ga. 175, 149 S.E.2d 128 (1966); *Crane v. Crane*, 225 Ga. 605, 170 S.E.2d 392 (1969) (But

see O.C.G.A. § 19-6-15(e), added in 1992).

Loss of custody does not relieve parent of legal obligation. — Award of custody of child to some other person, by reason of misconduct on part of parent, of itself does not relieve parent of legal obligation to support the child. *Brown v. Brown*, 132 Ga. 712, 64 S.E. 1092, 131 Am. St. R. 229 (1909).

Father's surrender of parental rights and consent to adoption did not release him from his support obligation under O.C.G.A. § 19-7-2. *Department of Human Resources v. Cowan*, 220 Ga. App. 230, 469 S.E.2d 384 (1996).

Support award not precluded by custody award. — Judgment awarding joint legal custody of a child does not preclude a monetary award of child support. *Hunt v. Carter*, 261 Ga. 259, 404 S.E.2d 121 (1991).

Inalienability of child's right to parental support. — Neither wife nor civil courts can take away child's rights to be provided for by both parents and, specifically, a wife cannot contract away right of child to be supported by the child's father. *Crumb v. Gordon*, 157 Ga. App. 839, 278 S.E.2d 725 (1981).

Surrender of parental rights does not alter support obligation. — Father's execution of a surrender of parental rights and final release for adoption did not terminate his obligation to support his children; he was obligated to support the children until and unless a court order altered that obligation, his belief regarding their adoption notwithstanding. *Department of Human Resources v. Baker*, 222 Ga. App. 664, 476 S.E.2d 41 (1996).

Attaining majority or marriage of child terminates parents' support obligation. — When child reaches majority, statutory and common-law duty of parents to support child ceases and should a minor marry, the duty of the parent to support the child ceases because such child is no longer a member of the parents' household. *Golden v. Golden*, 230 Ga. 867, 199 S.E.2d 796 (1973).

Requirement to provide child support beyond age of majority may not be imposed. *Clavin v. Clavin*, 238 Ga. 421, 233 S.E.2d 151 (1977); *Coleman v. Coleman*, 240 Ga. 417, 240 S.E.2d 870 (1977);

Barnes v. Justis, 219 Ga. App. 815, 467 S.E.2d 3 (1996) (But see O.C.G.A. § 19-6-15(e), added in 1992).

Courts cannot require a parent to support a child beyond the age of majority. *Crawford v. Kalman*, 166 Ga. App. 712, 305 S.E.2d 442 (1983) (But see O.C.G.A. § 19-6-15(e), added in 1992).

Legislative exception for mentally ill children. — General Assembly might conceivably make exception regarding children born mentally ill and remaining so beyond majority or who become ill later on in life and remain so after reaching majority. *Crane v. Crane*, 225 Ga. 605, 170 S.E.2d 392 (1969).

Duty of parent to support children ceases generally upon parent's death. *Clavin v. Clavin*, 238 Ga. 421, 233 S.E.2d 151 (1977).

No application to alimony. — Statute had no application to proceedings for alimony. *Barlow v. Barlow*, 161 Ga. 202, 129 S.E. 860 (1925), criticized, *Mell v. Mell*, 190 Ga. 511, 9 S.E.2d 756 (1940); *Eskew v. Eskew*, 199 Ga. 513, 34 S.E.2d 697 (1945).

Relation to § 19-6-15. — Former Code 1933, § 74-105 (see now O.C.G.A. § 19-7-2) was foundation upon which remedy provided in former Code 1933, § 30-207 (see now O.C.G.A. § 19-6-15) rests. *Mell v. Mell*, 190 Ga. 508, 9 S.E.2d 756 (1940).

Death of a child resulting from a negligent omission to comply with the parental duty stated in O.C.G.A. § 19-7-2 would amount to involuntary manslaughter by the commission of an unlawful act. *Lewis v. State*, 180 Ga. App. 369, 349 S.E.2d 257 (1986).

When O.C.G.A. § 19-8-6 not necessarily violated. — While divorce decree wherein mother waived child support was ineffective to modify statutory duty imposed upon father, his good faith reliance upon the decree constitutes a reasonable excuse for failing to provide for care and support of child; if an excuse is reasonable, although not legal, absence of legal excuse does not demand finding that O.C.G.A. § 19-8-6 has been violated. *Crumb v. Gordon*, 157 Ga. App. 839, 278 S.E.2d 725 (1981).

In contempt proceedings to enforce a support order, the trial court does not

General Consideration (Cont'd)

have authority to modify the order, and this includes modification of support obligations covered by O.C.G.A. § 19-7-2. *Department of Human Resources v. Tabb*, 221 Ga. App. 766, 472 S.E.2d 540 (1996).

Support may not be modified in contempt proceedings. — In a contempt proceeding brought by the Georgia Department of Human Resources, the trial court erred in modifying a parent's child support obligation and in forgiving a portion of the arrearage because the court lacked authority to modify support orders in contempt proceedings and O.C.G.A. § 19-6-17(e)(1)-(3) precluded retroactive modification of child support. *Ga. Dep't of Human Res. v. Gamble*, 297 Ga. App. 509, 677 S.E.2d 713 (2009).

Effect of third parties on obligation. — Parent's legal obligation to support is not governed by whether some third party asks the parent to support the child; and the parent's legal obligation to support the child cannot be diminished, waived, or mitigated by any third persons except as this may affect the question of willful and wanton failure to support. *Westberg v. Stamm*, 162 Ga. App. 369, 291 S.E.2d 439 (1982).

Joint rights in action for expenses. — Since the language of O.C.G.A. § 19-7-2 has been amended to reflect that it is the joint and several duty of each parent to support his or her minor children, it follows that an action to recover medical expenses of a minor is now vested exclusively in both parents. *Rose v. Hamilton Medical Ctr., Inc.*, 184 Ga. App. 182, 361 S.E.2d 1 (1987), cert. denied, 184 Ga. App. 182, 361 S.E.2d 1 (1987).

"Medical bills," in the allocation of statutory duties to a child in a divorce decree, are construed to include those reasonable charges of professionals in generally recognized fields of health care that are required to maintain a child in good health, and to correct or alleviate any physical or mental dysfunction, including the reasonable cost of services required for the child's dental health and the reasonable costs of providing corrective devices, such as eyeglasses, required by the child's optical needs. *Stone v. Tillis*, 258 Ga. 17,

365 S.E.2d 110 (1988).

Adult child not resident of parent's home. — Adult child's intent to live in the parent's home does not make the adult child a resident of the household for insurance purposes. As an adult, the child may only reside at the parents' home with their permission and consent. *Tuttle v. America First Ins. Co.*, 187 Ga. App. 68, 369 S.E.2d 342 (1988).

Agreement for payments exceeding guidelines. — Contractual agreement for modification providing for child support payments that exceed the statutory guidelines did not contravene O.C.G.A. § 19-6-15 or the public policy of the state. *Kendrick v. Childers*, 267 Ga. 98, 475 S.E.2d 604 (1996).

Cited in *Bulloch v. Bulloch*, 45 Ga. App. 1, 163 S.E. 708 (1932); *De Loach v. Waters*, 54 Ga. App. 386, 188 S.E. 58 (1936); *Breedlove v. Suttles*, 302 U.S. 277, 58 S. Ct. 205, 82 L. Ed. 252 (1937); *Harwell v. Gay*, 186 Ga. 80, 196 S.E. 758 (1938); *Edwards v. Addison*, 187 Ga. 756, 2 S.E.2d 77 (1939); *Alexander v. Lamar*, 188 Ga. 273, 3 S.E.2d 656 (1939); *Moore v. Moore*, 188 Ga. 314, 4 S.E.2d 18 (1939); *Chapin v. Cummings*, 191 Ga. 408, 12 S.E.2d 312 (1940); *Brackett v. Glaze*, 72 Ga. App. 314, 33 S.E.2d 733 (1945); *Colson v. Huber*, 74 Ga. App. 339, 39 S.E.2d 539 (1946); *Whitehurst v. Singletary*, 77 Ga. App. 811, 50 S.E.2d 80 (1948); *Strouse v. Barron*, 212 Ga. 777, 95 S.E.2d 791 (1956); *Murphey v. Murphey*, 215 Ga. 19, 108 S.E.2d 872 (1959); *Southern Ry. v. Neeley*, 101 Ga. App. 488, 114 S.E.2d 283 (1960); *Grimes v. Harvey*, 219 Ga. 675, 135 S.E.2d 281 (1964); *Brazell v. Anderson*, 113 Ga. App. 15, 146 S.E.2d 921 (1966); *Strange v. Strange*, 222 Ga. 44, 148 S.E.2d 494 (1966); *Barnwell v. Cordle*, 438 F.2d 236 (5th Cir. 1971); *City of Dalton v. Webb*, 131 Ga. App. 599, 206 S.E.2d 639 (1974); *Williamson v. State*, 138 Ga. App. 306, 226 S.E.2d 102 (1976); *Quarles v. Quarles*, 237 Ga. 703, 229 S.E.2d 452 (1976); *J.L. v. Parham*, 412 F. Supp. 112 (M.D. Ga. 1976); *Leitzke v. Leitzke*, 239 Ga. 17, 235 S.E.2d 500 (1977); *Hall v. Hall*, 240 Ga. 28, 239 S.E.2d 356 (1977); *Greer v. Moss*, 240 Ga. 121, 239 S.E.2d 685 (1977); *Kosikowski v. Kosikowski*, 240 Ga. 381, 240 S.E.2d 846 (1977); *Quilloin v. Walcott*,

434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); *Simonds v. Simonds*, 145 Ga. App. 227, 243 S.E.2d 545 (1978); *McLean v. McLean*, 242 Ga. 71, 247 S.E.2d 867 (1978); *Williamson v. Alderman*, 148 Ga. App. 297, 251 S.E.2d 153 (1978); *Ford v. Ford*, 243 Ga. 763, 256 S.E.2d 446 (1979); *Jones v. Jones*, 244 Ga. 32, 257 S.E.2d 537 (1979); *Allison v. Fulton-DeKalb Hosp. Auth.*, 245 Ga. 445, 265 S.E.2d 575 (1980); *Hicks v. Fulton County Dep't of Family & Children Servs.*, 155 Ga. App. 1, 270 S.E.2d 254 (1980); *State v. Causey*, 246 Ga. 735, 273 S.E.2d 6 (1980); *Stewart v. Stewart*, 160 Ga. App. 463, 287 S.E.2d 378 (1981); *Worthington v. Worthington*, 162 Ga. App. 813, 292 S.E.2d 861 (1982); *In re C.C.B.*, 164 Ga. App. 3, 296 S.E.2d 198 (1982); *Estes v. State*, 251 Ga. 347, 305 S.E.2d 778 (1983); *Department of Human Resources v. Brinson*, 171 Ga. App. 905, 321 S.E.2d 763 (1984); *Wood v. Wood*, 257 Ga. 598, 361 S.E.2d 819 (1987); *Weaver v. Chester*, 195 Ga. App. 471, 393 S.E.2d 715 (1990); *In re A.R.B.*, 209 Ga. App. 324, 433 S.E.2d 411 (1993); *State v. Roberts*, 234 Ga. App. 522, 507 S.E.2d 194 (1998); *Loveless v. State*, 245 Ga. App. 555, 538 S.E.2d 464 (2000); *Brandenburg v. Brandenburg*, 274 Ga. 183, 551 S.E.2d 721 (2001); *Dep't of Corr. v. Barkwell*, 256 Ga. App. 877, 570 S.E.2d 13 (2002); *In the Interest of A.T.*, 271 Ga. App. 470, 610 S.E.2d 121 (2005); *In the Interest of J.Q.W.*, 288 Ga. App. 444, 654 S.E.2d 424 (2007).

Effect of Divorce

Duty under statute did not cease upon separation or divorce of parents. *Mell v. Mell*, 190 Ga. 508, 9 S.E.2d 756 (1940).

Fact that father, subsequent to divorce decree, voluntarily assumed additional obligation of second family by marriage did not authorize termination of obligation to daughter by former marriage, especially since it was shown that the income of the father had substantially increased since the date of the alimony decree. *Strickland v. Strickland*, 220 Ga. 69, 137 S.E.2d 31 (1964).

Duty of parents to support their children is joint and several and does not cease upon separation or divorce of the

parents. *Collins v. Collins*, 172 Ga. App. 748, 324 S.E.2d 475 (1984).

Divorce decree cannot waive a minor child's right to support. *International Indem. Co. v. Collins*, 258 Ga. 236, 367 S.E.2d 786 (1988).

Noncustodial parent's support obligation. — Award of custody pursuant to divorce decree does not relieve noncustodial parent of support obligation. *Garrett v. Garrett*, 172 Ga. 812, 159 S.E. 255 (1931).

Child support required in divorce decree. — Obligation of support for child can be made a requirement of divorce decree. *Jenkins v. Jenkins*, 233 Ga. 902, 214 S.E.2d 368 (1975).

Trial court's discretion regarding child support. — In divorce action, trial court is vested with wide discretion regarding child support and should take into consideration the needs of the child and station of life of the parties. *McClain v. McClain*, 237 Ga. 80, 227 S.E.2d 5 (1976).

Award of child support substitutes for support required of parent by statute. *Golden v. Golden*, 230 Ga. 867, 199 S.E.2d 796 (1973); *Clavin v. Clavin*, 238 Ga. 421, 233 S.E.2d 151 (1977).

Divorce court may not require parent to provide life insurance for benefit of child absent voluntary assumption of such obligation. *Clavin v. Clavin*, 238 Ga. 421, 233 S.E.2d 151 (1977).

Month child attains majority included in support payment. — Decree ordering child support payment to include month child attains majority is illegal on the order's face. *Kimble v. Kimble*, 240 Ga. 100, 239 S.E.2d 676 (1977).

Custodial parent acquires no interest in support awarded to children. — When alimony is awarded to support minor children, custodial parent acquires no interest in the funds as such parent is a mere trustee charged with the duty of seeing that the funds are applied solely for the benefit of the children. Custodial parent cannot consent to reduction or remission of alimony, and ordinarily cannot relieve the other parent of paying alimony as directed by the court. *O'Neil v. Williams*, 232 Ga. 170, 205 S.E.2d 226 (1974).

Child support, unlike alimony, is always subject to revision under mod-

Effect of Divorce (Cont'd)

ification statute, even though entered into by contractual agreement. *McClain v. McClain*, 237 Ga. 80, 227 S.E.2d 5 (1976).

Modification action as exclusive remedy for obtaining additional support. — When the divorce decree does, at the very least, address a question concerning the liability of the noncustodial parent for child-support-obligation items, a modification action under O.C.G.A. § 19-6-19 is the custodial parent's exclusive remedy in regard to supplementing the decree with a provision obligating the noncustodial parent to pay additional child support. *Conley v. Conley*, 259 Ga. 68, 377 S.E.2d 663 (1989).

When parties may contract to settle child support. — Parties may enter into a written contract during the pendency of a divorce or alimony suit to settle child support for minor children and when such a contract is approved by the court and incorporated into the final divorce decree, the contract is fully enforceable as an adjudication on that issue. If support is sought for a child who has passed the age of majority, the agreement must contain specific language stating that support will continue. *Crawford v. Kalman*, 166 Ga. App. 712, 305 S.E.2d 442 (1983).

Contract may not provide for custody of child already reaching majority. — If a child has already reached the age of majority before a support agreement is signed, a provision awarding custody of the child to one of the child's parents is null and void. *Crawford v. Kalman*, 166 Ga. App. 712, 305 S.E.2d 442 (1983).

Promise to pay child support for non-biological child. — Trial court erred by requiring an ex-spouse to pay child support for a child of whom the ex-spouse was not the biological parent of, despite allegedly promising to pay, because the trial court incorrectly applied the doctrine of promissory estoppel to the agreement as there was no evidence that the promise to pay support caused the parent/ex-spouse of the child to forego, in reliance upon such promise, a valuable legal right to the actual parent's/ex-spouse's detriment. *Garcia v. Garcia*,

284 Ga. 152, 663 S.E.2d 709 (2008).

Periodic support payments do not constitute penalty. — Requirement of periodic support payments is not, strictly speaking, in nature of a penalty, but is merely enforcement of a legal obligation by summary process, and it cannot be imposed as a penalty or punishment since the purpose of the order is to secure a reasonable allowance for the wife's support. *Hudson v. State*, 248 Ga. 397, 283 S.E.2d 271 (1981).

Modification action as exclusive remedy for obtaining additional support. — When the divorce decree does, at the very least, address a question concerning the liability of the noncustodial parent for child-support-obligation items, a modification action under O.C.G.A. § 19-6-19 is the custodial parent's exclusive remedy in regard to supplementing the decree with a provision obligating the noncustodial parent to pay additional child support. *Conley v. Conley*, 259 Ga. 68, 377 S.E.2d 663 (1989).

Because: (1) a settlement agreement between a mother and father was not silent as to child support; and (2) an action for modification was the exclusive remedy for obtaining a provision supplementing the child support award contained in a divorce judgment, the trial court correctly treated the father's request to establish child support as one for modification. *Drake v. Drake*, 279 Ga. App. 576, 632 S.E.2d 165 (2006).

Application**1. In General**

Voluntary contract of relinquishment of parental control must be supported by legal consideration, which is sufficient when third person, who claims right to child's custody under voluntary contract with parent, has assumed all responsibility of child's maintenance, education, and protection. *Waldrup v. Crane*, 203 Ga. 388, 46 S.E.2d 919 (1948).

Execution of a surrender of parental rights by father did not release him from his support obligation because there was no court order providing for the adoption of his children or otherwise terminating his support obligation. Department of

Human Resources v. Tabb, 221 Ga. App. 766, 472 S.E.2d 540 (1996).

Person to whom parental rights are alienated. — When parental duty and control is lost or alienated to third person by any of the means recognized by law, then such third person stands in loco parentis to the child, and duty and obligation to provide for the child's welfare and protection devolves upon such third person. *Waldrup v. Crane*, 203 Ga. 388, 46 S.E.2d 919 (1948).

Application to termination of parental rights. — Because the Department of Children and Families presented sufficient evidence of a father's neglect of two children, lack of any meaningful parental bond, repeated incarceration, and failure to pay child support, the juvenile court, when coupled with the father's acknowledgment that the children thrived in the current placement, was authorized to find that sufficient evidence was presented to support a finding that deprivation of the two children by the father was likely to continue and that termination of the father's parental rights was in the children's best interest; furthermore, a claim that the father lacked knowledge of, and was not directed to pay child support, was irrelevant in light of the directive found in O.C.G.A. § 19-7-2 that a parent had a statutory duty to pay child support, with or without a court order. In the *Interest of T.C.*, 281 Ga. App. 137, 635 S.E.2d 395 (2006).

While the evidence showed that a mother failed to pay child support while her son was in foster care, the juvenile court did not address whether that failure was "without justifiable cause," as required by former O.C.G.A. § 15-11-94(b)(4)(C) (see now O.C.G.A. § 15-11-310) in order to authorize the termination of the mother's rights. There was nothing in the numerous reunification plans, progress reports, and court orders that notified the mother of her obligation to pay child support, let alone any notice of how much to pay, when, and to whom. In the *Interest of D. P.*, 326 Ga. App. 101, 756 S.E.2d 207 (2014).

Abandonment and wrongful death. — Father lacked standing to recover for the child's wrongful death pursuant to

O.C.G.A. §§ 19-7-1(c) and 51-4-4 as the father abandoned the child pursuant to § 19-7-1(b)(3); the father never supported the child, nor did the father ever visit the child in the many years after the child's hospitalization in infancy, there was no evidence that the father attempted to learn where the child resided in order to initiate visitation or support, and the father was obligated under O.C.G.A. § 19-7-2 to support the child, even though the divorce decree did not require support. *Baker v. Sweat*, 281 Ga. App. 863, 637 S.E.2d 474 (2006).

On death of parent having custody under divorce decree, right to custody automatically inures to surviving parent. *Raily v. Smith*, 202 Ga. 185, 42 S.E.2d 491 (1947).

Effect of custody agreement on obligation to Department of Human Resources. — Custody agreement between a father and his children's maternal grandmother did not relieve the father of any obligation to reimburse the Department of Human Resources for public assistance benefits payments made on behalf of his children. *Department of Human Resources v. Prince*, 198 Ga. App. 329, 401 S.E.2d 342 (1991).

Father's alleged support erroneously deemed to meet support obligations. — When the plaintiff brought a petition to adopt defendant's child, and the trial court found that although the defendant had legitimated the child in New York where the New York court had not entered a support order on behalf of the child, but for a period of 12 months prior to the filing of the plaintiff's petition, the defendant sent \$20.00 in child support to his child and clothing valued at \$8.99, had a gross income of \$13,163, had not seen the child for more than one year, but did make telephone calls to check on the child's welfare on various occasions, the trial court used an erroneous legal theory in concluding that the defendant had not failed to provide for the care and support of his child as required by O.C.G.A. § 19-7-2. *Pacella v. Sanchez*, 191 Ga. App. 611, 382 S.E.2d 371 (1989).

Failure to support child as abandonment under § 19-10-1. — Failure to comply with duty to support child imposed

Application (Cont'd)**1. In General (Cont'd)**

by former Code 1933, 74-105 (see now O.C.G.A. § 19-7-2) constituted intentional and willful voluntary abandonment within the meaning of former Code 1933, § 74-9902 (see now O.C.G.A. § 19-10-1). *Williamson v. State*, 138 Ga. App. 306, 226 S.E.2d 102 (1976).

When court may subsequently modify support order. — Since order entered in prosecution for abandonment is not a final order, modification of order for periodic payments in favor of wife, either by increase, decrease, or total discontinuance, is within the discretion of the court, and such order will be modified when the financial conditions of the parties change or other proper reasons exist. *Hudson v. State*, 248 Ga. 397, 283 S.E.2d 271 (1981).

Child support separate from divorce action. — Although the complaint in the divorce action did not seek child support, the custodial spouse was not barred from enforcing the responsibility of the non-custodial spouse to support the child, and the custodial spouse may institute an original action for an award of child support. *Hackbart v. Hackbart*, 272 Ga. 26, 526 S.E.2d 840 (2000).

Deprivation of children supported by lack of parental support. — Trial court's determination that the children's deprivation for purposes of O.C.G.A. § 15-11-94 resulted from the lack of proper parental care or control was supported by sufficient evidence that the mother did not pay any child support for her five children during the two years preceding the termination hearing, leaving the Department of Children and Families to support her children for two years; the mother had a statutory duty under O.C.G.A. § 19-7-2 to support her children, with or without a court order. In the *Interest of J.J.*, 259 Ga. App. 159, 575 S.E.2d 921 (2003).

Mother's failure to contribute to a child's support was evidence supporting a finding of the lack of proper parental care or control as a cause of the child's deprivation for purposes of terminating the mother's parental rights. In the *Interest of K.N.*, 272 Ga. App. 45, 611 S.E.2d 713 (2005).

Despite recent efforts made by the mother to comply with some of the case plan goals, the trial court was entitled to place more weight on negative past facts than positive promises as to the future and to find that the deprivation was likely to continue in light of the mother's past conduct; clear and convincing evidence established that the deprivation was likely to continue since the facts showed that the mother failed to complete the agency's reunification plan, failed to complete drug treatment, had repeated incarcerations, and failed to support the children as required by O.C.G.A. §§ 15-11-94(b)(4)(C)(ii) and 19-7-2. In the *Interest of A.H.*, 278 Ga. App. 192, 628 S.E.2d 626 (2006).

Juvenile court's termination of a mother's parental rights over her child was proper pursuant to O.C.G.A. § 15-11-94 since her lack of proper parental care or control amounted to deprivation to the child under O.C.G.A. § 15-11-2 as she failed to establish a bond with the child or substantially complete any of the goals of her reunification plan, and she did not provide support to the child under O.C.G.A. § 19-7-2; further, the deprivation was deemed likely to continue, it would likely result in harm to the child, and the child's best interest was served by termination of the mother's rights as the child had formed a bond with the foster parent. In the *Interest of J.D.*, 280 Ga. App. 861, 635 S.E.2d 226 (2006).

2. Education

Obligation to provide education beyond terms of compulsory law. — No means are provided to enforce obligation to provide education beyond terms of the compulsory attendance law. *Jenkins v. Jenkins*, 233 Ga. 902, 214 S.E.2d 368 (1975). (But see O.C.G.A. § 19-6-15(e), added in 1992).

No requirement to pay for education beyond age of majority. — Since a parent is not liable for child support or maintenance after a child achieves the age of majority, a divorced father's obligation to continue making support payments to his child depended upon the terms of the agreement between the parties in question as reflected in the divorce

decree. Additionally, no requirement to pay for his child's education beyond the age of majority could be imposed by the court. *Still v. Still*, 199 Ga. App. 723, 405 S.E.2d 762 (1991). (But see O.C.G.A. § 19-6-15(e), added in 1992).

When college education may be considered a necessity. — Depending on the family's life style and economic situation, a college education may be considered a necessity. *Coleman v. Coleman*, 240 Ga. 417, 240 S.E.2d 870 (1977).

Court's modification of settlement agreement was error. — When divorced parties entered a settlement agreement that was incorporated into their divorce judgment that provided for the husband to pay college expenses for the parties' son, with the only limitation being that the amount was not to exceed the tuition that would be paid for in-state attendance at the University of Georgia, the trial court erred in imposing an 11-semester limitation on that obligation. *Norris v. Norris*, 281 Ga. 566, 642 S.E.2d 34 (2007).

Divorce decree may impose obligation to pay college expenses during minority. — Trial court has jurisdiction to include in the divorce decree a provision for educational funds including expenses for attending college during minority where circumstances of case warrant it. *Coleman v. Coleman*, 240 Ga. 417, 240 S.E.2d 870 (1977).

Termination of judicially imposed obligation to pay college expenses. — Any obligation imposed by the trial court's decree to provide educational funds including expenses for attending college terminates when the child reaches majority or marries. *McClain v. McClain*, 235 Ga. 659, 221 S.E.2d 561 (1975).

Any obligation to pay educational expenses of the child imposed by a decree terminates when the child reaches majority or marries. *Coleman v. Coleman*, 240 Ga. 417, 240 S.E.2d 870 (1977).

Distinction between alimony decree and contractual obligation to provide college education. — There is

a significant difference between alimony decree rendered under law and contract providing for college education of children even after the children reach age of majority which is incorporated into alimony decree. The latter is enforceable as a contract. *McClain v. McClain*, 235 Ga. 659, 221 S.E.2d 561 (1975).

3. Medical Care and Expenses

Right to recover damages for child's injuries. — O.C.G.A. § 19-7-2 and case law make clear that the right to recover damages for a child's medical expenses vests solely in the child's parents, while the right to recover damages for pain and suffering vests in the child, not the parent. *Grange Mut. Cas. Co. v. Kay*, 264 Ga. App. 139, 589 S.E.2d 711 (2003).

Medical expenses incurred by reason of injury are necessities. *Evans v. Caldwell*, 52 Ga. App. 475, 184 S.E. 440 (1936), aff'd, 184 Ga. 203, 190 S.E. 582 (1937); *Jarrett v. State Merit Sys. of Personnel Admin.*, 205 Ga. App. 527, 423 S.E.2d 1, cert. denied, 205 Ga. App. 900, 423 S.E.2d 1 (1992); *Southern Guar. Ins. Co. v. Sinclair*, 228 Ga. App. 386, 491 S.E.2d 843 (1997).

4. Property

Parents are not required to settle an estate upon child. — Parents' responsibility under former Code 1933, §§ 30-215, 30-207 and 74-105 (see now O.C.G.A. §§ 19-6-13, 19-6-15, and 19-7-2) for support of child did not extend to awarding the child title to their property. Parents were not required to settle an estate upon the child. *Clark v. Clark*, 228 Ga. 838, 188 S.E.2d 487 (1972).

Reduction of parents' support obligation as a result of trust established by child's grandparent, the terms of which require use of trust funds for education and support of child during minority. *McElrath v. Citizens & S. Nat'l Bank*, 229 Ga. 20, 189 S.E.2d 49 (1972).

OPINIONS OF THE ATTORNEY GENERAL

Whereabouts of minor child would clearly seem to fall within area of parental

or guardianship responsibility and therefore primary responsibility for locating

child who is absent from educational center or school on unauthorized basis would fall upon parents or other guardians or custodians. 1978 Op. Att'y Gen. No. 78-48.

Doicile of minor is that of minor's parents, but this can be altered when

usual parental authority and control over minor is ended by voluntary or involuntary relinquishment. 1981 Op. Att'y Gen. No. U81-5.

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Parent and Child, §§ 22, 45 et seq.

C.J.S. — 67A C.J.S., Parent and Child, § 156 et seq.

ALR. — Criminal liability of father for failure to support child who is living apart from him without his consent, 23 ALR 864.

Criminal responsibility for abandonment or nonsupport of children who are being cared for by charitable institution, 24 ALR 1075.

Illegitimate child as within statute relating to duty to support child, 30 ALR 1075.

Civil liability of father for necessities furnished to child taken from home by mother, 32 ALR 1466.

Denial of, or expression of doubt as to paternity or other relationship as estoppel to assert right of inheritance by virtue of such relationship, 33 ALR 579.

Extent or character of support contemplated by statute making nonsupport of wife or child offense, 36 ALR 866.

Liability of parent for necessities furnished to adult child, 42 ALR 150.

One charged with desertion or failure to support wife or child as fugitive from justice, subject to extradition, 54 ALR 281.

Appointment of guardian for infant as affecting rights and duties of parents, 63 ALR 1147.

Child's ownership of or right to income or property as affecting parent's duty to support, or as ground for reimbursing parent for expenditures in that regard, 121 ALR 176.

Criminal responsibility of parent under desertion or nonsupport statutes, as affected by child's possession of independent means, or by fact other persons supply his needs or are able to do so, 131 ALR 482.

Construction and application of statute charging father and mother jointly with child's care and support, 131 ALR 862.

Parent's obligation to support adult child, 1 ALR2d 910; 48 ALR4th 919.

Liability of mother's husband, not the father of her illegitimate child, for its support, 90 ALR2d 583.

Nature of care contemplated by statute imposing general duty to care for indigent relatives, 92 ALR2d 348.

Award of custody of child where contest is between child's father and grandparent, 25 ALR3d 7.

Power of divorce court, after child attained majority, to enforce by contempt proceedings payment of arrears of child support, 32 ALR3d 888.

Right of child to enforce provisions for his benefit in parents' separation or property settlement agreement, 34 ALR3d 1357.

Divorce: provision in decree that one party obtain or maintain life insurance for benefit of other party or child, 59 ALR3d 9.

Liability of parent for support of child institutionalized by juvenile court, 59 ALR3d 636.

Permitting child to walk to school unattended as contributory negligence of parents in action for injury to or death of child, 62 ALR3d 541.

Validity, construction, and application of statute imposing upon stepparent obligation to support child, 75 ALR3d 1129.

Father's liability for support of child furnished after divorce decree which awarded custody to mother but made no provision for support, 91 ALR3d 530.

Parent's obligation to support unmarried minor child who refuses to live with parent, 98 ALR3d 334.

Propriety of decree in proceeding between divorced parents to determine mother's duty to pay support for children in custody of father, 98 ALR3d 1146.

Responsibility of noncustodial divorced parent to pay for, or contribute to, costs of child's college education, 99 ALR3d 322.

Validity and effect, as between former spouses, of agreement releasing parent from payment of child support provided for in an earlier divorce decree, 100 ALR3d 1129.

Child's right of action for loss of support, training, parental attention, or the like, against third person negligently injuring parent, 11 ALR4th 549.

Postsecondary education as within nondivorced parent's child-support obligation, 42 ALR4th 819.

Stepparent's postdivorce duty to support stepchild, 44 ALR4th 520.

Postmajority disability as reviving parental duty to support child, 48 ALR4th 919.

Right to credit on child support payments for social security or other government dependency payments made for benefit of child, 34 ALR5th 447.

What voluntary acts of child, other than marriage or entry into military service, terminate parent's obligation to support, 55 ALR5th 557.

Liability of father for retroactive child support on judicial determination of paternity, 87 ALR5th 361.

19-7-3. "Grandparent" defined; original actions for visitation rights or intervention; revocation or amendment of visitation rights; appointment of guardian ad litem; mediation; hearing; notification of grandchild's participation in events.

(a) As used in this Code section, the term "grandparent" means the parent of a parent of a minor child, the parent of a minor child's parent who has died, and the parent of a minor child's parent whose parental rights have been terminated.

(b)(1) Except as otherwise provided in paragraph (2) of this subsection, any grandparent shall have the right to file an original action for visitation rights to a minor child or to intervene in and seek to obtain visitation rights in any action in which any court in this state shall have before it any question concerning the custody of a minor child, a divorce of the parents or a parent of such minor child, a termination of the parental rights of either parent of such minor child, or visitation rights concerning such minor child or whenever there has been an adoption in which the adopted child has been adopted by the child's blood relative or by a stepparent, notwithstanding the provisions of Code Section 19-8-19.

(2) This subsection shall not authorize an original action where the parents of the minor child are not separated and the child is living with both parents.

(c)(1) Upon the filing of an original action or upon intervention in an existing proceeding under subsection (b) of this Code section, the court may grant any grandparent of the child reasonable visitation rights if the court finds the health or welfare of the child would be harmed unless such visitation is granted and if the best interests of the child would be served by such visitation. In considering whether the health or welfare of the child would be harmed without such visitation, the court shall consider and may find that harm to the

child is reasonably likely to result where, prior to the original action or intervention:

(A) The minor child resided with the grandparent for six months or more;

(B) The grandparent provided financial support for the basic needs of the child for at least one year;

(C) There was an established pattern of regular visitation or child care by the grandparent with the child; or

(D) Any other circumstance exists indicating that emotional or physical harm would be reasonably likely to result if such visitation is not granted.

The court shall make specific written findings of fact in support of its rulings.

(2) An original action requesting visitation rights shall not be filed by any grandparent more than once during any two-year period and shall not be filed during any year in which another custody action has been filed concerning the child. After visitation rights have been granted to any grandparent, the legal custodian, guardian of the person, or parent of the child may petition the court for revocation or amendment of such visitation rights, for good cause shown, which the court, in its discretion, may grant or deny; but such a petition shall not be filed more than once in any two-year period.

(3) While a parent's decision regarding grandparent visitation shall be given deference by the court, the parent's decision shall not be conclusive when failure to provide grandparent contact would result in emotional harm to the child. A court may presume that a child who is denied any contact with his or her grandparent or who is not provided some minimal opportunity for contact with his or her grandparent may suffer emotional injury that is harmful to such child's health. Such presumption shall be a rebuttable presumption.

(4) In no case shall the granting of visitation rights to a grandparent interfere with a child's school or regularly scheduled extracurricular activities. Visitation time awarded to a grandparent shall not be less than 24 hours in any one-month period.

(d) Notwithstanding the provisions of subsections (b) and (c) of this Code section, if one of the parents of a minor child dies, is incapacitated, or is incarcerated, the court may award the parent of the deceased, incapacitated, or incarcerated parent of such minor child reasonable visitation to such child during his or her minority if the court in its discretion finds that such visitation would be in the best interests of the child. The custodial parent's judgment as to the best interests of the

child regarding visitation shall be given deference by the court but shall not be conclusive.

(e) If the court finds that the grandparent or grandparents can bear the cost without unreasonable financial hardship, the court, at the sole expense of the petitioning grandparent or grandparents, may:

(1) Appoint a guardian ad litem for the minor child; and

(2) Assign the issue of visitation rights of a grandparent for mediation.

(f) In the event that the court does not order mediation or upon failure of the parties to reach an agreement through mediation, the court shall fix a time for the hearing of the issue of visitation rights of the grandparent or grandparents.

(g) Whether or not visitation is awarded to a grandparent, the court may direct a custodial parent, by court order, to notify such grandparent of every performance of the minor child to which the public is admitted, including, but not limited to, musical concerts, graduations, recitals, and sporting events or games. (Ga. L. 1976, p. 247, § 1; Ga. L. 1980, p. 936, § 1; Ga. L. 1981, p. 1318, § 1; Ga. L. 1986, p. 10, § 19; Ga. L. 1986, p. 1516, § 1; Ga. L. 1988, p. 864, § 1; Ga. L. 1990, p. 1572, § 4; Ga. L. 1993, p. 456, § 1; Ga. L. 1996, p. 1089, § 1; Ga. L. 2012, p. 860, § 1/HB 1198.)

Editor's notes. — Ga. L. 1996, p. 1089, § 2, not codified by the General Assembly, provides: "The trial court may award reasonable attorney fees and costs to a respondent in an action filed pursuant to this Act upon the finding that the petition is brought for the purpose of harassment or any other improper purpose."

Law reviews. — For article surveying developments in Georgia domestic relations law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 109 (1981). For article citing developments in Georgia juvenile court practice and procedure from mid-1980 through mid-1981, see 22 Mercer L. Rev. 167 (1981). For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For annual survey of law of domestic relations, see 38 Mercer L. Rev. 179 (1986). For annual survey article discussing developments in domestic relations law, see 51 Mercer L.

Rev. 263 (1999). For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004). For annual survey of domestic relations law, see 58 Mercer L. Rev. 133 (2006). For survey article on domestic relations law, see 59 Mercer L. Rev. 139 (2007) and 60 Mercer L. Rev. 121 (2008). For annual survey on domestic relations law, see 64 Mercer L. Rev. 121 (2012). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 320 (2012).

For note on permissive intervention of grandparents in divorce proceedings, see 26 Ga. L. Rev. 787 (1992). For review of 1996 domestic relations legislation, see 13 Ga. St. U.L. Rev. 148 (1996).

For comment on "Grandparents' Visitation Rights in Georgia," see 29 Emory L.J. 1083 (1980). For comment on *Brooks v. Parkerson*, 265 Ga. 189, 454 S.E.2d 769 (1995), appearing below, see 11 Ga. St. U.L. Rev. 779 (1995).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICATION

General Consideration

Unconstitutional. — O.C.G.A. § 19-7-3 is unconstitutional under both the state and federal constitutions because the statute does not clearly promote the health or welfare of the child and does not require a showing of harm before state interference is authorized. *Brooks v. Parkerson*, 265 Ga. 189, 454 S.E.2d 769 (1995).

Section not an exception to adoption statute terminating legal relationships. — O.C.G.A. § 19-7-3, which provides visitation rights for grandparents in certain situations, is not an exception to O.C.G.A. § 19-8-14, which operates to terminate all legal relationships between an adopted person and that person's relatives, when both the natural mother and father have released the child for adoption. *Mitchell v. Erdmier*, 253 Ga. 335, 320 S.E.2d 163 (1984).

"Grandparents' Bill of Rights" is not an exception to O.C.G.A. § 19-8-14. The only provision which grants grandparents visitation rights after an adoption is the limited one of the death of one parent, the remarriage of the surviving parent, followed by the adoption of the child by the stepparent. In other adoptions, the severance of relationships provision of § 19-8-14 controls, and no rights of visitation by former grandparents exist. *Heard v. Coleman*, 181 Ga. App. 899, 354 S.E.2d 164 (1987).

Construction of word "parent". — Limiting language of O.C.G.A. § 19-7-3(b), forbidding original actions for grandparent visitation if the parents are together and living with the child, includes adoptive parents because in the absence of language limiting the term "parent" to only "natural parents" or "biological parents," there is no legislative intent to withhold from adoptive parents the same constitutionally protected status enjoyed by biological parents to raise their children without state interference, and in

construing O.C.G.A. § 19-7-3(b), the definition of parent in the adoption statute, O.C.G.A. § 19-8-1(6) and (8), which gives full legal status to adoptive parents, cannot be ignored; grandparents may have a sincere, beneficent interest in participating in their grandchildren's lives, and this interest often coincides with the best interest of the child, but beyond constitutional considerations, policy decisions addressing disputes between grandparents and parents are the province of the legislature. *Bailey v. Kunz*, 307 Ga. App. 710, 706 S.E.2d 98 (2011), *aff'd*, 290 Ga. 361, 720 S.E.2d 634 (2012).

Adoption compared to proceeding to terminate parental rights. — An adoption is not the equivalent to a proceeding to terminate parental rights within the meaning of O.C.G.A. § 19-7-3. *Murphy v. McCarthy*, 201 Ga. App. 101, 410 S.E.2d 198 (1991).

Grandparents' rights not affected by stepparent adoption. — Because O.C.G.A. § 19-8-19 provides for the termination of all legal relationships between an adopted child and his or her relatives, under O.C.G.A. § 19-7-3(b), grandparents' rights are not affected by an adoption by a stepparent. *Lightfoot v. Hollins*, 308 Ga. App. 538, 707 S.E.2d 491 (2011), overruled on other grounds, *Kunz v. Bailey*, 290 Ga. 361, 720 S.E.2d 634 (2012).

Amendment to custody petition as "original action for visitation rights". — Child custody action originated by a grandmother who sought visitation rights through an amendment to the custody petition was an "original action for visitation rights" within the meaning of O.C.G.A. § 19-7-3(b). *Sewell v. Bill Johnson Motors, Inc.*, 213 Ga. App. 853, 446 S.E.2d 239 (1994).

Legislative intent of subsection (c). — General Assembly, by the enactment of O.C.G.A. § 19-7-3(c), has sought to limit the number of original actions for visitation which grandparents may file. *Anderson v. Sanford*, 198 Ga. App. 410, 401 S.E.2d 604 (1991).

Basis of grandparents' right to visitation with grandchildren. — Any right of grandparents to visitation with their grandchildren is based on Ga. L. 1976, p. 247, § 1 (see now O.C.G.A. § 19-7-3). *Spitz v. Holland*, 243 Ga. 9, 252 S.E.2d 406 (1979).

Grandparents have no right to visitation, but only a right to request privilege of visitation. *Sachs v. Walzer*, 242 Ga. 742, 251 S.E.2d 302 (1978).

Grant of visitation rights to grandparents is purely discretionary. — Statute allows court having before it a custody question to grant visitation to child's grandparents. However, any such grant is purely discretionary, and may be exercised only when the court is considering custody matters and finds that conditions are such that it is appropriate to allow this privilege to the grandparents. *Sachs v. Walzer*, 242 Ga. 742, 251 S.E.2d 302 (1978).

O.C.G.A. § 19-7-3 allows trial court discretion to grant or deny visitation rights to grandparents. *Ryback v. Cobb County Dep't of Family & Children Servs.*, 163 Ga. App. 165, 293 S.E.2d 563 (1982); *Welch v. Suggs*, 175 Ga. App. 233, 333 S.E.2d 31 (1985).

Trial court did not abuse the court's discretion in denying visitation rights to grandparent since the court found that to grant visitation privileges would disturb present stability of the child and would probably result in severe emotional trauma. *Ryback v. Cobb County Dep't of Family & Children Servs.*, 163 Ga. App. 165, 293 S.E.2d 563 (1982).

When section may be invoked. — It is only when custody questions are in issue that statute may be invoked. *Spitz v. Holland*, 243 Ga. 9, 252 S.E.2d 406 (1979).

Court may consider grant of visitation rights to grandparents only in cases when the court has before it a question concerning custody. *Mead v. Owens*, 149 Ga. App. 303, 254 S.E.2d 431 (1979).

O.C.G.A. § 19-7-3 only authorizes grandparents to intervene to obtain visitation rights in the proceedings specified in the section. *Murphy v. McCarthy*, 201 Ga. App. 101, 410 S.E.2d 198 (1991).

Specific findings of fact required. — Trial court's conclusory statement to the

effect that the granddaughter's visitation with the maternal grandparents was in the granddaughter's best interests failed to set forth specific findings of fact supporting the trial court's grant of grandparent visitation; those findings enable a reviewing court to conduct an intelligent review of the merits of the visitation case, and absent those findings the case had to be vacated and the case remanded to the trial court for adequate findings. *Rainey v. Lange*, 261 Ga. App. 491, 583 S.E.2d 163 (2003).

Trial court erred in failing to rule upon a maternal grandfather's request for visitation with a mother's child because the trial court was required to apply O.C.G.A. § 19-7-3(c) and determine whether the grandfather had presented clear and convincing evidence that the health or welfare of the child would be harmed unless visitation was granted and whether the child's best interests would be served by allowing such visitation. *Sheppard v. McCraney*, 317 Ga. App. 91, 730 S.E.2d 721 (2012).

Trial court erred in failing to show that the court applied the proper evidentiary standard and in failing to include written findings of fact to support the court's broad, conclusory ruling as required by O.C.G.A. § 19-7-3(c)(1); the trial court stated only that the court had considered the entire record before concluding that the grandmother had shown, pursuant to § 19-7-3, that the health and welfare of the minor child would be harmed unless visitation was provided for the child with the grandmother. *Van Leuvan v. Carlisle*, 322 Ga. App. 576, 745 S.E.2d 814 (2013).

When grandparents seek modification of order denying grandparents custody. — Custody question arises when grandparents seek modification of habeas corpus order denying the grandparents custody. *George v. Sizemore*, 238 Ga. 525, 233 S.E.2d 779 (1977).

Grandparents' rights to bring action for custody not dependent on legitimation. — Although the definition of "grandparents" found in O.C.G.A. § 19-7-3(a) is limited to that Code section, outlining visitation rights for grandparents, the statute sheds light upon a grandparent's status as that of the parent of a

General Consideration (Cont'd)

parent; the paternal grandparents' right to bring an action for custody of a child was controlled by a showing that their son was the parent of the child, not by their son legitimating that child, and a trial court's order dismissing the paternal grandparents' custody action for lack of standing due to a void legitimation of the child was reversed. *Reeves v. Hayes*, 266 Ga. App. 297, 596 S.E.2d 668 (2004).

Grandparents' visitation deemed tried by consent when parent did not object. — Because a parent's only objection to the grandparents' visitation raised at the hearing was the parent's concern for advance notice by the grandparents before scheduling a visit, the parent failed to preserve any objection that the grandparents had failed to intervene in the action as contemplated by O.C.G.A. § 19-7-3(c), pursuant to O.C.G.A. § 9-11-15(b). *Grove v. Grove*, 296 Ga. 435, 768 S.E.2d 453 (2015).

Legislature's intent in enacting 1980 amendment to O.C.G.A. § 19-7-3 was to give grandparents standing to seek visitation in a situation in which their own child had lost his or her parental rights through death or termination. *Smith v. Finstad*, 247 Ga. 603, 277 S.E.2d 736 (1981).

Law as amended in 1980 applies retroactively, and reviewing court should apply law as the law exists at time of the court's judgment rather than law prevailing at rendition of judgment under review. *Houston v. Houston*, 156 Ga. App. 47, 274 S.E.2d 91 (1980).

Provisions of O.C.G.A. § 19-7-3 granting visitation rights to grandparents are retroactive. *Ryback v. Cobb County Dep't of Family & Children Servs.*, 163 Ga. App. 165, 293 S.E.2d 563 (1982).

Retroactive application of section not unconstitutional. — Because no one may acquire a vested interest in custody of a minor child, no vested rights are affected by O.C.G.A. § 19-7-3 and, therefore, the statute's retroactive application is not unconstitutional. *Smith v. Finstad*, 247 Ga. 603, 277 S.E.2d 736 (1981).

Application of the 1976 law (Ga. L. 1976, p. 247, § 1 in modification of the

1975 child custody award was not impermissible as a retroactive application of the 1976 statute. *George v. Sizemore*, 238 Ga. 525, 233 S.E.2d 779 (1977).

Cited in *Dyer v. Allen*, 238 Ga. 516, 233 S.E.2d 772 (1977); *Rhodes v. Peacock*, 142 Ga. App. 328, 235 S.E.2d 762 (1977); *Goodwin v. Goodwin*, 194 Ga. App. 147, 390 S.E.2d 247 (1990); *Motes v. Love*, 202 Ga. App. 749, 415 S.E.2d 334 (1992); *Bergmann v. McCullough*, 218 Ga. App. 353, 461 S.E.2d 544 (1995); *Scott v. Scott*, 311 Ga. App. 726, 716 S.E.2d 809 (2011).

Application

Child in temporary custody of paternal grandmother. — When a child was in the temporary custody of the child's paternal grandmother, the trial court erred in applying O.C.G.A. § 19-7-3 to the petition of the maternal grandmother for unsupervised visitation with her grandchild. *Perrin v. Stansell*, 243 Ga. App. 475, 533 S.E.2d 458 (2000).

In order to gain visitation rights with a grandchild who is in the temporary custody of a third party, i.e., another grandparent or a stranger, it is not necessary for the petitioning grandparent to prove that the child would be harmed without visitation; instead, the petitioner must demonstrate by a simple preponderance of the evidence that visitation is in the best interest of the child. *Perrin v. Stansell*, 243 Ga. App. 475, 533 S.E.2d 458 (2000).

Effect of intervention in deprivation proceeding. — Grandparents' intervention in a proceeding to determine deprivation did not bar their subsequent petition for visitation rights since there had been no previous adjudication of their right to visitation, nor had the grandparents brought any other action seeking visitation with their grandchildren. *Anderson v. Sanford*, 198 Ga. App. 410, 401 S.E.2d 604 (1991).

Paternal grandparents cannot intervene in adoption proceeding. — Adoption proceeding in which all paternal rights are sought to be severed is not such a proceeding concerning custody or guardianship as will support an intervening petition by paternal grandparents for visitation privileges. *Mead v. Owens*, 149 Ga. App. 303, 254 S.E.2d 431 (1979).

When grandparents are not entitled to relief. — When grandparents have not intervened in the proceedings, the grandparents are not parties to the action, nor are the grandparents otherwise before the trial court, and the grandparents are not entitled to be granted relief. *Smith v. Smith*, 174 Ga. App. 903, 332 S.E.2d 41 (1985).

Grandparents were not statutorily authorized to intervene in adoption proceedings brought by a married couple who were not blood relatives of the child since the child's parents were living, and the grandparents did not intervene to seek visitation rights, but instead intervened to object to the adoption and to seek to adopt the child themselves. *Murphy v. McCarthy*, 201 Ga. App. 101, 410 S.E.2d 198 (1991).

Grandmother who was temporary legal custodian of child under juvenile court deprivation order did not have standing to intervene in adoption proceedings. *Edgar v. Shave*, 205 Ga. App. 337, 422 S.E.2d 234 (1992).

Trial court erred in denying a motion filed by a child's mother and stepfather to dismiss a paternal grandparents' petition for visitation with the child because the petition was not authorized, and the trial court erred by interpreting the word "parent" in O.C.G.A. § 19-7-3(b) to include only biological parents; the child's father surrendered his parental rights, the stepfather adopted the child, and the mother and stepfather lived with the child. *Bailey v. Kunz*, 307 Ga. App. 710, 706 S.E.2d 98 (2011), *aff'd*, 290 Ga. 361, 720 S.E.2d 634 (2012).

Visitation rights precluded when child adopted by stepfather. — Paternal grandparents were not entitled to visitation rights after the child's natural father's parental rights had been terminated and the child had been adopted by his stepfather, who was not a "blood relative". *Campbell v. Holcomb*, 193 Ga. App. 474, 388 S.E.2d 65 (1989); *Echols v. Smith*, 207 Ga. App. 317, 427 S.E.2d 820 (1993).

Term "parents" in O.C.G.A. § 19-7-3(b) did not exclude a child's adoptive parent; therefore, because a child was living with the child's mother and adoptive father,

who were not separated, the child's natural grandparents had no right to file an original action for visitation with the child under the statute. Upon their son's termination of his parental rights to the child, the grandparents became strangers to the child, pursuant to O.C.G.A. § 19-8-19. *Kunz v. Bailey*, 290 Ga. 361, 720 S.E.2d 634 (2012).

Paternal grandparents entitled to visitation award in stepfather's adoption. — Trial court was specifically authorized to award grandparent visitation into a stepparent adoption decree pursuant to O.C.G.A. § 19-7-3(c)(1); although, generally, the adoption of the child would have extinguished any visitation rights of the child's former grandparents under O.C.G.A. § 19-8-19(a)(1). *Evans v. Sangster*, 330 Ga. App. 533, 768 S.E.2d 278 (2015).

O.C.G.A. § 19-7-3 does not require finding that parent is unfit, but simply that the health or welfare of the child would be harmed unless grandparent visitation is granted. *Rogers v. Barnett*, 237 Ga. App. 301, 514 S.E.2d 443 (1999).

Grandparent visitation properly denied. — In the absence of clear and convincing evidence that the child would experience actual physical, mental, or emotional harm if visitation was denied, the trial court's order granting visitation rights to the grandparents was not justified. *Hunter v. Carter*, 226 Ga. App. 251, 485 S.E.2d 827 (1997).

Trial court did not abuse the court's discretion in relying on the testimony of the grandparents and the father to make the court's judgment denying the grandparents' request for visitation rights with their granddaughter or in choosing not to appoint a guardian ad litem because, while the grandparents claimed that the trial court failed to consider their granddaughter's best interests, the trial court heard testimony on that subject from them as well as from the father; both the grant of visitation rights to a grandparent under O.C.G.A. § 19-7-3(c), and the appointment of a guardian ad litem under § 19-7-3 (d) are purely within the discretion of the trial court. *Srader v. Midkiff*, 303 Ga. App. 514, 693 S.E.2d 856 (2010).

Trial court did not abuse the court's

Application (Cont'd)

discretion in denying the grandparents' request for visitation rights with their granddaughter because the trial court held a hearing on the issue of grandparent visitation and determined that the grandparents failed to show that the health or welfare of the granddaughter would be harmed unless such visitation was granted and that the best interests of the granddaughter would be served by such visitation; the trial court did not err in failing to assign the issue to mediation because under O.C.G.A. § 19-7-3(d)(2), assignment of grandparent visitation cases to mediation was within the discretion of the trial court. *Srader v. Midkiff*, 303 Ga. App. 514, 693 S.E.2d 856 (2010).

Grandparent visitation should have been denied. — Because the mother and the father objected to court-mandated visitation with the grandparents and there was no showing that a failure to grant visitation to the grandparents would be harmful to the children, pursuant to O.C.G.A. § 19-7-3(c), the trial court erred in awarding visitation to the grandparents. *Ormond v. Ormond*, 274 Ga. App. 869, 619 S.E.2d 370 (2005).

Grandparent visitation properly granted. — Trial court's grandparent visitation award contained a finding that the children would have suffered emotional harm unless grandparent visitation was granted, and that such visitation was in the best interests of the children; thus, visitation was granted on the grounds authorized by the Grandparent Visitation Statute, O.C.G.A. § 19-7-3. *Luke v. Luke*, 280 Ga. App. 607, 634 S.E.2d 439 (2006).

Juvenile court erred by terminating a grandparent's visitation rights previously granted by relying on the child's out-of-court statements and by failing to recite what standard the court was using to modify the previous visitation awarded to the grandparent. *In re K. I. S.*, 294 Ga. App. 295, 669 S.E.2d 207 (2008).

Discretionary appeal procedure applicable to grandparent's visitation privileges. — Since visitation privileges are, of course, part of custody, grandparents seeking appellate review of an unfavorable ruling regarding visitation privi-

leges are, like parents, required to follow the procedure necessary to secure a discretionary appeal. *Tuttle v. Stauffer*, 177 Ga. App. 112, 338 S.E.2d 544 (1985).

Grandparent visitation continued. — When the trial court denied a couple's petition to adopt a child and to terminate the parental rights of the child's legal father, the trial court did not err in also finding that it was in the child's best interest to continue the child's relationship with a paternal grandmother; the couple offered no evidence that it was not in the child's best interest to continue such visitation, and the trial court found that the paternal grandmother exercised regular visitation with the child and that it was in the child's best interests for all of the grandparents to cooperate in providing for the child. *Thaggard v. Willard*, 285 Ga. App. 384, 646 S.E.2d 479 (2007).

Efforts at grandparent visitation thwarted by parent. — Trial court did not err in denying a father's motion for summary judgment in maternal grandparents' action seeking visitation with his child pursuant to O.C.G.A. § 19-7-3(b) because the trial court had the discretion to choose to allow the case to go forward under O.C.G.A. § 9-11-56(f) in order for the guardian ad litem to investigate the facts since the lack of a relationship between the grandparents and the child could or could not be the fault of the grandparents when there was some evidence that the father had thwarted attempts at visitation in the early years following the mother's death; although the grandparents' affidavits in opposition to the father's motion for summary judgment contained information about the child's best interests, the grandparents did not provide any direct evidence of harm that the child would suffer as a result of not having visitation with the grandparents, but instead, the grandparents relied on § 9-11-56(f) and the trial court's appointment of a guardian ad litem under § 19-7-3(d)(1) to argue that the facts needed to be further developed and that a decision on summary judgment was premature. *Lightfoot v. Hollins*, 308 Ga. App. 538, 707 S.E.2d 491 (2011), overruled on other grounds, *Kunz v. Bailey*, 290 Ga. 361, 720 S.E.2d 634 (2012).

Mother was a proper party to a maternal grandfather's action seeking visitation with the mother's child, and the mother's objection to the grandfather's request for visitation was pertinent to the claim under O.C.G.A. § 19-7-3 because the award of temporary guardianship and custody of the child to the paternal grandparents did not terminate the mother's rights or confer permanent guardianship or custody. *Sheppard v. McCraney*, 317 Ga. App. 91, 730 S.E.2d 721 (2012).

Visitation to father's sister improper. — Trial court erred in granting a father's sister visitation because the sister was neither a grandparent seeking visitation nor a family member seeking custody but was a non-party to the mother's action seeking child support and the father's counterclaim for legitimation. *Morris v. Morris*, 309 Ga. App. 387, 710 S.E.2d 601 (2011).

Trial court required to make findings of fact. — Trial court erred in dismissing a paternal grandmother's petition for visitation with three minor grandchildren who had been adopted by their stepfather because the trial court was required to determine if the parents were separated and whether the child was living with both of the parents. If the parents were separated and the child was not

living with both of the parents, O.C.G.A. § 19-7-3 would authorize the grandmother to seek visitation. *Hudgins v. Harding*, 313 Ga. App. 613, 722 S.E.2d 355 (2012).

To resolve the issue of visitation, a trial court is required to apply O.C.G.A. § 19-7-3(c) in the court's determination of whether a grandparent has presented clear and convincing evidence that the child's health or welfare would be harmed unless visitation was granted, and whether such visitation was in the child's best interests with the inclusion of specific written findings of fact supported by clear and convincing record evidence being mandatory to justify a grant of visitation. Therefore, the trial court erred by awarding a biological grandmother visitation when the court failed to make the specific findings of fact. *Esasky v. Ford*, 321 Ga. App. 891, 743 S.E.2d 550 (2013).

Attorney fees. — After entering judgment for the defendant in an action for grandparent's visitation, the trial court abused the court's discretion in deciding the defendant's motion for attorney fees without properly reviewing her claim that the grandparents harassed her or unnecessarily expanded the proceedings by other improper conduct. *McKeen v. McKeen*, 224 Ga. App. 410, 481 S.E.2d 236 (1997).

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Parent and Child, § 13.

Am. Jur. Proof of Facts. — Grandparent Visitation and Custody Awards, 69 POF3d 281.

C.J.S. — 67A C.J.S., Parent and Child, §§ 52 et seq., 357, 358.

ALR. — Award of custody of child where contest is between child's father and grandparent, 25 ALR3d 7.

Award of custody of child where contest is between child's parents and grandparents, 31 ALR3d 1187.

Grandparents' visitation rights, 90 ALR3d 222.

Visitation rights of persons other than natural parents or grandparents, 1 ALR4th 1270.

Religion as factor in child custody and visitation cases, 22 ALR4th 971.

Attorneys' fee awards in parent-nonparent child custody cases, 45 ALR4th 212.

Grandparents' visitation rights where child's parents are deceased, or where status of parents is unspecified, 69 ALR5th 1.

Grandparent's visitation rights where child's parents are living, 71 ALR5th 99.

19-7-4. Criteria for loss of parental custody.

If a child is found under circumstances of destitution and suffering, abandonment, or exposure or if the child has been begging or if it is found that the child is being reared under immoral, obscene, or indecent influences which are likely to degrade his moral character and devote him to a vicious life and it appears to the appropriate court by competent evidence, including such examination of the child as may be practicable, that by reason of the neglect, habitual drunkenness, lewd or other vicious habits, or other behavior of the parents or guardians of the child, it is necessary for the welfare of the child to protect the child from such conditions, the court may order that the parents or guardians be deprived of custody of the child and that appropriate measures as provided by law be taken for the welfare of the child. (Orig. Code 1863, § 1746; Code 1868, § 1786; Code 1873, § 1795; Ga. L. 1878-79, p. 162, § 1; Code 1882, §§ 1795, 4612g; Civil Code 1895, §§ 2504, 2505; Civil Code 1910, §§ 3023, 3024; Code 1933, §§ 74-109, 74-110.)

Cross references. — Termination of parental rights in proceedings before juvenile courts, § 15-11-81 et seq. Restriction on jurisdiction of probate court under this Code section, § 15-9-30(a)(6).

Law reviews. — For article, "Custody Disputes and the Proposed Model Act," see 2 Ga. L. Rev. 162 (1968). For article, "The Child as a Party in Interest in Custody Proceedings," see 10 Ga. St. B.J. 577

(1974). For article criticizing parental rights doctrine and advocating best interests of child doctrine in parent-third party custody disputes, see 27 Emory L.J. 209 (1978).

For comment on *Bodrey v. Cape*, 120 Ga. App. 859, 172 S.E.2d 643 (1969), see 7 Ga. St. B.J. 256 (1970). For comment on "Grandparents' Visitation Rights in Georgia," see 29 Emory L.J. 1083 (1980).

JUDICIAL DECISIONS**ANALYSIS****GENERAL CONSIDERATION****FITNESS****CUSTODY DISPUTES BETWEEN PARENT AND THIRD PERSON****General Consideration**

Section must be strictly construed. — Proceeding authorized by statute was a very harsh one, permitting as the statute did the taking of a child from the child's parent at the instance of any citizen, without regard to the individual right of the applicant. A statute thus in derogation of parental rights should be considered strictly, and prescribed allegations must be specifically made and sworn to before that section can be set in operation. *Hammond v. Hammond*, 90 Ga. 527, 16 S.E. 265 (1892).

When parent may lose right to custody. — Parent may lose right to custody only if one of the conditions specified in former Code 1933, §§ 74-108—74-110 (see now O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4) was found to exist, or, in exceptional cases, if the parent was found to be unfit. *Morris v. Grant*, 196 Ga. 692, 27 S.E.2d 295 (1943); *Bowman v. Bowman*, 234 Ga. 348, 216 S.E.2d 103 (1975); *Childs v. Childs*, 237 Ga. 177, 227 S.E.2d 49 (1976), later appeal, 239 Ga. 304, 236 S.E.2d 646 (1977); *Mathis v. Nicholson*, 244 Ga. 106, 259 S.E.2d 55 (1979); *Larson*

v. Gambrell, 157 Ga. App. 193, 276 S.E.2d 686 (1981).

Mother within definition of former Code 1933, § 74-203 (see now O.C.G.A. § 19-7-25) cannot be denied custody of a child at habeas corpus proceeding against third parties unless it was shown that parental power was lost under provisions of former Code 1933, §§ 74-108—74-110 (see now O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4), or that the parent was shown to be unfit. Pettiford v. Mott, 230 Ga. 692, 198 S.E.2d 662 (1973).

Parental control may be lost for any of the reasons provided in former Code 1933, § 74-108 (see now O.C.G.A. § 19-7-1), and may also be lost, under former Code 1933, §§ 74-109 and 74-110 (see now O.C.G.A. § 19-7-4) if the parent was guilty of cruel treatment of the child, and, as to a child under 12 years of age, if the child becomes destitute, or was being reared under immoral influences. Byers v. Loftis, 208 Ga. 398, 67 S.E.2d 118 (1951).

Parental right to custody may be lost in habeas proceeding if one of conditions specified in O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4 is found to exist, or if parent is found to be unfit. Miele v. Gregory, 248 Ga. 93, 281 S.E.2d 565 (1981).

Forfeiture of parental rights not prerequisite to change of custody award. — In order to change award of custody, trial court did not necessarily have to find that legal custodian have forfeited parental rights under former Code 1933, §§ 74-108—74-110 (see now O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4). Dearman v. Rhoden, 235 Ga. 457, 219 S.E.2d 704 (1975).

In order to change an award of custody, the trial court did not necessarily have to find that the legal custodian had forfeited parental rights under former Code 1933, §§ 74-108—74-110 (see now O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4), but must find either that the original custodian was no longer able or suited to retain custody or that the conditions and circumstances surrounding the child have so changed that the child's welfare would be enhanced by modifying original judgment. Bell v. Bell, 154 Ga. App. 290, 267 S.E.2d 894 (1980).

Clear and strong proof is necessary to show abandonment. — When parent

has a prima facie right to custody of child, burden is upon contestant to prove by clear and strong proof the contestant's contention that the parent has lost such right by abandonment. Hale v. Henderson, 210 Ga. 273, 79 S.E.2d 804 (1954).

In order to find an abandonment, there must be sufficient evidence of an actual desertion, accompanied by an intention to sever entirely, as far as possible to do so, the parental relation, throw off all obligations growing out of the relationship, and forego all parental duties and claims. In re S.H., 181 Ga. App. 438, 352 S.E.2d 621 (1987).

Custody inures to surviving parent upon death of custodial parent. — When mother of child, to whom custody had been awarded by divorce decree, dies, prima facie right of custody automatically inured to father. In such circumstances, father's right to custody can be lost only by one of the grounds provided under former Code 1933, §§ 74-108—74-110 (see now O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4), and, unless so lost, discretion reposed in the trial judge under former Code 1933, § 50-121 (see now O.C.G.A. § 9-14-2) did not apply. Baynes v. Cowart, 209 Ga. 376, 72 S.E.2d 716 (1952); Hale v. Henderson, 210 Ga. 273, 79 S.E.2d 804 (1954).

When the child's mother dies, the father, as surviving parent, acquires a prima facie right to custody of the child and, unless the right to custody has been lost as provided by law, the father is entitled to custody of his child. Jackson v. Dunn, 158 Ga. App. 194, 279 S.E.2d 514 (1981).

Child's best interests control in custody dispute. — When case involves two "fit" parents, the law contemplates that child be awarded to parent in whose custody the child's best interests will be served. Larson v. Gambrell, 157 Ga. App. 193, 276 S.E.2d 686 (1981).

Consideration given to welfare of child in custody proceeding. — When plaintiff lost parental control by virtue of order under former Code 1933, §§ 74-109 and 74-110 and no longer has a prima facie right to custody and control of her children, the only consideration in a case in which parent sought to regain custody

General Consideration (Cont'd)

was welfare and happiness of children, the determination of which rested in sound discretion of trial judge, and in exercise of which the award might be made to a third person. *Green v. Loggins*, 216 Ga. 169, 115 S.E.2d 350 (1960).

Who may petition. — Under former Code 1895, §§ 2504 and 2505 any citizen, if he knows that young children are being reared under these improper influences, may make a sworn statement of facts, and ordinary (now judge of probate court) was authorized to take children away from their parents or guardians and make such disposition of the children, under the law, as the ordinary may think proper. *Haire v. McCardle*, 107 Ga. 775, 33 S.E. 683 (1899).

Divorce decree awarding child to one parent was no obstacle to proceeding under statute. *Williams v. Crosby*, 118 Ga. 296, 45 S.E. 282 (1903).

Evidence admissible to show immoral conditions. — Evidence that mother's general reputation for chastity in the community where she lived was bad, and that she was generally reputed to be an immoral woman, was admissible as well as evidence of specific acts tending to show that she was an improper person to have care and custody of children. *Moore v. Dozier*, 128 Ga. 90, 57 S.E. 110 (1907).

Cited in *Moore v. Dozier*, 128 Ga. 90, 57 S.E. 110 (1907); *Bulloch v. Bulloch*, 45 Ga. App. 1, 163 S.E. 708 (1932); *Chapin v. Cummings*, 191 Ga. 408, 12 S.E.2d 312 (1940); *Bond v. Norwood*, 195 Ga. 383, 24 S.E.2d 289 (1943); *Skinner v. Skinner*, 204 Ga. 635, 51 S.E.2d 420 (1949); *Snell v. Lopez*, 91 Ga. App. 552, 86 S.E.2d 363 (1955); *Chambers v. Lee*, 215 Ga. 629, 112 S.E.2d 614 (1960); *Eller v. Matthews*, 216 Ga. 315, 116 S.E.2d 235 (1960); *Adams v. Kirkland*, 218 Ga. 512, 128 S.E.2d 730 (1962); *McMillan v. McMillan*, 224 Ga. 790, 164 S.E.2d 839 (1968); *Shaddrix v. Womack*, 231 Ga. 628, 203 S.E.2d 225 (1974); *Howell v. Gossett*, 234 Ga. 145, 214 S.E.2d 882 (1975); *Conroy v. Jones*, 238 Ga. 321, 232 S.E.2d 917 (1977); *Cox v. Mills*, 238 Ga. 374, 233 S.E.2d 353 (1977); *Higbee v. Tuck*, 242 Ga. 376, 249 S.E.2d 62

(1978); *Bryant v. Wigley*, 246 Ga. 155, 269 S.E.2d 418 (1980); *Lewis v. Lewis*, 154 Ga. App. 853, 269 S.E.2d 919 (1980); *Wright v. Hanson*, 248 Ga. 523, 283 S.E.2d 882 (1981); *In re M.M.A.*, 166 Ga. App. 620, 305 S.E.2d 139 (1983).

Fitness

Determination of unfitness must be based on parent's present condition. *Bozeman v. Williams*, 248 Ga. 606, 285 S.E.2d 9 (1981).

Evidence of past unfitness, standing alone, is insufficient to terminate the rights of a parent in the parent's natural child; clear and convincing evidence of present unfitness is required. *Blackburn v. Blackburn*, 249 Ga. 689, 292 S.E.2d 821 (1982).

Finding of unfitness must center on the parent alone; a court is not allowed to terminate a parent's natural right because the court has determined that the child might have better financial, educational, or even moral advantages elsewhere. *Blackburn v. Blackburn*, 249 Ga. 689, 292 S.E.2d 821 (1982).

Fitness of parent. — Fitness was not necessarily synonymous with absence of conduct penalized by former Code 1933, §§ 74-108—74-110 (see now O.C.G.A. §§ 19-7-1 and 19-7-4). Fact that parent had not forfeited or relinquished parental right by any of the modes of those sections did not establish the parent as fit. *Perkins v. Courson*, 219 Ga. 611, 135 S.E.2d 388 (1964).

Clear and satisfactory proof necessary to establish unfitness. — Right to custody may be lost on ground of unfitness only if it is shown by clear and satisfactory proof that circumstances of case justify court in acting for best interest and welfare of child. *Bowman v. Bowman*, 234 Ga. 348, 216 S.E.2d 103 (1975).

Evidence of parent's unfitness must be clear and convincing. *Bowman v. Bowman*, 234 Ga. 348, 216 S.E.2d 103 (1975); *Mathis v. Nicholson*, 244 Ga. 106, 259 S.E.2d 55 (1979).

Unfitness shown by clear and convincing evidence justifies court in acting for child's best interest. — Parent may lose right to custody if parent is found to be unfit. Unfitness of parent

should be shown by clear and convincing evidence that circumstances of case justify court in acting for best interest and welfare of child. *White v. Bryan*, 236 Ga. 349, 223 S.E.2d 710 (1976).

Appellate court will not interfere with trial court's finding of unfitness absent abuse of discretion. — When evidence amply authorized, although the evidence did not demand, finding that parent is not a fit and proper person to have custody of children and that it is for best interests and welfare of children that the children be awarded to other person, the appellate court will not substitute the court's judgment for that of the trial judge absent abuse of legal discretion. *Adams v. Kirkland*, 218 Ga. 512, 128 S.E.2d 730 (1962).

Custody Disputes Between Parent and Third Person

Findings required. — In every case involving a custody dispute between a parent and a third party, the trial court must first make a determination as to whether the parent has lost his or her right pursuant to O.C.G.A. § 19-7-4 or is unfit pursuant to Georgia case law. *Martini v. Jefferson*, 213 Ga. App. 666, 445 S.E.2d 814 (1994).

Probate court was without legal authority to make any determination under O.C.G.A. § 19-7-4 regarding the mother's loss of legal custody of her child in favor of a third party. *Brown v. King*, 193 Ga. App. 495, 388 S.E.2d 400 (1989).

Parent must be made party to proceeding to remove parent as child's natural guardian, and parent must be served with notice, otherwise the proceeding is void as depriving the parent of parental control without due process of law; after the parent has been removed and there is no longer a natural guardian, only then does the judge of the probate court attain jurisdiction to appoint. *Whitlock v. Barrett*, 158 Ga. App. 100, 279 S.E.2d 244 (1981).

Parent entitled to custody unless shown unfit or child mistreated. — When a third party sues the custodial parent to obtain custody of a child and to terminate the parent's custodial rights to the child, the parent is entitled to custody

of the child unless the third party shows by "clear and convincing evidence" that the parent is unfit or otherwise not entitled to custody under O.C.G.A. §§ 19-7-1 and 19-7-4. *Heath v. McGuire*, 167 Ga. App. 489, 306 S.E.2d 741 (1983); *In re C.T.L.*, 182 Ga. App. 845, 357 S.E.2d 298 (1987); *Larson v. Larson*, 192 Ga. App. 163, 384 S.E.2d 193 (1989).

When right to custody cannot be legally challenged by third persons. — Unless parental control had been lost under former Code 1933, §§ 74-108—74-110 (see now O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4), parent's prima facie right to custody and control of minor child, as against claim of third person, was not subject to legal challenge. *Waldrup v. Crane*, 203 Ga. 388, 46 S.E.2d 919 (1948).

In contest between parent and third party over custody of child, a parent may lose the right to custody only if one of the conditions specified in O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4 is found to exist, or, in exceptional cases, if the parent is found to be unfit. *Bozeman v. Williams*, 248 Ga. 606, 285 S.E.2d 9 (1981).

As between natural parent and third party (grandparent), parent can be deprived of custody only if one of the conditions specified in O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4, or one of the other legal grounds (O.C.G.A. §§ 15-11-2(8) and 15-11-81) is found to exist by clear and convincing evidence. *Brant v. Bazemore*, 159 Ga. App. 659, 284 S.E.2d 674 (1981).

Discretion in habeas proceedings granted by former Code 1933, § 50-121 (see now O.C.G.A. § 9-14-2) applied only when parental control had been lost. *Morris v. Grant*, 196 Ga. 692, 27 S.E.2d 295 (1943).

Exercise of discretion in habeas proceeding. — *Williams v. Ferrell*, 231 Ga. 470, 202 S.E.2d 427 (1973); *Triplett v. Elder*, 234 Ga. 243, 215 S.E.2d 247 (1975); *Dein v. Mossman*, 244 Ga. 866, 262 S.E.2d 83 (1979).

Person claiming no legal right may not bring habeas proceeding. — Habeas proceeding to obtain custody may not be brought by person claiming no legal right of custody. This does not mean that one concerned with welfare of child, who is

Custody Disputes Between Parent and Third Person (Cont'd)

being raised under conditions detrimental to the child's welfare, has no remedy. *Spitz v. Holland*, 243 Ga. 9, 252 S.E.2d 406 (1979).

Nonrelated third party lacked standing. — Although former O.C.G.A. § 19-9-50 required that a nonrelated third party be made a "party" to the father's suit against the mother, this was only because the third party had physical custody of the child; she had no standing to petition to terminate the father's rights and acquired no rights by virtue of having been given custody by the mother or by virtue of having developed certain emotional ties after obtaining physical custody of the child. *Brooks v. Carson*, 194 Ga. App. 365, 390 S.E.2d 859 (1990), overruled on other grounds, *Bennett v. Executive Benefits, Inc.*, 210 Ga. App. 429, 436 S.E.2d 544 (1993).

In dispute between parent and third party, initial determination of parental rights is required. *Morris v. Grant*, 196 Ga. 692, 27 S.E.2d 295 (1943).

Presumption that child's best interest is to be with parent. — While in child custody case, welfare of child is always the law's paramount concern, the law presumes that it is in the child's best interest to be with the child's parent if the parent is not unfit to be the child's custodian. *Larson v. Gambrell*, 157 Ga. App. 193, 276 S.E.2d 686 (1981).

Presumption must be rebutted before custody awarded to third party. — Before custody of child may be awarded to third party, presumption that it will be in best interest of child to be with the child's parent must be rebutted by clear

and convincing evidence showing that the parent is unfit to be awarded custody. *Larson v. Gambrell*, 157 Ga. App. 193, 276 S.E.2d 686 (1981).

Father's youth and poor work habits. — Court's finding that father is too young to care for children and that he is somewhat delinquent in his work habits cannot be said to constitute grave and substantial cause for awarding custody to a third party on ground of unfitness. *Bowman v. Bowman*, 234 Ga. 348, 216 S.E.2d 103 (1975).

Use of best interest standard in third party suit error. — When a third party sues the natural custodial parent for custody of the child, the trial court errs in applying the "best interests of the child" standard. In such a case, the parent is entitled to custody of the child unless the third party shows by "clear and convincing evidence" that the parent is unfit or otherwise not entitled to custody under O.C.G.A. §§ 19-7-1 and 19-7-4. In *re J.C.P.*, 167 Ga. App. 572, 307 S.E.2d 1 (1983). But see *In re A.W.*, 240 Ga. App. 259, 523 S.E.2d 88 (1999).

Effect of awarding permanent custody to third party. — When a parent was a party to a proceeding in which his or her right to custody was lost and custody was permanently awarded to a third party, the third party, and not the parent, has a prima facie right to custody. *Durden v. Barron*, 249 Ga. 686, 290 S.E.2d 923 (1982).

For a third party to prevail in obtaining custody in a contest with the surviving parent, clear and convincing evidence that the parent has lost the right to parental custody and control by abandonment or some other legal ground must be presented. In *re S.H.*, 181 Ga. App. 438, 352 S.E.2d 621 (1987).

OPINIONS OF THE ATTORNEY GENERAL

Domicile of minor is that of the minor's parents, but this can be altered when usual parental authority and con-

trol over the minor is ended by voluntary or involuntary relinquishment. 1981 Op. Att'y Gen. No. U81-5.

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Parent and Child, §§ 16, 18, 19.

C.J.S. — 67A C.J.S., Parent and Child, §§ 73 et seq., 87 et seq.

ALR. — Criminal responsibility for abandonment or nonsupport of children who are being cared for by charitable institution, 24 ALR 1075.

Attempt to bastardize child as affecting right to custody of the child, 37 ALR 531.

Abandonment of adopted child, 44 ALR 820.

One charged with desertion or failure to support wife or child as fugitive from justice, subject to extradition, 54 ALR 281.

Constitutionality of statute which for reformatory purposes deprives parent of custody or control of child, 60 ALR 1342.

Liability of parent or person in loco parentis for personal tort against minor child, 19 ALR2d 423; 41 ALR3d 904.

What constitutes abandonment or desertion of child by its parent or parents within purview of adoption laws, 35 ALR2d 662; 78 ALR3d 712.

Right to custody of child as affected by death of custodian appointed by divorce decree, 39 ALR2d 258.

Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis, 89 ALR2d 396.

Award of custody of child where contest is between child's father and grandparent, 25 ALR3d 7.

Award of custody of child where contest is between child's mother and grandparent, 29 ALR3d 366.

Liability of parent for injury to

unemancipated child caused by parent's negligence, 41 ALR3d 904.

Physical abuse of child by parent as ground for termination of parent's right to child, 53 ALR3d 605.

Sexual abuse of child by parent as ground for termination of parent's right to child, 58 ALR3d 1074.

Right, in child custody proceedings, to cross-examine investigating officer whose report is used by court in its decision, 59 ALR3d 1337.

Who has custody or control of child within terms of penal statute punishing cruelty or neglect by one having custody or control, 75 ALR3d 933.

Right of indigent parent to appointed counsel in proceeding for involuntary termination of parental rights, 80 ALR3d 1141.

Admissibility of expert medical testimony on battered child syndrome, 98 ALR3d 306.

Custodial parent's sexual relations with third person as justifying modification of child custody order, 100 ALR3d 625.

Liability of parent for injury to unemancipated child caused by parent's negligence — modern cases, 6 ALR4th 1066.

Validity of state statute providing for termination of parental rights, 22 ALR4th 774.

Admissibility at criminal prosecution of expert testimony on battering parent syndrome, 43 ALR4th 1203.

19-7-5. Reporting of child abuse; when mandated or authorized; content of report; to whom made; immunity from liability; report based upon privileged communication; penalty for failure to report.

(a) The purpose of this Code section is to provide for the protection of children. It is intended that mandatory reporting will cause the protective services of the state to be brought to bear on the situation in an effort to prevent abuses, to protect and enhance the welfare of children, and to preserve family life wherever possible. This Code section shall be liberally construed so as to carry out the purposes thereof.

(b) As used in this Code section, the term:

(1) "Abortion" shall have the same meaning as set forth in Code Section 15-11-681.

- (2) "Abused" means subjected to child abuse.
- (3) "Child" means any person under 18 years of age.
- (4) "Child abuse" means:

- (A) Physical injury or death inflicted upon a child by a parent or caretaker thereof by other than accidental means; provided, however, that physical forms of discipline may be used as long as there is no physical injury to the child;

- (B) Neglect or exploitation of a child by a parent or caretaker thereof;

- (C) Sexual abuse of a child; or

- (D) Sexual exploitation of a child.

However, no child who in good faith is being treated solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof shall, for that reason alone, be considered to be an "abused" child.

- (5) "Child service organization personnel" means persons employed by or volunteering at a business or an organization, whether public, private, for profit, not for profit, or voluntary, that provides care, treatment, education, training, supervision, coaching, counseling, recreational programs, or shelter to children.

- (6) "Clergy" means ministers, priests, rabbis, imams, or similar functionaries, by whatever name called, of a bona fide religious organization.

- (7) "Pregnancy resource center" means an organization or facility that:

- (A) Provides pregnancy counseling or information as its primary purpose, either for a fee or as a free service;

- (B) Does not provide or refer for abortions;

- (C) Does not provide or refer for FDA approved contraceptive drugs or devices; and

- (D) Is not licensed or certified by the state or federal government to provide medical or health care services and is not otherwise bound to follow federal Health Insurance Portability and Accountability Act of 1996, P.L. 104-191, or other state or federal laws relating to patient confidentiality.

- (8) "Reproductive health care facility" means any office, clinic, or any other physical location that provides abortions, abortion counseling, abortion referrals, or gynecological care and services.

(9) "School" means any public or private pre-kindergarten, elementary school, secondary school, technical school, vocational school, college, university, or institution of postsecondary education.

(10) "Sexual abuse" means a person's employing, using, persuading, inducing, enticing, or coercing any minor who is not that person's spouse to engage in any act which involves:

(A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) Bestiality;

(C) Masturbation;

(D) Lewd exhibition of the genitals or pubic area of any person;

(E) Flagellation or torture by or upon a person who is nude;

(F) Condition of being fettered, bound, or otherwise physically restrained on the part of a person who is nude;

(G) Physical contact in an act of apparent sexual stimulation or gratification with any person's clothed or unclothed genitals, pubic area, or buttocks or with a female's clothed or unclothed breasts;

(H) Defecation or urination for the purpose of sexual stimulation; or

(I) Penetration of the vagina or rectum by any object except when done as part of a recognized medical procedure.

"Sexual abuse" shall not include consensual sex acts involving persons of the opposite sex when the sex acts are between minors or between a minor and an adult who is not more than five years older than the minor. This provision shall not be deemed or construed to repeal any law concerning the age or capacity to consent.

(11) "Sexual exploitation" means conduct by any person who allows, permits, encourages, or requires that child to engage in:

(A) Prostitution, as defined in Code Section 16-6-9; or

(B) Sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, as defined in Code Section 16-12-100.

(c)(1) The following persons having reasonable cause to believe that suspected child abuse has occurred shall report or cause reports of such abuse to be made as provided in this Code section:

(A) Physicians licensed to practice medicine, physician assistants, interns, or residents;

- (B) Hospital or medical personnel;
- (C) Dentists;
- (D) Licensed psychologists and persons participating in internships to obtain licensing pursuant to Chapter 39 of Title 43;
- (E) Podiatrists;
- (F) Registered professional nurses or licensed practical nurses licensed pursuant to Chapter 26 of Title 43 or nurse's aides;
- (G) Professional counselors, social workers, or marriage and family therapists licensed pursuant to Chapter 10A of Title 43;
- (H) School teachers;
- (I) School administrators;
- (J) School counselors, visiting teachers, school social workers, or school psychologists certified pursuant to Chapter 2 of Title 20;
- (K) Child welfare agency personnel, as such agency is defined in Code Section 49-5-12;
- (L) Child-counseling personnel;
- (M) Child service organization personnel;
- (N) Law enforcement personnel; or
- (O) Reproductive health care facility or pregnancy resource center personnel and volunteers.

(2) If a person is required to report child abuse pursuant to this subsection because such person attends to a child pursuant to such person's duties as an employee of or volunteer at a hospital, school, social agency, or similar facility, such person shall notify the person in charge of such hospital, school, agency, or facility, or the designated delegate thereof, and the person so notified shall report or cause a report to be made in accordance with this Code section. An employee or volunteer who makes a report to the person designated pursuant to this paragraph shall be deemed to have fully complied with this subsection. Under no circumstances shall any person in charge of such hospital, school, agency, or facility, or the designated delegate thereof, to whom such notification has been made exercise any control, restraint, or modification or make any other change to the information provided by the reporter, although each of the aforementioned persons may be consulted prior to the making of a report and may provide any additional, relevant, and necessary information when making the report.

(3) When a person identified in paragraph (1) of this subsection has reasonable cause to believe that child abuse has occurred

involving a person who attends to a child pursuant to such person's duties as an employee of or volunteer at a hospital, school, social agency, or similar facility, the person who received such information shall notify the person in charge of such hospital, school, agency, or facility, or the designated delegate thereof, and the person so notified shall report or cause a report to be made in accordance with this Code section. An employee or volunteer who makes a report to the person designated pursuant to this paragraph shall be deemed to have fully complied with this subsection. Under no circumstances shall any person in charge of such hospital, school, agency, or facility, or the designated delegate thereof, to whom such notification has been made exercise any control, restraint, or modification or make any other change to the information provided by the reporter, although each of the aforementioned persons may be consulted prior to the making of a report and may provide any additional, relevant, and necessary information when making the report.

(d) Any other person, other than one specified in subsection (c) of this Code section, who has reasonable cause to believe that suspected child abuse has occurred may report or cause reports to be made as provided in this Code section.

(e) With respect to reporting required by subsection (c) of this Code section, an oral report by telephone or other oral communication or a written report by electronic submission or facsimile shall be made immediately, but in no case later than 24 hours from the time there is reasonable cause to believe that suspected child abuse has occurred. When a report is being made by electronic submission or facsimile to the Division of Family and Children Services of the Department of Human Services, it shall be done in the manner specified by the division. Oral reports shall be followed by a later report in writing, if requested, to a child welfare agency providing protective services, as designated by the Division of Family and Children Services of the Department of Human Services, or, in the absence of such agency, to an appropriate police authority or district attorney. If a report of child abuse is made to the child welfare agency or independently discovered by the agency, and the agency has reasonable cause to believe such report is true or the report contains any allegation or evidence of child abuse, then the agency shall immediately notify the appropriate police authority or district attorney. Such reports shall contain the names and addresses of the child and the child's parents or caretakers, if known, the child's age, the nature and extent of the child's injuries, including any evidence of previous injuries, and any other information that the reporting person believes might be helpful in establishing the cause of the injuries and the identity of the perpetrator. Photographs of the child's injuries to be used as documentation in support of allegations by hospital employees or volunteers, physicians, law enforcement person-

nel, school officials, or employees or volunteers of legally mandated public or private child protective agencies may be taken without the permission of the child's parent or guardian. Such photographs shall be made available as soon as possible to the chief welfare agency providing protective services and to the appropriate police authority.

(f) Any person or persons, partnership, firm, corporation, association, hospital, or other entity participating in the making of a report or causing a report to be made to a child welfare agency providing protective services or to an appropriate police authority pursuant to this Code section or any other law or participating in any judicial proceeding or any other proceeding resulting therefrom shall in so doing be immune from any civil or criminal liability that might otherwise be incurred or imposed, provided such participation pursuant to this Code section or any other law is made in good faith. Any person making a report, whether required by this Code section or not, shall be immune from liability as provided in this subsection.

(g) Suspected child abuse which is required to be reported by any person pursuant to this Code section shall be reported notwithstanding that the reasonable cause to believe such abuse has occurred or is occurring is based in whole or in part upon any communication to that person which is otherwise made privileged or confidential by law; provided, however, that a member of the clergy shall not be required to report child abuse reported solely within the context of confession or other similar communication required to be kept confidential under church doctrine or practice. When a clergy member receives information about child abuse from any other source, the clergy member shall comply with the reporting requirements of this Code section, even though the clergy member may have also received a report of child abuse from the confession of the perpetrator.

(h) Any person or official required by subsection (c) of this Code section to report a suspected case of child abuse who knowingly and willfully fails to do so shall be guilty of a misdemeanor.

(i) A report of child abuse or information relating thereto and contained in such report, when provided to a law enforcement agency or district attorney pursuant to subsection (e) of this Code section or pursuant to Code Section 49-5-41, shall not be subject to public inspection under Article 4 of Chapter 18 of Title 50 even though such report or information is contained in or part of closed records compiled for law enforcement or prosecution purposes unless:

(1) There is a criminal or civil court proceeding which has been initiated based in whole or in part upon the facts regarding abuse which are alleged in the child abuse reports and the person or entity seeking to inspect such records provides clear and convincing evidence of such proceeding; or

(2) The superior court in the county in which is located the office of the law enforcement agency or district attorney which compiled the records containing such reports, after application for inspection and a hearing on the issue, shall permit inspection of such records by or release of information from such records to individuals or entities who are engaged in legitimate research for educational, scientific, or public purposes and who comply with the provisions of this paragraph. When those records are located in more than one county, the application may be made to the superior court of any one of such counties. A copy of any application authorized by this paragraph shall be served on the office of the law enforcement agency or district attorney which compiled the records containing such reports. In cases where the location of the records is unknown to the applicant, the application may be made to the Superior Court of Fulton County. The superior court to which an application is made shall not grant the application unless:

(A) The application includes a description of the proposed research project, including a specific statement of the information required, the purpose for which the project requires that information, and a methodology to assure the information is not arbitrarily sought;

(B) The applicant carries the burden of showing the legitimacy of the research project; and

(C) Names and addresses of individuals, other than officials, employees, or agents of agencies receiving or investigating a report of abuse which is the subject of a report, shall be deleted from any information released pursuant to this subsection unless the court determines that having the names and addresses open for review is essential to the research and the child, through his or her representative, gives permission to release the information. (Code 1933, § 74-111, enacted by Ga. L. 1965, p. 588, § 1; Ga. L. 1968, p. 1196, § 1; Ga. L. 1973, p. 309, § 1; Ga. L. 1974, p. 438, § 1; Ga. L. 1977, p. 242, §§ 1-3; Ga. L. 1978, p. 2059, §§ 1, 2; Ga. L. 1980, p. 921, § 1; Ga. L. 1981, p. 1034, §§ 1-3; Ga. L. 1988, p. 1624, § 1; Ga. L. 1990, p. 1761, § 1; Ga. L. 1993, p. 1695, §§ 1, 1.1; Ga. L. 1994, p. 97, § 19; Ga. L. 1999, p. 81, § 19; Ga. L. 2006, p. 485, § 1/SB 442; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2009, p. 733, § 1/SB 69; Ga. L. 2012, p. 899, § 5-1/HB 1176; Ga. L. 2013, p. 141, § 19/HB 79; Ga. L. 2013, p. 294, § 4-23/HB 242; Ga. L. 2013, p. 524, § 2-1/HB 78; Ga. L. 2015, p. 906, § 1/HB 268.)

The 2013 amendments. — The first 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, substituted “Chapter 26” for “Chapter 24” in subparagraph (c)(1)(F). The second 2013 amendment, effective January 1, 2014, substituted “Code Section 15-11-681” for “Code Sec-

tion 15-11-111" in paragraph (b)(1). The third 2013 amendment, effective July 1, 2013, inserted "physician assistants," in subparagraph (c)(1)(A). See editor's notes for applicability.

The 2015 amendment, effective July 1, 2015, in subsection (a), deleted "whose health and welfare are adversely affected and further threatened by the conduct of those responsible for their care and protection" following "children" at the end of the first sentence, in the second sentence, deleted "the" following "intended that" near the beginning, deleted "of such cases" preceding "will cause", deleted "further" following "effort to prevent" in the middle, and deleted "these" following "enhance the welfare of" near the end; rewrote subsection (c); substituted "suspected child abuse has occurred" for "a child is abused" in the middle of subsection (d); and in subsection (e), substituted the present provisions of the first sentence for the former provisions, which read: "An oral report shall be made immediately, but in no case later than 24 hours from the time there is reasonable cause to believe a child has been abused, by telephone or otherwise and followed by a report in writing, if requested, to a child welfare agency providing protective services, as designated by the Department of Human Services, or, in the absence of such agency, to an appropriate police authority or district attorney.", and added the present second sentence.

Cross references. — Criminal penalty for cruelty to children, § 16-5-70. Battery, assault, stalking, and other offenses involving family members, § 19-13-1 et seq. Restriction of access to records concerning reports of child abuse and neglect, § 49-5-40 et seq.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1988, "willfully" was substituted for "wilfully" near the end of subsection (h) (formerly subsection (e)).

Pursuant to Code Section 28-9-5, in 1990, "provided" was substituted for "providing" in the first sentence of subsection (f).

Editor's notes. — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall

apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Administrative rules and regulations. — Student support, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia Department of Education, Chapter 160-4-8.

Group day care homes, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Human Resources, Chapter 290-2-1.

Day care centers, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Human Resources, Chapter 290-2-2.

Family day care homes, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Human Resources, Chapter 290-2-3.

Rules and regulations for child caring institutions, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Human Resources, Chapter 290-2-5.

Child care institutions, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Human Resources, Chapter 290-2-6.

Rules and regulations for outdoor child

caring programs, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Human Resources, Chapter 290-2-7.

Intensive residential treatment facilities for children and youth, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Human Resources, Chapter 290-4-4.

Law reviews. — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969). For article citing developments in Georgia juvenile court practice and procedure from

mid-1980 through mid-1981, see 33 Mercer L. Rev. 167 (1981). For annual survey of criminal law and procedure, see 41 Mercer L. Rev. 115 (1989). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

For note on 1990 amendment of this Code section, see 7 Ga. St. U.L. Rev. 268 (1990). For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 131 (1993). For note, "Mandatory Child Abuse Reporting Laws in Georgia: Strengthening Protection for Georgia's Children," see 31 Ga. St. U.L. Rev. 643 (2015).

JUDICIAL DECISIONS

Immunity not applicable to an act of molestation. — Immunity provided by O.C.G.A. § 19-7-5 is applicable only to such civil or criminal liability as might otherwise result from the act of reporting suspected child molestation or abuse, not to such criminal liability as may arise from the commission of the molestation or abuse itself. *Austin v. State*, 179 Ga. App. 235, 345 S.E.2d 688 (1986).

"Psychologist" means licensed psychologist. — Term "psychologist", as contained in O.C.G.A. § 19-7-5, includes only licensed psychologists. *Gladson v. State*, 258 Ga. 885, 376 S.E.2d 362 (1989).

Counselor, who held a doctoral degree in human development from an accredited university but was not a licensed psychologist, could not be held criminally liable for failure to report alleged child abuse. *Gladson v. State*, 258 Ga. 885, 376 S.E.2d 362 (1989).

Limitation on mandatory obligation to report child abuse. — Statutory obligation to report the abuse of a child is limited to the abuse of a child to whom the mandatory reporter attends pursuant to the reporter's duties in the profession, occupation, employment, or volunteer work by which the reporter is identified as a mandatory reporter. *May v. State*, 295 Ga. 388, 761 S.E.2d 38 (2014).

Limitation on teacher's mandatory obligation to report child abuse. — Because, by the time the defendant learned of the sexual abuse, the child was no longer the defendant's student, was no

longer enrolled in the school at which the defendant taught, and was no longer enrolled at any school in the same school system, the defendant was not attending to the child pursuant to the defendant's duties as a school teacher, and had no legal obligation to report the sexual abuse. *May v. State*, 295 Ga. 388, 761 S.E.2d 38 (2014).

No private cause of action. — O.C.G.A. § 19-7-5 does not expressly create a civil cause of action for damages in favor of the victim or anyone else. *Cechman v. Travis*, 202 Ga. App. 255, 414 S.E.2d 282 (1991), cert. denied, 202 Ga. App. 905, 414 S.E.2d 282 (1992); *Vance v. T.R.C.*, 229 Ga. App. 608, 494 S.E.2d 714 (1997).

There is nothing within the provisions of O.C.G.A. § 19-7-5 which purports to create a private cause of action in tort in favor of an alleged victim of child abuse against the physician. *Cechman v. Travis*, 202 Ga. App. 255, 414 S.E.2d 282 (1991), cert. denied, 202 Ga. App. 905, 414 S.E.2d 282 (1992); *Vance v. T.R.C.*, 229 Ga. App. 608, 494 S.E.2d 714 (1997).

No private cause of action lies for a failure to report child abuse in accordance with O.C.G.A. § 19-7-5. *Odem v. Pace Academy*, 235 Ga. App. 648, 510 S.E.2d 326 (1998).

Psychologist was not subject to malpractice liability for failure to report suspected child sexual abuse pursuant to O.C.G.A. § 19-7-5; prior case law established that O.C.G.A. § 19-7-5 did not cre-

ate a private cause of action for the failure to report child abuse. *McGarrah v. Posig*, 280 Ga. App. 808, 635 S.E.2d 219 (2006).

Person alleging child abuse held immune from liability for slander. —

As a tenant admitted at a deposition that the tenant's son was sometimes in their home, which the tenant knew was contaminated with toxic mold, without a mask, the landlord had reasonable cause to allege to authorities that the tenant was guilty of child abuse, and was thus entitled to immunity from the tenant's slander claim under O.C.G.A. § 19-7-5(f). *Brown v. Rader*, 299 Ga. App. 606, 683 S.E.2d 16 (2009).

No immunity for false reports of child abuse. —

Trial court did not err in granting a protective order under O.C.G.A. § 16-5-90(a)(1) against a foster parent who had placed a family under extensive surveillance through a combination of Internet searches and third party observations of the family's home and contacted law enforcement, causing groundless investigations. The foster parent was not immune from liability under O.C.G.A. § 19-7-5(f) because the foster parent had not received any information that a child in the home had been subjected to abuse. *Owen v. Watts*, 307 Ga. App. 493, 705 S.E.2d 852 (2010).

Plaintiff, staff member at defendant's school, was not within class of protected persons contemplated by O.C.G.A. § 19-7-5, and the plaintiff's claim for damages under O.C.G.A. § 51-1-6 could not survive summary judgment. *Odem v. Pace Academy*, 235 Ga. App. 648, 510 S.E.2d 326 (1998).

Immunity from liability of person participating in report. — Grant of immunity from liability, under O.C.G.A. § 19-7-5, extended to a psychologist to whom a child welfare agency referred a child for evaluation as part of an investigation of suspected child abuse and the evidence did not establish bad faith on the part of the psychologist in making a report to the agency that the child had been sexually abused. *Michaels v. Gordon*, 211 Ga. App. 470, 439 S.E.2d 722 (1993).

Doctor had to report suspected abuse. — When children's allegations were sufficient to cause a reasonable per-

son to suspect that child abuse occurred, a doctor had to report the suspected abuse and had immunity from suit for that report. *O'Heron v. Blaney*, 276 Ga. 871, 583 S.E.2d 834 (2003).

Supervisory decisions were discretionary acts. —

As a student's personal injury damages claims against three school employees were based on the employees negligent failure to supervise the student when the student was with a non-party, and that such failure allegedly led to the student being molested by the third-party, the supervisory decisions made were discretionary acts requiring personal deliberation and judgment; hence, any reliance on O.C.G.A. § 19-7-5 did not provide a basis for civil liability against the employees for a negligent breach of a ministerial duty, and the student's claims were barred by the doctrine of official immunity as a matter of law. *Reece v. Turner*, 284 Ga. App. 282, 643 S.E.2d 814 (2007).

Hospital's report of the results of a drug test administered to a child was not made in bad faith, and summary judgment for the hospital based on the good faith immunity provision of O.C.G.A. § 19-7-5(f) was warranted. *Baldwin County Hosp. Auth. v. Trawick*, 233 Ga. App. 539, 504 S.E.2d 708 (1998).

No liability for failure to discover abuse. — O.C.G.A. § 19-7-5 does not require that notice be given by those physicians who should have had reasonable cause to suspect child abuse, and it does not penalize those physicians who fail to discover and report suspected instances of child abuse. *Cechman v. Travis*, 202 Ga. App. 255, 414 S.E.2d 282 (1991), cert. denied, 202 Ga. App. 905, 414 S.E.2d 282 (1992).

As a general rule, when the injury is not due to the fault of the person to be charged, the fact that a person sees another who is injured does not, of itself, impose on that person any legal obligation to afford relief or assistance, but the person may have a strong moral and humanitarian obligation to do so. O.C.G.A. § 19-7-5 may change this common-law rule to the extent of imposing upon the physician, who has reasonable cause to believe that a child has been abused, a

legal duty to the state to report that suspicion. That section does not, however, change that common-law rule by imposing upon the physician, who merely failed to discover and report suspected child abuse, a legal liability to the child for future acts of child abuse. *Cechman v. Travis*, 202 Ga. App. 255, 414 S.E.2d 282 (1991), cert. denied, 202 Ga. App. 905, 414 S.E.2d 282 (1992).

Denial of immunity not a final judgment. — Denial of the plea in bar, asserting immunity from prosecution pursuant to O.C.G.A. § 19-7-5, does not constitute a final judgment, nor is the order otherwise directly appealable. *Austin v. State*, 179 Ga. App. 235, 345 S.E.2d 688 (1986).

Refusal to give jury instruction proper. — Trial court did not err by

refusing to charge the jury regarding O.C.G.A. § 19-7-5 because the defendant cited no authority in support of the defendant's proposition that the trial court erred in refusing to give the instruction; the individual whom the defendant alleged failed to report the abuse as required by the statute was not a witness at trial, and the issue was irrelevant to the jury's determination of the defendant's guilt. *Hamrick v. State*, 304 Ga. App. 378, 696 S.E.2d 403 (2010).

Cited in *Lipsey v. State*, 170 Ga. App. 770, 318 S.E.2d 184 (1984); *Perguson v. State*, 221 Ga. App. 212, 470 S.E.2d 909 (1996); *Moss v. State*, 244 Ga. App. 295, 535 S.E.2d 292 (2000); *Hubert v. State*, 297 Ga. App. 71, 676 S.E.2d 436 (2009).

OPINIONS OF THE ATTORNEY GENERAL

"Cause to believe" is equivalent to "cause to suspect." — For purposes of Georgia's child abuse reporting statute, providing for protection of children whose health and welfare are adversely affected and threatened, "cause to believe" is equivalent to "cause to suspect." 1976 Op. Att'y Gen. No. 76-131.

"Deprived" child includes one who is abused, neglected, or exploited. — Although the statute did not explicitly mention "deprived" children as defined in Juvenile Court Code, the definition was certainly inclusive of a child who is abused, neglected, or exploited. 1976 Op. Att'y Gen. No. 76-131.

Phrase "participating in any judi-

cial proceeding" clearly extended to filing of petition as well as mere testimony in proceeding initiated by others. 1967 Op. Att'y Gen. No. 67-70.

"Caretakers." — Personnel of public and private schools are "caretakers" as defined in O.C.G.A. § 19-7-5. 1987 Op. Att'y Gen. No. 87-29.

Scope of authority to investigate. — Department of Human Resources, pursuant to O.C.G.A. § 19-7-5, has authority and responsibility only for investigating reports of suspected abuse when it is alleged or reasonably suspected that the abuse of the child was by a parent or caretaker. 1987 Op. Att'y Gen. No. 87-29.

RESEARCH REFERENCES

Am. Jur. Trials. — Trial Report: Third Party Suit Against Therapists for Implanting False Memory of Childhood Molestation, 57 Am. Jur. Trials 313.

When Clergy Fail Their Flock: Litigating the Clergy Sexual Abuse Case, 91 Am. Jur. Trials 151.

ALR. — Failure to provide medical attention for child as criminal neglect, 12 ALR2d 1047.

Right, in child custody proceedings, to cross-examine investigating officer whose

report is used by court in its decision, 59 ALR3d 1337.

Admissibility of expert medical testimony on battered child syndrome, 98 ALR3d 306.

Validity and construction of penal statute prohibiting child abuse, 1 ALR4th 38.

Admissibility at criminal prosecution of expert testimony on battering parent syndrome, 43 ALR4th 1203.

Validity, construction, and application of statute limiting physician-patient priv-

ilege in judicial proceedings relating to child abuse or neglect, 44 ALR4th 649.

Validity, construction, and application of state statute requiring doctor or other person to report child abuse, 73 ALR4th 782.

Denial or restriction of visitation rights to parent charged with sexually abusing child, 1 ALR5th 776.

19-7-6. Reporting of juvenile drug use.

(a) The purpose of this Code section is to provide for the protection of children whose health and welfare are adversely affected and further threatened by the unlawful use and abuse of controlled substances or marijuana. The General Assembly recognizes the need for early intervention, counseling, and treatment as an effective means of addressing the problem of child controlled substance and marijuana abuse. It is intended that the reporting of the unlawful use of any controlled substance or marijuana will cause the protective services of the state to be brought to bear on this situation in an effort to protect and enhance the welfare of children. This Code section shall be liberally construed so as to carry out the purposes thereof.

(b) Any person exercising in loco parentis control over a child under the age of 18 years who has reasonable cause to believe that the child is habitually using in an unlawful manner any controlled substance or marijuana, as defined in Code Section 16-13-21, is encouraged to report such information to the child's parents and a child welfare agency providing protective services, as designated by the Department of Human Services.

(c) When the attendance of the person exercising in loco parentis control over a child is pursuant to the performance of services as a member of the staff of any school, social agency, or similar facility, the reporting person shall notify the person in charge of the facility or his designated delegate; and such person or his delegate shall report or cause reports to be made in accordance with this Code section.

(d) An oral report shall be made as soon as possible by telephone or otherwise and shall be followed by a report in writing, if requested, to the child welfare agency providing protective services, as designated by the Department of Human Services. Such report shall contain the names and addresses of the child and his parents or caretakers, if known, the child's age, and the nature and extent of the child's controlled substance or marijuana abuse history, if known.

(e) No agency or political subdivision of this state shall enact or enforce any disciplinary rule or penalty against an employee of the state or of any political subdivision of the state for failure to make any report referred to in subsection (b), (c), or (d) of this Code section.

(f) Any person or persons, partnership, firm, corporation, association, hospital, or other entity participating in the making of a report or

causing a report to be made to a child welfare agency providing protective services pursuant to this Code section or any other law or participating in any judicial proceeding or any other proceeding resulting therefrom shall, in doing so, be immune from any civil or criminal liability that might otherwise be incurred or imposed if such participation, pursuant to this Code section or any other law, is made in good faith. Any person making a report, whether required by this Code section or not, shall be immune from liability as provided in this subsection.

(g) Any person or official required to report under this Code section shall be exempt from reporting any information received from the child during a counseling or treatment program.

(h) The child welfare agency providing protective services, as designated by the Department of Human Services, shall forward a copy of all reports wherein the reporting person or official has actual knowledge that a child under the age of 18 has unlawfully consumed or otherwise used any controlled substance or marijuana to the juvenile court. As used in this subsection, the term "juvenile court" means the court exercising jurisdiction over juvenile matters, as defined under Code Section 15-11-2, in the county where the report was made. (Code 1981, § 19-7-6, enacted by Ga. L. 1987, p. 1000, § 1; Ga. L. 2009, p. 453, § 2-2/HB 228.)

Cross references. — Right of minors to obtain treatment of drug abuse on their consent alone, § 37-7-8. Immunity of teachers and school personnel from liability for communicating information concerning drug abuse, § 51-1-30.2.

ARTICLE 2

LEGITIMACY

19-7-20. What children are legitimate; disproving legitimacy; legitimation by marriage of parents and recognition of child.

(a) All children born in wedlock or within the usual period of gestation thereafter are legitimate.

(b) The legitimacy of a child born as described in subsection (a) of this Code section may be disputed. Where possibility of access exists, the strong presumption is in favor of legitimacy and the proof must be clear to establish the contrary. If pregnancy existed at the time of the marriage and a divorce is sought and obtained on that ground, the child, although born in wedlock, will not be legitimate.

(c) The marriage of the mother and reputed father of a child born out of wedlock and the recognition by the father of the child as his shall

render the child legitimate; in such case the child shall immediately take the surname of his father. (Orig. Code 1863, §§ 1736, 1737; Code 1868, § 1777; Code 1873, § 1786; Code 1882, § 1786; Civil Code 1895, § 2493; Civil Code 1910, § 3012; Code 1933, § 74-101; Ga. L. 1988, p. 1720, § 4.)

Cross references. — Inheritance by and from illegitimates, §§ 53-4-4, 53-4-5.

Law reviews. — For article, "Georgia Inheritance Rights of Children Born Out of Wedlock," see 23 Ga. St. B.J. 28 (1986). For article, "Who is Georgia's Mother? Gestational Surrogacy: A Formulation for Georgia's Legislature," see 38 Ga. L. Rev. 395 (2003). For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004).

For note proposing Blood Grouping Test Act to expand admissible guidance in paternity proceedings, see 1 Mercer L. Rev. 266 (1950). For note discussing scientific basis of blood classification and use of blood tests as evidence, see 16 Mercer L.

Rev. 306 (1964). For note discussing legitimation of illegitimate children by subsequent marriage of parents, see 4 Ga. L. Rev. 383 (1970). For note discussing the admissibility of husband and wife's testimony concerning nonaccess in determining the legitimacy of a child, see 6 Ga. St. B.J. 448 (1970). For a note on the role of a judicial determination of paternity in the inheritance rights of illegitimate children in Georgia, see 16 Ga. L. Rev. 171 (1981).

For comment on *Wallace v. Wallace*, 221 Ga. 510, 145 S.E.2d 546 (1965), see 3 Ga. St. B.J. 219 (1966). For case comment, "In re Baby Girl Eason: Balancing Three Competing Interests in Third Party Adoptions," see 22 Ga. L. Rev. 1217 (1988).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION APPLICATION

General Consideration

Primary purpose of the legitimation and paternity statutes is to provide for the establishment rather than the disestablishment of legitimacy and paternity. *Ghrist v. Fricks*, 219 Ga. App. 415, 465 S.E.2d 501 (1995), overruled on other grounds, *Brine v. Shipp*, 291 Ga. 376, 729 S.E.2d 393 (2012).

Law favors legitimation. — Law favors marriage, and likewise the legitimizing of children, when it can be done with safety to society. *Harrison v. Odum*, 148 Ga. 489, 96 S.E. 1038 (1918).

Presumption of legitimacy arises only when child is born in wedlock. *Mincey v. Mincey*, 233 Ga. 512, 212 S.E.2d 345 (1975).

When child may avail itself of presumption. — Absent evidence that mother was ever married, child cannot avail itself of benefit of presumption. *Mincey v. Mincey*, 233 Ga. 512, 212 S.E.2d 345 (1975).

Statute presumed child born within wedlock to be legitimate. *Mims v. State*, 43 Ga. App. 100, 157 S.E. 901 (1931); *Ellis v. Woods*, 214 Ga. 105, 103 S.E.2d 297 (1958); *Boone v. Boone*, 225 Ga. 610, 170 S.E.2d 414 (1969); *B-B v. Califano*, 476 F. Supp. 970 (M.D. Ga. 1979), *aff'd sub. nom. B.B. ex rel. A.L.B. v. Schweiker*, 643 F.2d 1069 (5th Cir. 1981).

Child born in wedlock is presumed to be child of husband. *Mims v. State*, 43 Ga. App. 100, 157 S.E. 901 (1931); *Ellis v. Woods*, 214 Ga. 105, 103 S.E.2d 297 (1958); *Boone v. Boone*, 225 Ga. 610, 170 S.E.2d 414 (1969).

Presumption of legitimacy is one of the strongest and most persuasive known to the law, and to overcome such presumption proof should be clear to establish contrary where possibility of access between husband and wife exists. *Stephens v. State*, 80 Ga. App. 823, 57 S.E.2d 493 (1950).

Presumption is rebuttable. — Pre-

sumption that child born in wedlock is legitimate is rebuttable. *McDonald v. Hester*, 115 Ga. App. 740, 155 S.E.2d 720 (1967); *B-B v. Califano*, 476 F. Supp. 970 (M.D. Ga. 1979), *aff'd sub nom. B-B v. Schweiker*, 643 F.2d 1069 (5th Cir. 1981); *Parks v. State*, 155 Ga. App. 44, 270 S.E.2d 271 (1980); *Families First v. Gooden*, 211 Ga. App. 272, 439 S.E.2d 34 (1993).

When presumption may be rebutted. — In civil action, or on criminal prosecution, by evidence of nonaccess, or other testimony, presumption of legitimacy of offspring may be rebutted. *Thornton v. State*, 129 Ga. App. 574, 200 S.E.2d 298 (1973).

Presumption not rebutted. — Mother failed to rebut the presumption of legitimacy raised by a child's birth during the marriage pursuant to O.C.G.A. §§ 19-7-20 and 19-8-1(6) since the mother and husband knew that another man was the biological father of the child, the husband was listed with the mother's consent on the child's birth certificate as the child's father and had always provided financial and emotional support for the child, and when, if the husband had attempted to rebut the presumption of legitimacy the husband would have still been required to make child support payments. *Baker v. Baker*, 276 Ga. 778, 582 S.E.2d 102 (2003).

No absolute right to validate child. — Because the juvenile court failed to determine if one parent abandoned their opportunity interest to develop a relationship with the subject child, and failed to conduct a test of that parent's fitness or make a determination based upon the best interests of the child, the court's speculative conclusions were not equivalent to an examination of the benefit that might flow to the child if legitimated. Thus, the court, in essence, interpreted the parent's right to legitimate the child as absolute, without qualification, which was erroneous, requiring reversal. In the *Interest of M.K.*, 288 Ga. App. 71, 653 S.E.2d 354 (2007).

Standard of proof needed to overcome presumption. — Presumption of legitimacy of children born in wedlock can be overcome by clear and convincing proof,

the common-law doctrine not being of force in Georgia. *Harris v. Shelton*, 151 Ga. 615, 107 S.E. 842 (1921).

Whether presumption has been rebutted is for jury determination. — It is duty of jury to weigh evidence against presumption and to decide, as in exercise of the jury's judgment, the truth as it may appear. *Parks v. State*, 155 Ga. App. 44, 270 S.E.2d 271 (1980).

Effect of rebuttal of presumption. — When there was uncontradicted testimony of the child's mother that she had lived apart from and not even seen her former husband for more than two years preceding conception of the child, the presumption of legitimacy did not apply, and the trial court's refusal of the putative father's request to give a charge on this principle was not error. *Rainwater v. State*, 210 Ga. App. 594, 436 S.E.2d 772 (1993).

Legitimated child may inherit from father's estate. *Morris v. Dilbeck*, 71 Ga. App. 470, 31 S.E.2d 93 (1944).

"Children," as a general rule, means legitimate children. *Hicks v. Smith*, 94 Ga. 809, 22 S.E. 153 (1895).

Husband of woman at time of conception or birth is party at interest when another man claims fatherhood of the child in a legitimation proceeding; therefore, due process requires that the "legal father" must be served, but that service may be perfected in the same manner as provided for in adoption proceedings. *In re White*, 254 Ga. 678, 333 S.E.2d 588 (1985).

Initial burden of proving legitimacy. — Evidence of the presumption of legitimacy arising from the birth of a child requires the production of contrary evidence from the husband, but it does not relieve the wife of her burden of proof to establish legitimacy in the first place. *Miller v. Miller*, 258 Ga. 168, 366 S.E.2d 682 (1988).

Virtual adoption. — Trial court erred by granting a biological son's motion for partial summary judgment on the issue of virtual adoption asserted by the purported adopted daughter because the court clearly erred by misinterpreting the requirement of partial performance of the agreement to adopt and erroneously con-

General Consideration (Cont'd)

cluded that an established virtual adoption can be undone by showing that the purported adopted daughter formed a relationship with their natural father after learning of his existence when a teenager. *Sanders v. Riley*, 296 Ga. 693, 770 S.E.2d 570 (2015).

Cited in *Harrison v. Odum*, 148 Ga. 489, 96 S.E. 1038 (1918); *Wheeler v. Howard*, 211 Ga. 596, 87 S.E.2d 377 (1955); *Hobby v. Burke*, 227 F.2d 932 (5th Cir. 1955); *Miller v. Miller*, 96 Ga. App. 469, 100 S.E.2d 594 (1957); *Peters v. State*, 98 Ga. App. 340, 106 S.E.2d 77 (1958); *King v. King*, 218 Ga. 534, 129 S.E.2d 147 (1962); *Smith v. Smith*, 224 Ga. 442, 162 S.E.2d 379 (1968); *Clark v. Buttry*, 121 Ga. App. 492, 174 S.E.2d 356 (1970); *Dobyns v. Prudential Ins. Co. of Am.*, 227 Ga. 253, 179 S.E. 915 (1971); *In re J.B.*, 140 Ga. App. 668, 231 S.E.2d 821 (1976); *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); *Aikens v. Turner*, 241 Ga. 401, 245 S.E.2d 660 (1978); *Ingram v. Pirkle*, 150 Ga. App. 337, 258 S.E.2d 25 (1979); *McMahan v. Koppers Co.*, 654 F.2d 380 (5th Cir. 1981); *Glover v. Clark*, 161 Ga. App. 552, 288 S.E.2d 887 (1982); *In re Ashmore*, 163 Ga. App. 194, 293 S.E.2d 457 (1982); *Department of Human Resources v. Brinson*, 171 Ga. App. 905, 321 S.E.2d 763 (1984); *Jackson v. Jackson*, 253 Ga. 576, 322 S.E.2d 725 (1984); *Wilkins v. Department of Human Resources*, 174 Ga. App. 105, 329 S.E.2d 266 (1985); *Wilkins v. Georgia Dep't of Human Resources*, 255 Ga. 230, 337 S.E.2d 20 (1985); *J.C. Penney Cas. Ins. Co. v. Woodard*, 190 Ga. App. 727, 380 S.E.2d 282 (1989); *Jones v. Sullivan*, 953 F.2d 1291 (11th Cir. 1992); *Hall v. Coleman*, 242 Ga. App. 576, 530 S.E.2d 485 (2000).

Application

Mother may testify that "legal father" is not biological father of her child, and testify as to the identity of the biological father. *In re White*, 254 Ga. 678, 333 S.E.2d 588 (1985) (overruling *Colson v. Huber*, 74 Ga. App. 339, 39 S.E.2d 539 (1946), to the extent that it holds otherwise).

Mother of child born during wedlock is precluded by public policy from asserting the child's illegitimacy to show consideration for contract with man other than her husband, providing for payment of certain monthly sum for the child's support. *Colson v. Huber*, 74 Ga. App. 339, 39 S.E.2d 539 (1946), overruled on other grounds, *In re White*, 254 Ga. 678, 333 S.E.2d 588 (1985).

Witness cannot testify that husband denied paternity. — Testimony that husband, in life, at time of delivery of testimony, said to witnesses that child born during marriage is not his is insufficient to overcome presumption that all children born in wedlock, whether begotten before or after marriage or within usual period of gestation thereafter, are legitimate, and presumptively the children of the husband; such declarations of the husband in life at time witnesses testified are not admissible evidence to show child is illegitimate or to bastardize the child. *Richards v. State*, 55 Ga. App. 184, 189 S.E. 682 (1937).

When plea of not guilty raises issue of legitimacy. — Husband, by plea of not guilty in criminal case of abandonment of his minor child, or of bastardy, may put legitimacy of child in issue, and method of proving illegitimacy must be in accordance with rules of law. *Richards v. State*, 55 Ga. App. 184, 189 S.E. 682 (1937).

Issue of legitimacy is appropriate in divorce proceeding. *McDonald v. Hester*, 115 Ga. App. 740, 155 S.E.2d 720 (1967).

Marriage of parents and father's recognition of child legitimates child. — Child born out of wedlock is made legitimate by subsequent valid marriage of child's parents, and recognition of child by father as his own. *Morris v. Dilbeck*, 71 Ga. App. 470, 31 S.E.2d 93 (1944).

Order requiring genetic testing erroneous following marriage and recognition of child. — In an action wherein a juvenile court approved the state's plan for nonreunification of two twin children, the juvenile court erred by ordering a parent to submit to genetic testing and by holding that the parent lacked standing in any future related proceedings until that parent submitted to

such testing as the parent had married the children's other parent and recognized the children as the parent's own. Further, the Department of Family and Children services failed to fully comply with O.C.G.A. § 19-7-43(d) by not supporting the motion with a sworn statement either alleging or denying the parent's paternity. *In the Interest of T.W.*, 288 Ga. App. 386, 654 S.E.2d 218 (2007).

Illegitimate child may be legitimated by marriage of mother and reputed father and recognition of such child as his. *Kersey v. Gardner*, 264 F. Supp. 887 (M.D. Ga. 1967).

Legitimation by marriage dates from birth. — Former Code 1933, §§ 74-101 and 74-201 (see now O.C.G.A. §§ 19-7-20 and 19-7-23) made child whose parents marry after the child's birth legitimate for all purposes from date of birth. *Morris v. Dilbeck*, 71 Ga. App. 470, 31 S.E.2d 93 (1944).

Legitimation of issue of bigamous marriage by cohabitation and recognition after death of first wife. See *Smith v. Reed*, 145 Ga. 724, 89 S.E. 815, 1917a L.R.A. 492 (1916).

Opportunity of access raises strong presumption in favor of legitimacy. — When husband and wife have had opportunity of sexual intercourse, a very strong presumption arises that it must have taken place, and that child in question is the fruit; but it is only a very strong presumption, and no more. This presumption may be rebutted by evidence showing, inter alia, the habits of life and relative situations of the parties, their conduct and declarations connected with conduct, such as, for example, in birth certificates, or impossibility of access. *Gibbons v. Maryland Cas. Co.*, 114 Ga. App. 788, 152 S.E.2d 815 (1966).

Husband not biological father. — Former husband was improperly awarded the former wife's biological child, who was born before the parties' marriage; the husband's marriage to the wife after the child was born and acknowledgement of the child did not render the child legitimate under O.C.G.A. § 19-7-20(c), as O.C.G.A. § 19-7-20(c), which applied to reputed fathers, was inapplicable as the parties always acknowledged that the husband was

not the biological father of the child. *Veal v. Veal*, 281 Ga. 128, 636 S.E.2d 527 (2006).

When sexual intercourse is proved, nothing short of impossibility should impugn legitimacy of offspring. *Simeonides v. Zervis*, 120 Ga. App. 883, 172 S.E.2d 649 (1969), aff'd, 127 Ga. App. 506, 194 S.E.2d 324 (1972).

Once sexual intercourse between husband and wife is proved, nothing short of impossibility will rebut presumption of legitimacy of child born to wife. *Herrin v. Herrin*, 242 Ga. 256, 248 S.E.2d 651 (1978).

When sexual intercourse is presumed from propinquity of parties, slighter proof is required to rebut presumption. *Simeonides v. Zervis*, 120 Ga. App. 883, 172 S.E.2d 649 (1969), aff'd, 127 Ga. App. 506, 194 S.E.2d 324 (1972).

That four children previously were born of marriage shows only presumption of sexual intercourse between parties. *Simeonides v. Zervis*, 120 Ga. App. 883, 172 S.E.2d 649 (1968), aff'd, 127 Ga. App. 506, 194 S.E.2d 324 (1972).

Responsibility for illegitimate child placed upon parent who is present. This placing of full parental power in mother is consistent with public policy favoring marriage and family because father can choose to join the family. *Quilloin v. Walcott*, 238 Ga. 230, 232 S.E.2d 246 (1977), aff'd, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978).

Intervention in legitimation proceeding. — Trial court erred in granting a putative biological father's legitimation petition while a husband's timely, meritorious motion to intervene of right under O.C.G.A. § 9-11-24(a) was pending because when the husband moved to intervene in the legitimation proceeding he was the child's legal father and had parental and custodial rights to the child, and the husband clearly had an interest in the legitimation proceeding; the husband's interest as the child's legal father would be impaired by a decision of the trial court that was unfavorable to him, and his interest was not adequately represented by the parties to the action since the child's mother consented to the legitimation action. *Baker v. Lankford*, 306 Ga.

Application (Cont'd)

App. 327, 702 S.E.2d 666 (2010).

Denial of legitimation petition proper. — Trial court properly denied the father's petition to legitimate a child since the father abandoned the father's interest when the father took no action during the

wife's pregnancy or birth and did not seek to legitimate the child until more than five years after receiving the DNA results. *Matthews v. Dukes*, 314 Ga. App. 782, 726 S.E.2d 95 (2012), overruled on other grounds, *Brine v. Shipp*, 291 Ga. 376, 729 S.E.2d 393 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Statute placed strong presumption in favor of legitimacy of child born in wedlock, and while this legitimacy may be disputed, it would take clear and positive evidence to rebut presumption in favor of child's legitimacy. 1945-47 Op. Att'y Gen. p. 418.

Mere indication that husband is not natural father of child is insufficient to rebut this presumption. 1945-47 Op. Att'y Gen. p. 418.

Issue born of common-law marriage would be legitimate. 1958-59 Op. Att'y Gen. p. 89.

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, *Illegitimate Children*, §§ 1 et seq., 27, 68, 137.

C.J.S. — 14 C.J.S., *Children Out-of-Wedlock*, §§ 1, 15, 18 et seq.

ALR. — Attempt to bastardize child as affecting right to custody of the child, 4 ALR 1119; 37 ALR 531.

Presumption of legitimacy of child born to married woman as affected by lapse of more than normal period of gestation after access by husband, 7 ALR 329.

Right of child legitimated by marriage of parents to take by inheritance from kindred of parents, 64 ALR 1124.

What constitutes a "marriage" within meaning of a statute legitimating issue of all marriages null in law, 84 ALR 499.

Degree of proof necessary to overcome presumption of legitimacy, 128 ALR 713.

Status of child born to inmate of public institution, 159 ALR 1229.

Legitimizing effect of intermarriage of parents as affected by father's failure to acknowledge paternity, 175 ALR 375.

Admissibility, on issue of child's legitimacy or parentage, of declarations of parents, relatives, or the child, deceased or unavailable, 31 ALR2d 989.

Presumption of legitimacy, or of paternity, of child conceived or born before marriage, 57 ALR2d 729.

Who qualifies as "child" within survivor benefit provisions of Federal Social Secu-

rity Act, § 216(h)(2) [42 U.S.C. § 416(h)(2)], 60 ALR2d 1070.

Determination of paternity, legitimacy, or legitimation in action for divorce, separation, or annulment, 65 ALR2d 1381.

Race or color of child as admissible in evidence on issue of legitimacy or paternity, or as basis of rebuttal or exception to presumption of legitimacy, 32 ALR3d 1303.

Presumption of legitimacy of child born after annulment, divorce, or separation, 46 ALR3d 158.

Rule as regards competency of husband or wife to testify as to nonaccess, 49 ALR3d 212.

Death of putative father as precluding action for determination of paternity or for child support, 58 ALR3d 188.

Effect, in subsequent proceedings, of paternity findings or implications in divorce or annulment decree or in support of custody order made incidental thereto, 78 ALR3d 846.

Legitimation by marriage to natural father of child born during mother's marriage to another, 80 ALR3d 219.

Proof of husband's impotency or sterility as rebutting presumption of legitimacy, 84 ALR3d 495.

Who may dispute presumption of legitimacy of child conceived or born during wedlock, 90 ALR3d 1032.

Rights and remedies of parents inter se

with respect to the names of their children, 40 ALR5th 697.

19-7-21. When children conceived by artificial insemination legitimate.

All children born within wedlock or within the usual period of gestation thereafter who have been conceived by means of artificial insemination are irrebuttably presumed legitimate if both spouses have consented in writing to the use and administration of artificial insemination. (Code 1933, § 74-101.1, enacted by Ga. L. 1964, p. 166, § 1.)

Cross references. — Persons authorized to administer or perform artificial insemination, § 43-34-42.

Law reviews. — For article, “Artificial Human Reproduction: Legal Problems Presented by the Test Tube Baby,” see 28 Emory L.J. 1045 (1980). For article, “The Orwellian Nightmare Reconsidered: A Proposed Regulatory Framework for the Advanced Reproductive Technologies,” see 25 Ga. L. Rev. 625 (1991). For article, “Who is Georgia’s Mother? Gestational Surrogacy: A Formulation for Georgia’s Legislature,” see 38 Ga. L. Rev. 395 (2003).

For article, “10th Annual Legal Ethics and Professionalism Symposium: Drawing the Ethical Line: Controversial Cases, Zealous Advocacy, and the Public Good,” see 44 Ga. L. Rev. 413 (2010). For note discussing legitimacy of children born by means of artificial insemination, see 4 Ga. L. Rev. 383 (1970). For note, “It Takes a Village: Considering the Other Interests at Stake When Extending Inheritance Rights to Posthumously Conceived Children,” see 44 Ga. L. Rev. 873 (2010).

For comment, “Surrogate Mother Contracts: Analysis of a Remedial Quagmire,” see 37 Emory L.J. 721 (1988).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Illegitimate Children, § 2. 59 Am. Jur. 2d, Parent and Child, § 2.

ALR. — Rights and obligations resulting from human artificial insemination, 83 ALR4th 295.

19-7-21.1. “Acknowledgment of legitimation” and “legal father” defined; signing acknowledgment of legitimation; when acknowledgment not recognized; making false statement; rescinding acknowledgment.

(a) As used in this Code section, the term:

(1) “Acknowledgment of legitimation” means a written statement contained in a voluntary acknowledgment of paternity form indicating that a mother and father of a child born out of wedlock have freely agreed and consented that the child may be legitimated.

(2) “Legal father” means a male who:

(A) Has legally adopted a child;

(B) Was married to the biological mother of that child at the time the child was conceived or was born, unless such paternity was disproved by a final order pursuant to Article 3 of this chapter;

(C) Married the legal mother of the child after the child was born and recognized the child as his own, unless such paternity was disproved by a final order pursuant to Article 3 of this chapter;

(D) Has been determined to be the father by a final paternity order pursuant to Article 3 of this chapter;

(E) Has legitimated the child by a final order pursuant to Code Section 19-7-22; or

(F) Has legitimated a child pursuant to this Code section and who has not surrendered or had terminated his rights to the child.

(b) Prior to the child's first birthday, a father of a child born out of wedlock may render his relationship with the child legitimate when both the mother and father have freely agreed, consented, and signed a voluntary acknowledgment of paternity and an acknowledgment of legitimation which have been made and have not been rescinded pursuant to Code Section 19-7-46.1. The State Office of Vital Records shall provide notice, in writing, of the alternatives to, legal consequences of, and the rights and responsibilities of signing a voluntary acknowledgment of legitimation.

(c) Voluntary acknowledgment of legitimation shall not be recognized if:

(1) The mother was married to another man when the child was born;

(2) The mother was married to another man at any time within the usual period of gestation;

(3) There is another legal father;

(4) The mother has voluntarily and in writing surrendered all of her parental rights pursuant to the provisions of subsection (a) of any of Code Section 19-8-4, 19-8-5, 19-8-6, or 19-8-7 and has not withdrawn her surrender as permitted by the provisions of subsection (b) of Code Section 19-8-9 or the mother's parental rights have been judicially terminated by a court of competent jurisdiction or an action to terminate such rights has been initiated and is pending;

(5) The mother has signed a voluntary acknowledgment of legitimation with another man; or

(6) The child is one year of age or older.

(d) If any of the circumstances described in subsection (c) of this Code section exists, the provisions of Code Section 19-7-22 shall be the only method of legitimation.

(e) Voluntary acknowledgment of legitimation shall not authorize the father to receive custody or visitation until there is a judicial determination of custody or visitation.

(f) It shall be unlawful to make a false statement on a voluntary acknowledgment of legitimation, and the making of a false statement shall be punishable as an act of false statements and writings under Code Section 16-10-20.

(g) Where a voluntary acknowledgment of paternity is timely rescinded and includes a voluntary acknowledgment of legitimation, the legitimation shall also be deemed rescinded. (Code 1981, § 19-7-21.1, enacted by Ga. L. 2008, p. 667, § 4/SB 88.)

Editor's notes. — Ga. L. 2008, p. 667, § 1/SB 88, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Care of a Grandchild Act.'"

Ga. L. 2008, p. 667, § 2/SB 88, not codified by the General Assembly, provides: "The General Assembly finds that:

"(1) An increasing number of relatives in Georgia, including grandparents and great-grandparents, are providing care to children who cannot reside with their parents due to the parent's incapacity or inability to perform the regular and ex-

pected functions to provide such care and support;

"(2) Parents need a means to confer to grandparents or great-grandparents the authority to act on behalf of grandchildren without the time and expense of a court proceeding; and

"(3) Providing a statutory mechanism for granting such authority enhances family preservation and stability."

Law reviews. — For annual survey on domestic relations, see 61 Mercer L. Rev. 117 (2009).

JUDICIAL DECISIONS

Adoption petition failed to address statutory factors. — In a step-father's appeal, a trial court erred by denying the step-father's petition for adoption because the adoption petition did not address the issue of whether the biological father was a parent of the child for purposes of the adoption statutes, O.C.G.A. §§ 19-7-21.1(a)(2)(F) and 19-8-1(6). *Allifi v. Raider*, 323 Ga. App. 510, 746 S.E.2d 763 (2013).

Denial of petition for legitimation improperly set aside. — Trial court erred by setting aside the denial of a biological father's petition for legitimation because the voluntary acknowledgment of paternity preempted the denial as the father failed to make the trial court aware of the acknowledgment and could not subsequently use the document to set aside

the trial court's final judgment. *Allifi v. Raider*, 323 Ga. App. 510, 746 S.E.2d 763 (2013).

Out of state paternity order substantially equivalent to Georgia legitimation order. — Trial court properly denied the applicants' motion to terminate a father's parental rights and denied the applicants' adoption petition because a State of Alabama paternity order obtained by the father was substantially equivalent to a Georgia legitimation order such that the father had not lost his right to contest the adoption and the father properly domesticated the Alabama order with the trial court. *Park v. Bailey*, 329 Ga. App. 569, 765 S.E.2d 721 (2014).

Cited in *Ray v. Hann*, 323 Ga. App. 45, 746 S.E.2d 600 (2013).

19-7-22. Petition for legitimation of child; requirement that mother be named as a party; court order; effect; claims for custody or visitation; third-party action for legitimation in response to petition to establish paternity.

(a) A father of a child born out of wedlock may render his relationship with the child legitimate by petitioning the superior court of the county of the residence of the child's mother or other party having legal custody or guardianship of the child; provided, however, that if the mother or other party having legal custody or guardianship of the child resides outside the state or cannot, after due diligence, be found within the state, the petition may be filed in the county of the father's residence or the county of the child's residence. If a petition for the adoption of the child is pending, the father shall file the petition for legitimation in the county in which the adoption petition is filed.

(b) The petition shall set forth the name, age, and sex of the child, the name of the mother, and, if the father desires the name of the child to be changed, the new name. If the mother is alive, she shall be named as a party and shall be served and provided an opportunity to be heard as in other civil actions under Chapter 11 of Title 9, the "Georgia Civil Practice Act."

(c) Upon the presentation and filing of the petition, the court may pass an order declaring the father's relationship with the child to be legitimate, and that the father and child shall be capable of inheriting from each other in the same manner as if born in lawful wedlock and specifying the name by which the child shall be known.

(d) A legitimation petition may be filed, pursuant to Code Section 15-11-11, in the juvenile court of the county in which a dependency proceeding regarding the child is pending.

(e) Except as provided by subsection (f) of this Code section, the court shall upon notice to the mother further establish such duty as the father may have to support the child, considering the facts and circumstances of the mother's obligation of support and the needs of the child as provided under Code Section 19-6-15.

(f) After a petition for legitimation is granted, if a demand for a jury trial as to support has been properly filed by either parent, then the case shall be transferred from juvenile court to superior court for such jury trial.

(f.1) The petition for legitimation may also include claims for visitation, parenting time, or custody. If such claims are raised in the legitimation action, the court may order, in addition to legitimation, visitation, parenting time, or custody based on the best interests of the child standard. In a case involving allegations of family violence, the

provisions of paragraph (4) of subsection (a) of Code Section 19-9-3 shall also apply.

(g)(1) In any petition to establish paternity pursuant to paragraph (4) of subsection (a) of Code Section 19-7-43, the alleged father's response may assert a third-party action for the legitimation of the child born out of wedlock. Upon the determination of paternity or if a voluntary acknowledgment of paternity has been made and has not been rescinded pursuant to Code Section 19-7-46.1, the court or trier of fact as a matter of law and pursuant to the provisions of Code Section 19-7-51 may enter an order or decree legitimating a child born out of wedlock, provided that such is in the best interest of the child. Whenever a petition to establish the paternity of a child is brought by the Department of Human Services, issues of name change, visitation, and custody shall not be determined by the court until such time as a separate petition is filed by one of the parents or by the legal guardian of the child, in accordance with Code Section 19-11-8; if the petition is brought by a party other than the Department of Human Services or if the alleged father seeks legitimation, the court may determine issues of name change, visitation, and custody in accordance with subsections (b) and (f.1) of this Code section. Custody of the child shall remain in the mother unless or until a court order is entered addressing the issue of custody.

(2) In any voluntary acknowledgment of paternity which has been made and has not been rescinded pursuant to Code Section 19-7-46.1, when both the mother and father freely agree and consent, the child may be legitimated by the inclusion of a statement indicating a voluntary acknowledgment of legitimation. (Orig. Code 1863, § 1738; Code 1868, § 1778; Code 1873, § 1787; Code 1882, § 1787; Civil Code 1895, § 2494; Civil Code 1910, § 3013; Code 1933, § 74-103; Ga. L. 1985, p. 279, § 2; Ga. L. 1988, p. 1720, § 5; Ga. L. 1989, p. 441, § 1; Ga. L. 1997, p. 1613, § 14; Ga. L. 1997, p. 1681, § 5; Ga. L. 2000, p. 20, § 10; Ga. L. 2005, p. 1491, § 1/SB 53; Ga. L. 2007, p. 554, § 6/HB 369; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2013, p. 294, § 4-24/HB 242.)

The 2013 amendment, effective January 1, 2014, in subsection (d), substituted "Code Section 15-11-11" for "paragraph (2) of subsection (e) of Code Section 15-11-28" near the beginning, and substituted "dependency" for "deprivation" near the end. See editor's note for applicability.

Cross references. — Effect of legitimation on vital records, §§ 31-10-12, 31-10-14.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1997, subsection

(b), as enacted by Ga. L. 1997, p. 1613, § 14, was redesignated as subsection (g).

Editor's notes. — Ga. L. 2007, p. 554, § 1/HB 369, not codified by the General Assembly, provides: "The General Assembly of Georgia declares that it is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encourage parents to share in the rights and responsibilities of rearing

their children after the parents have separated or dissolved their marriage or relationship.”

Ga. L. 2007, p. 554, § 8/HB 369, not codified by the General Assembly, provides that the 2007 amendment shall apply to all child custody proceedings and modifications of child custody filed on or after January 1, 2008.

Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: “This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions.”

Law reviews. — For annual survey of law of wills, trusts, and administration of estates, see 38 Mercer L. Rev. 417 (1986). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997). For survey article on domestic relations cases for the period from June 1, 2002 through May 31,

2003, see 55 Mercer L. Rev. 223 (2003). For annual survey of wills, trusts, guardianships, and fiduciary administration, see 57 Mercer L. Rev. 403 (2005). For survey article on domestic relations law, see 59 Mercer L. Rev. 139 (2007). For survey article on domestic relations law, see 60 Mercer L. Rev. 121 (2008). For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417 (2008). For article on domestic relations, see 66 Mercer L. Rev. 65 (2014).

For note discussing the admissibility of husband and wife’s testimony concerning nonaccess in determining the legitimacy of a child, see 6 Ga. St. B.J. 448 (1970). For a note on the role of a judicial determination of paternity in the inheritance rights of illegitimate children in Georgia, see 16 Ga. L. Rev. 171 (1981). For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 234 (1989).

For comment on statutes requiring consent of mother, but not of father, as prerequisite to adoption of illegitimate child, violating the fourteenth amendment equal protection clause, see 29 Emory L.J. 833 (1981). For comment, “The Constitutional Rights of Unwed Fathers in Georgia: In re Baby Girl Eason,” see 5 Ga. St. U.L. Rev. 591 (1989). For case comment, “In re Baby Girl Eason: Balancing Three Competing Interests in Third Party Adoptions,” see 22 Ga. L. Rev. 1217 (1988).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION.

PROCEDURAL ISSUES.

APPLICATION.

General Consideration.

Constitutionality. — O.C.G.A. § 19-7-22 does not violate constitutional guarantees of due process and equal protection. *Pruitt v. Lindsey*, 261 Ga. 540, 407 S.E.2d 750 (1991).

Rights afforded a mother in the scheme for legitimating the mother’s child render the mother a defendant within the meaning of Ga. Const. 1983, Art. VI, Sec. II, Para. VI; thus, that portion of O.C.G.A.

§ 19-7-22(a) that provides for venue in the county of the putative father, when different from the county of the mother, offends the Georgia Constitution. If one portion of a statute is unconstitutional, the Supreme Court of Georgia has the power to sever that portion of the statute and preserve the remainder if the remaining portion of the act accomplishes the purpose the Georgia General Assembly intended; accordingly, severance of this venue provision does not affect the pur-

pose of the remainder of the statute, and the remaining provisions of O.C.G.A. § 19-7-22(a) are to be given full effect. *Holmes v. Traweek*, 276 Ga. 296, 577 S.E.2d 777 (2003).

Application of amended statute. — As there were no vested substantive rights that would have been impaired by application of the current version of O.C.G.A. § 19-7-22(b) to an appeal by a putative father, although the prior version was in effect at the time of the juvenile court's ruling, the current version was used for appellate review of the issues raised. *In the Interest of A.H.*, 279 Ga. App. 77, 630 S.E.2d 587 (2006).

Effect of legitimation order. — Because the juvenile court erred in the court's application of O.C.G.A. § 19-7-1(b.1), as a child's legal father was not one of the limited number of related third parties who could seek custody from a legal parent, and in light of the superior court's grant of a legitimation petition to the child's biological father, which the legal father did not challenge by way of an appeal, the legal father lacked standing to challenge the biological father's custody under present Georgia law, and therefore no longer had rights to the custody of the child. *In the Interest of C.L.*, 284 Ga. App. 674, 644 S.E.2d 530 (2007).

No absolute right to legitimate child. — Because the juvenile court failed to determine if one parent abandoned their opportunity interest to develop a relationship with the subject child, and failed to conduct a test of that parent's fitness or make a determination based upon the best interests of the child, the court's speculative conclusions were not equivalent to an examination of the benefit that might flow to the child if legitimated. Thus, the court, in essence, interpreted the parent's right to legitimate the child as absolute, without qualification, which was erroneous, requiring reversal. *In the Interest of M.K.*, 288 Ga. App. 71, 653 S.E.2d 354 (2007).

Construction of section. — Being in derogation of common law, statute must be strictly construed. *In re Pickett*, 131 Ga. App. 159, 205 S.E.2d 522 (1974).

Construction with § 15-11-96. — Because a father failed to give written notice

to the juvenile court that a legitimation petition was filed, as required by O.C.G.A. § 15-11-96(h), within 30 days of receiving notification of a termination proceeding, the juvenile court properly entered an order terminating the father's parental rights, and the father was thus denied the right to object. *In the Interest of S.M.R.*, 286 Ga. App. 139, 648 S.E.2d 697 (2007).

There is no statutory provision for inheritance by illegitimates, per se, from their fathers. *Savage v. Blanks*, 117 Ga. App. 316, 160 S.E.2d 461 (1968).

Section provides exclusive procedure for legitimizing children. — Exclusive procedure by which fathers may render children legitimate was set forth in the statute. *Savage v. Blanks*, 117 Ga. App. 316, 160 S.E.2d 461 (1968).

Only a father can by voluntary unilateral action make an illegitimate child legitimate. *Parham v. Hughes*, 441 U.S. 347, 99 S. Ct. 1742, 60 L. Ed. 2d 269 (1979).

Right is with father only. — Clear language of statute showed legislative intent to be that father alone has right to legitimate a child, whether father was married or single. *In re Pickett*, 131 Ga. App. 159, 205 S.E.2d 522 (1974).

It was not intent of legislature that legitimation proceedings be only available to unmarried fathers. *In re Pickett*, 131 Ga. App. 159, 205 S.E.2d 522 (1974).

Qualification on father's right to legitimate child. — Under statute, father's right to legitimate was absolute, subject only to qualification that natural mother may object and if she showed valid reasons why petition should not be granted, judge may deny the petition. *In re Pickett*, 131 Ga. App. 159, 205 S.E.2d 522 (1974).

Mother's rights. — Mother of illegitimate child is entitled to file objections to a petition brought by putative father to legitimate such child. *Murphy v. Thomas*, 89 Ga. App. 687, 81 S.E.2d 26 (1954).

Complaint for legitimation under O.C.G.A. § 19-7-22 cannot be maintained by the mother. *Pruitt v. Lindsey*, 261 Ga. 540, 407 S.E.2d 750 (1991).

Putative father who filed a legitimation petition pursuant to O.C.G.A. § 17-9-22 had to serve the mother with the petition

General Consideration. (Cont'd)

in a timely manner, pursuant to the service requirements under O.C.G.A. § 19-7-22(b), as the juvenile court which was ruling on a county agency's petition to terminate parental rights over the child had only orally and provisionally terminated the mother's rights at the time that the putative father's petition for legitimation was filed and, accordingly, the mother was entitled to service. *In the Interest of A.H.*, 279 Ga. App. 77, 630 S.E.2d 587 (2006).

Children born through adulterous relationships. — Statute did not deny legitimization to children born through adulterous relationships. *In re Pickett*, 131 Ga. App. 159, 205 S.E.2d 522 (1974).

If a father wants to gain the right to custody or visitation, he must take the steps required by O.C.G.A. § 19-7-22 to "legitimate the child," or, more correctly, to legitimate the relationship between himself and the child. *Pruitt v. Lindsey*, 261 Ga. 540, 407 S.E.2d 750 (1991).

Father of illegitimate child, legitimated by court order has claim to parental and custodial rights with respect to his child. *Mitchell v. Ward*, 231 Ga. 671, 203 S.E.2d 484 (1974).

Because an alleged legal father failed to provide the juvenile court with sufficient evidence that the father legitimated the child at issue, the father lacked standing to contest both the custody of the child and the court's order granting custody to DFCS; thus, the custody order was vacated and the case was remanded for further proceedings in which the father could legitimate the child, and if that occurred the court should enter a further order addressing the father's request for custody. *In the Interest of A.D.*, 286 Ga. App. 352, 648 S.E.2d 786 (2007).

Legitimation does not immunize father against loss of custody. — Fact that children have been legitimated does not ipso facto immunize their father from proper showing that children should be removed from his custody. *Sims v. Pope*, 228 Ga. 289, 185 S.E.2d 80 (1971).

Scope of rights conferred upon legitimated child. — Legitimation under statute did not render illegitimate child

legitimate according to full significance of that term, but only renders him so far legitimate as will enable him to inherit from his father. *Hicks v. Smith*, 94 Ga. 809, 22 S.E. 153 (1895).

Statute did not have effect of rendering legitimate an illegitimate child according to full significance of that term, but only to legitimate so as to enable child to inherit from father, to enjoy his name and like amenities. The authorized right to inherit does not extend to his father's wife who is not his mother nor to his half brothers and sisters. *In re Pickett*, 131 Ga. App. 159, 205 S.E.2d 522 (1974).

Legitimation of illegitimate child gives the child no more right to support, and no more right than he already had not to be discriminated against because of his birth. *Mabry v. Tadlock*, 157 Ga. App. 257, 277 S.E.2d 688 (1981).

Visitation rights not at issue upon petition to legitimate. — O.C.G.A. § 19-7-22 contains no language which can be read as requiring a trial court to consider a visitation issue when determining the merits of a petition to legitimate. *In re J.B.K.*, 169 Ga. App. 450, 313 S.E.2d 147 (1984).

By asserting a counterclaim for paternity, the mother of a child born out of wedlock converted the putative father's legitimation action into a paternity suit; therefore, the trial court did not have the authority to consider an award of visitation to the putative father. *Petersen v. Tyson*, 253 Ga. App. 431, 559 S.E.2d 164 (2002).

Biological father had no absolute right to grant of legitimacy for purpose of obtaining visitation privileges with his children, and trial judge did not abuse the judge's inherent discretion in refusing to legitimate such children on ground that best interests of children would be served by maintaining status quo in stable family unit of children's mother and mother's present husband. *Mabry v. Tadlock*, 157 Ga. App. 257, 277 S.E.2d 688 (1981).

Mother is entitled to notice of petition to legitimate and may voice objection. *Gregg v. Barnes*, 203 Ga. App. 549, 417 S.E.2d 206, cert. denied, 203 Ga. App. 906, 417 S.E.2d 206 (1992).

Father's legitimacy order was properly

granted as the father never abandoned his opportunity interest in forming a bond with his child; the father loved the child, continued to make efforts to contact him, and financially supported him. *Carden v. Warren*, 269 Ga. App. 275, 603 S.E.2d 769 (2004).

Out of state paternity order substantially equivalent to Georgia legitimation order and resulted in adoption denial. — Trial court properly denied the applicants' motion to terminate a father's parental rights and denied the applicants' adoption petition because a State of Alabama paternity order obtained by the father was substantially equivalent to a Georgia legitimation order such that the father had not lost his right to contest the adoption and the father properly domesticated the Alabama order with the trial court. *Park v. Bailey*, 329 Ga. App. 569, 765 S.E.2d 721 (2014).

Procedural Issues.

Delay in filing petition. — After the lapse of thirteen years, public policy forbids the court from becoming involved in a paternity suit when the plaintiff had an opportunity in 1983 to establish paternity even though the plaintiff alleges that the delay was partially a result of his reliance on counsel's correspondence. *Grice v. Detwiler*, 227 Ga. App. 280, 488 S.E.2d 755 (1997).

Delay based on genetic testing. — Appellate court rejected a father's contention that the juvenile court erred in holding that a delay in instituting legitimation proceedings justified a finding that the father abandoned his opportunity interest, as the father's reason for the delay, specifically, waiting to obtain the results of genetic testing, was not a condition precedent to filing a legitimation petition; moreover, even with the delay, the father could have filed his legitimation petition and then sought court-ordered genetic testing. In the Interest of *J.L.E.*, 281 Ga. App. 805, 637 S.E.2d 446 (2006).

Order terminating a biological parent's parental rights was upheld on appeal, as the parent failed to file for legitimation of the affected children within 30 days of being notified of the termination petition, despite repeatedly being notified to do so,

and despite the appointment of an attorney in the termination proceedings. In the Interest of *S.M.G.*, 284 Ga. App. 64, 643 S.E.2d 296 (2007).

Trial court properly terminated a parent's parental rights to a child as a result of the parent failing to timely file a notice of the petition to legitimate the child with the juvenile court within 30 days. The fact that the termination petition misstated relevant statutes did not relieve the parent of the obligation to file both a petition to legitimate and a notice. In the Interest of *M.D.*, 293 Ga. App. 700, 667 S.E.2d 693 (2008).

Failure to file civil case filing form not fatal to legitimation petition. — Putative biological father's failure to pay a filing fee and a civil case filing form required by O.C.G.A. § 9-11-3(b) was not fatal to the father's legitimation claim because the clerk, when asked by the father, did not require payment of a filing fee, and the father's attorney merely followed the procedure suggested by the clerk. *Brewton v. Poss*, 316 Ga. App. 704, 728 S.E.2d 837 (2012).

Continuance to complete service. — Within the context of a parental rights termination proceeding, a juvenile court had the discretion to determine whether to grant an extension of time for a putative father to serve the legitimation petition on the mother, pursuant to O.C.G.A. §§ 15-11-96(i), 19-7-22(b), and Georgia case law that allowed application of the procedural rules set out in the Civil Practice Act, including O.C.G.A. § 9-11-4(c) relating to service and extensions thereto; accordingly, the juvenile court's refusal to hear the legitimation petition was error as was the decision to terminate the putative father's parental rights under O.C.G.A. § 15-11-94 without first determining that he had standing or not under the legitimation action. In the Interest of *A.H.*, 279 Ga. App. 77, 630 S.E.2d 587 (2006).

Denial of motion to sever improper. — Trial court abused the court's discretion by denying a putative biological father's motion to sever his petition for legitimation of a son from a husband's adoption proceeding because the father's petition substantially complied with the substance of the legitimation statute, O.C.G.A.

Procedural Issues. (Cont'd)

§ 19-7-22; the petition contained the requisite information, it was served on the wife, and it was timely filed in the proper court, and the father's failure to file his petition as a separate civil action caused no prejudice to anyone. *Brewton v. Poss*, 316 Ga. App. 704, 728 S.E.2d 837 (2012).

Father's wife has no legal status to object to legitimation even though child was conceived by another woman during wife's marriage to father. *In re Pickett*, 131 Ga. App. 159, 205 S.E.2d 522 (1974).

Standing of legitimated father as to challenges to custody. — Upon legitimation, father stands in same position as any other parent regarding challenges to custody for good and legal cause. *Sims v. Pope*, 228 Ga. 289, 185 S.E.2d 80 (1971).

Right to file objections to petition. — Although O.C.G.A. § 19-7-22 only provides for notice to the mother, this notice implies a right to file objections to the petition. *In re Ashmore*, 163 Ga. App. 194, 293 S.E.2d 457 (1982); *Adamavage v. Holloway*, 206 Ga. App. 156, 424 S.E.2d 837 (1992).

Georgia Civil Practice Act rules applicable. — Court of Appeals of Georgia, First Division interprets the language of O.C.G.A. § 19-7-22(b) to mean that the procedural rules set out in the Georgia Civil Practice Act and Georgia case law interpreting those rules should apply to the service of a legitimation petition; accordingly, the Court of Appeals of Georgia, First Division concluded that a juvenile court has discretion to grant a putative biological father a continuance of a legitimation or parental rights termination hearing in order to allow him additional time to perfect service of his legitimation petition upon the biological mother, irrespective of whether the 30-day limitation period set out in O.C.G.A. § 15-11-96(i) has passed. *In the Interest of A.H.*, 279 Ga. App. 77, 630 S.E.2d 587 (2006).

Right to trial by jury. — O.C.G.A. § 19-7-40 expressly prohibited jury trials in paternity actions, and since the mother and former boyfriend consolidated a paternity action with a legitimation proceeding, which did allow for a jury trial, the right to a jury trial under the legitimation

statute, O.C.G.A. § 19-7-22, had to give way because otherwise the goals of the paternity statute would be thwarted; accordingly, the mother had no right to a jury trial in the consolidated action. *Banks v. Hopson*, 275 Ga. 758, 571 S.E.2d 730 (2002).

Petitions for legitimation separate civil actions. — Father's petition for legitimation should have been filed as a separate civil action because the language within O.C.G.A. § 19-7-22 suggested that legitimation petitions were separate civil actions; the absence of language explicitly providing for a similar avenue in the adoption context implies that the legislature intended legitimation petitions to be stand-alone actions. *Brewton v. Poss*, 316 Ga. App. 704, 728 S.E.2d 837 (2012).

Application.

Evidence supported denial of legitimation petition. — Because the evidence presented before the juvenile court showed that a biological father: (1) initially refused to take a DNA test to establish paternity; (2) was hostile toward the child's case worker; (3) waited over two years after the child's birth to file a legitimation petition; (4) never visited the child and apparently spoke to the child only once on the telephone after the child was placed in foster care; and (5) failed to provide financial support for the child, the evidence was sufficient to allow the juvenile court to determine that the father abandoned any opportunity and interest to develop a relationship with the child and to deny the father's legitimation petition. *In the Interest of L.S.T.*, 286 Ga. App. 638, 649 S.E.2d 841 (2007).

Husband could not legitimize child. — Former husband was improperly awarded the former wife's biological child; the husband was unable to legitimize the child under O.C.G.A. §§ 19-7-22 and 19-7-25, as those legitimation procedures only applied to biological fathers, and the husband and wife always acknowledged that the child, born before the parties' marriage, was not the husband's biological father. *Veal v. Veal*, 281 Ga. 128, 636 S.E.2d 527 (2006).

Petition for legitimation denied when not filed in good faith. — When

gist of mother's objections to father's petition to legitimate child was that he had no paternal interest in the child but sought only to deprive her of the child by delivering the child into the possession of his mother and father, which if true would authorize the trial court in the exercise of the court's discretion to find that the petition was not filed in good faith and to deny the application for legitimation, the trial court did not err in overruling demurrer (now motion to dismiss) to the mother's objections. *Murphy v. Thomas*, 89 Ga. App. 687, 81 S.E.2d 26 (1954).

Denial of petition improperly set aside. — Trial court erred by setting aside the denial of a biological father's petition for legitimation because the voluntary acknowledgment of paternity preempted the denial as the father failed to make the trial court aware of the acknowledgment and could not subsequently use the document to set aside the trial court's final judgment. *Allifi v. Raider*, 323 Ga. App. 510, 746 S.E.2d 763 (2013).

Evidence did not support denial of legitimation petition. — Trial court erred in denying a parent's petition to legitimate a child because the parent's constant payment of financial support coupled with the parent's avowed interest in establishing and maintaining a relationship with the child mitigated against a finding of abandonment. *Binns v. Fairnot*, 292 Ga. App. 336, 665 S.E.2d 36 (2008), cert. denied, 2008 Ga. LEXIS 876 (Ga. 2008).

New trial after mother participated in fraudulent scheme. — Trial court erred in denying a child's extraordinary motion for new trial based on the mother's participation in a fraudulent scheme to have the child legitimated by someone other than the child's father. *Clements v. Phillips*, 235 Ga. App. 588, 510 S.E.2d 311 (1998).

Stepfather could not be awarded custody. — It was error for a trial court to award a child's legal and physical custody to the child's stepfather because: (1) the child's mother was permitted to exercise all parental power over the child since the child's father had not legitimated the child under O.C.G.A. § 19-7-22; (2) the stepfather had not adopted the child; and (3) as

a result, the stepfather did not have the same status as any of the nonparents specified in O.C.G.A. § 19-7-1(b.1), leaving the trial court with no discretion to award the child's custody to the stepfather. *Phillips v. Phillips*, 316 Ga. App. 829, 730 S.E.2d 548 (2012).

Grandparents' rights to bring action for custody not dependent on legitimation. — Paternal grandparents' right to bring an action for custody of a child was controlled by a showing that their son was the parent of the child, not by their son legitimating that child; a trial court's order dismissing the paternal grandparents' custody action for lack of standing due to a void legitimation of the child was reversed. *Reeves v. Hayes*, 266 Ga. App. 297, 596 S.E.2d 668 (2004).

Legitimation judgment authorized. — When the mother had notice and had additionally consented to try all issues between the parties, which included competing claims for custody of the child, and when no objection to the legitimation appears of record, the judgment of legitimation was authorized. *Gregg v. Barnes*, 203 Ga. App. 549, 417 S.E.2d 206, cert. denied, 203 Ga. App. 906, 417 S.E.2d 206 (1992).

Intervention by adoption agency and adoptive parents. — As legal custodians of the child, adoption agency and adoptive parents had an interest in the father's petition to legitimate the child, and when their rights were not represented, they had a right to intervene. *In re Ashmore*, 163 Ga. App. 194, 293 S.E.2d 457 (1982).

Adoptive parents need not reveal their true identity in their objections to the father's petition to legitimate the child they seek to adopt. *In re Ashmore*, 163 Ga. App. 194, 293 S.E.2d 457 (1982).

Modification of support in context of legitimation proceeding. — Even though a petition for modification of child support could be brought in the context of a legitimation proceeding, a showing of changed circumstances is required before an existing award may be modified. *Department of Human Resources v. Jones*, 215 Ga. App. 322, 450 S.E.2d 339 (1994).

Order granting legitimation overturned. — It was error to grant the petition of the probable biological father to

Application. (Cont'd)

legitimate a minor child whom the legal father had been raising since birth as his own son since the biological father had abandoned his opportunity by failing to take action for nearly three years, the court did not inquire into and apply the best interests of the child standard, and the court did not consider the legal father's prior order. *LaBrec v. Davis*, 243 Ga. App. 307, 534 S.E.2d 84 (2000).

Termination of parental rights. — Pursuant to O.C.G.A. § 15-11-28(a)(2)(C), the superior court did not have subject matter jurisdiction to terminate the husband's parental rights because the biological father's petition to legitimate a child who was born in wedlock was a petition to terminate the parental rights of the legal father; after the superior court determined that the biological father had not abandoned his opportunity interest, the issue became whether the superior court could grant the petition to legitimate the child, and to grant the legitimation petition required the superior court to first terminate the parental rights of the husband, who was the legal father. *Brine v. Shipp*, 291 Ga. 376, 729 S.E.2d 393 (2012).

Name change. — Trial court did not abuse the court's discretion in granting a father's name change petition, pursuant to O.C.G.A. § 19-7-22(g)(1), when he filed a legitimation petition because the evidence supported the trial court's ruling

that it was in the child's best interest, would strengthen the father and son bond, and the child and mother no longer shared the same surname. *Riggins v. Stirgus*, 319 Ga. App. 790, 738 S.E.2d 635 (2013).

Cited in *Bennett v. Day*, 92 Ga. App. 680, 89 S.E.2d 674 (1955); *Hobby v. Burke*, 227 F.2d 932 (5th Cir. 1955); *Chambers v. Lee*, 215 Ga. 629, 112 S.E.2d 614 (1960); *Blakemore v. Blakemore*, 217 Ga. 174, 121 S.E.2d 642 (1961); *Kersey v. Gardner*, 264 F. Supp. 887 (M.D. Ga. 1967); *Pettiford v. Frazier*, 226 Ga. 438, 175 S.E.2d 549 (1970); *Dobyns v. Prudential Ins. Co. of Am.*, 227 Ga. 253, 179 S.E.2d 915 (1971); *Quilloin v. Walcott*, 238 Ga. 230, 232 S.E.2d 246 (1977); *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); *Woods v. Morris*, 247 Ga. 771, 279 S.E.2d 704 (1981); *Williams v. Davenport*, 159 Ga. App. 531, 284 S.E.2d 45 (1981); *Craighead v. Davis*, 163 Ga. App. 145, 290 S.E.2d 358 (1982); *Pruitt v. Hooks*, 163 Ga. App. 892, 296 S.E.2d 193 (1982); *In re M.A.F.*, 254 Ga. 748, 334 S.E.2d 668 (1985); *Prince v. Black*, 256 Ga. 79, 344 S.E.2d 411 (1986); *Hardy v. Arcemont*, 213 Ga. App. 243, 444 S.E.2d 327 (1994); *In re Adventure Bound Sports, Inc.*, 858 F. Supp. 1192 (S.D. Ga. 1994); *In the Interest of S.H.*, 251 Ga. App. 555, 553 S.E.2d 849 (2001); *In the Interest of D.W.*, 264 Ga. App. 833, 592 S.E.2d 679 (2003); *Allen v. State*, 284 Ga. 310, 667 S.E.2d 54 (2008); *Ray v. Hann*, 323 Ga. App. 45, 746 S.E.2d 600 (2013).

OPINIONS OF THE ATTORNEY GENERAL

Illegitimate child defined. — Illegitimate child, or bastard, is a child born out of wedlock and whose parents do not sub-

sequently intermarry. 1952-53 Op. Att'y Gen. p. 138.

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, *Illegitimate Children*, § 131 et seq.

C.J.S. — 14 C.J.S., *Children Out-of-Wedlock*, § 18 et seq.

ALR. — Attempt to bastardize child as affecting right to custody of the child, 37 ALR 531.

Statute regarding status or rights of children born out of wedlock as applicable to children born before it became effective, 140 ALR 1323.

What amounts to recognition within statutes affecting the status or rights of illegitimates, 33 ALR2d 705.

Right of putative father to visitation with child born out of wedlock, 58 ALR5th 669.

19-7-23. "Child born out of wedlock" defined.

The term "child born out of wedlock" means:

(1) A child whose parents are not married when that child is born or who do not subsequently intermarry;

(2) A child who is the issue of adulterous intercourse of the wife during wedlock; or

(3) A child who is not legitimate within the meaning of Code Section 19-7-20. (Orig. Code 1863, § 1748; Code 1868, § 1788; Code 1873, § 1797; Code 1882, § 1797; Civil Code 1895, § 2507; Civil Code 1910, § 3026; Code 1933, § 74-201; Ga. L. 1988, p. 1720, § 6.)

JUDICIAL DECISIONS

Statute codifies common law that child born out of wedlock whose parents did not subsequently intermarry was illegitimate. *Hobby v. Burke*, 227 F.2d 932 (5th Cir. 1955).

Construction with O.C.G.A. § 19-7-1. — Because the juvenile court erred in the court's application of O.C.G.A. § 19-7-1(b.1), as a child's legal father was not one of the limited number of related third parties who could seek custody from a legal parent, and in light of the superior court's grant of a legitimation petition to the child's biological father, which the legal father did not challenge by way of an appeal, the legal father lacked standing to challenge the biological father's custody under present Georgia law, and therefore no longer had rights to the custody of the child. *In the Interest of C.L.*, 284 Ga. App. 674, 644 S.E.2d 530 (2007).

Marriage of parents and father's recognition of child legitimates child. — Illegitimate child may be legitimated by marriage of mother and reputed father and recognition of such child as his. *Kersey v. Gardner*, 264 F. Supp. 887 (M.D. Ga. 1967).

Legitimation by marriage dates from birth. — Former Code 1933, §§ 74-101 and 74-201 (see now O.C.G.A. §§ 19-7-20 and 19-7-23) make child whose parents marry after child's birth legiti-

mate for all purposes from date of birth. *Morris v. Dilbeck*, 71 Ga. App. 470, 31 S.E.2d 93 (1944).

Legitimate child may inherit from father's estate. — See *Morris v. Dilbeck*, 71 Ga. App. 470, 31 S.E.2d 93 (1944).

Mother of child born during wedlock is precluded by public policy from asserting the child's illegitimacy to show consideration for contract with man other than her husband, providing for payment of certain monthly sum for the child's support. *Colson v. Huber*, 74 Ga. App. 339, 39 S.E.2d 539 (1946), overruled on other grounds, *In re White*, 254 Ga. 678, 333 S.E.2d 588 (1985).

While there is a strong presumption that child born during wedlock is legitimate, this presumption is not conclusive, and will be held to have been rebutted, when proof to contrary is clear. *McLoud v. State*, 122 Ga. 393, 50 S.E. 145 (1905); *Jones v. State*, 11 Ga. App. 760, 76 S.E. 72 (1912).

Rebuttal of presumption of legitimacy. — Presumption of legitimacy of children born in wedlock may be rebutted by evidence of nonaccess or other testimony. *Thornton v. State*, 129 Ga. App. 574, 200 S.E.2d 298 (1973); *Parks v. State*, 155 Ga. App. 44, 270 S.E.2d 271 (1980).

Whether presumption has been rebutted is for jury determination. — It

is duty of jury to weigh evidence against presumption, and to decide, in exercise of the jury's judgment, the truth as it may appear. *Parks v. State*, 155 Ga. App. 44, 270 S.E.2d 271 (1980).

When child of married woman is illegitimate. — Child of married woman begotten by one who is not her husband is illegitimate. *Jones v. State*, 11 Ga. App. 760, 76 S.E. 72 (1912).

Legitimacy of children born of bigamous marriage is unclear. — Because it was not possible to determine from former Code 1933, §§ 74-201 and 53-104 (see now O.C.G.A. §§ 19-7-23 and 19-3-5, respectively) whether General Assembly intended children born following wedding between single man and woman already married to another man to be legitimate or illegitimate children, the man's trustors executing trusts must be charged with knowledge that the word "children" as used in their trusts would not per se include illegitimate children. *King v. King*, 218 Ga. 534, 129 S.E.2d 147 (1962), appeal dismissed, 375 U.S. 17, 84 S. Ct. 101, 11 L. Ed. 2d 45 (1963).

When children of bigamous marriages are legitimate. — Construing former Code 1933, § 74-201 (see now O.C.G.A. § 19-7-23) in connection with former Code 1933, § 53-104 (see now O.C.G.A. § 19-3-5) which provided that children of marriages of persons unable, unwilling, or fraudulently induced to contract were legitimate although such marriages were void, the Supreme Court concluded that the legislature intended to remove stigma of bastardy from innocent children if their parents go through a marriage ceremony, even though marriage was void because one of the parties was unable to contract marriage by reason of an existing marriage. *Brazziel v. Spivey*, 219 Ga. 445, 133 S.E.2d 885 (1963).

Word "children" does not per se include illegitimate children. *King v. King*, 218 Ga. 534, 129 S.E.2d 147 (1962), appeal dismissed, 375 U.S. 17, 84 S. Ct. 101, 11 L. Ed. 2d 45 (1963).

Cited in *Clark v. Buttry*, 121 Ga. App. 492, 174 S.E.2d 356 (1970); *In re M.A.F.*, 254 Ga. 748, 334 S.E.2d 668 (1985); *Allen v. State*, 284 Ga. 310, 667 S.E.2d 54 (2008).

OPINIONS OF THE ATTORNEY GENERAL

Issue born of common-law marriage would be legitimate. 1958-59 Op. Att'y Gen. p. 89.

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Illegitimate Children, § 1 et seq.

C.J.S. — 14 C.J.S., Children Out-of-Wedlock, § 1 et seq.

ALR. — Attempt to bastardize child as affecting right to custody of the child, 37 ALR 531.

Statute regarding status or rights of children born out of wedlock as applicable to children born before it became effective, 140 ALR 1323.

Legitimizing effect of intermarriage of parents as affected by father's failure to acknowledge paternity, 175 ALR 375.

Admissibility, on issue of child's legitimacy or parentage, of declarations of parents, relatives, or the child, deceased or unavailable, 31 ALR2d 989.

Determination of paternity, legitimacy, or legitimation in action for divorce, separation, or annulment, 65 ALR2d 1381.

Discrimination on basis of illegitimacy as denial of constitutional rights, 38 ALR3d 613.

Death of putative father as precluding action for determination of paternity or for child support, 58 ALR3d 188.

Legitimation by marriage to natural father of child born during mother's marriage to another, 80 ALR3d 219.

Proof of husband's impotency or sterility as rebutting presumption of legitimacy, 84 ALR3d 495.

Who may dispute presumption of legitimacy of child conceived or born during wedlock, 90 ALR3d 1032.

19-7-24. Parents' obligations to child born out of wedlock.

It is the joint and several duty of each parent of a child born out of wedlock to provide for the maintenance, protection, and education of the child until the child reaches the age of 18 or becomes emancipated, except to the extent that the duty of one parent is otherwise or further defined by court order. (Orig. Code 1863, § 1749; Code 1868, § 1789; Code 1873, § 1798; Code 1882, § 1798; Civil Code 1895, § 2508; Civil Code 1910, § 3027; Code 1933, § 74-202; Ga. L. 1972, p. 494, § 1; Ga. L. 1979, p. 466, § 44; Ga. L. 1988, p. 1720, § 7; Ga. L. 2006, p. 141, § 5/HB 847.)

Cross references. — Parents' obligation to child, generally, § 19-7-2.

Law reviews. — For article on 2006

amendment of this Code section, see 23 Ga. St. U.L. Rev. 79 (2006).

JUDICIAL DECISIONS

Statutory scheme relating to illegitimate children and remedies available to state require support from both parents and both are subject to criminal prosecution. *Hudgins v. State*, 243 Ga. 798, 256 S.E.2d 899 (1979).

Liability for period prior to paternity adjudication. — Trial court erred in refusing to award back support to the mother of a child for those periods prior to an adjudication of paternity when she had been supporting the child without the benefit of public assistance payments. *Weaver v. Chester*, 195 Ga. App. 471, 393 S.E.2d 715 (1990).

Both parents are responsible for illegitimate child's support. — Although under common law an illegitimate child was the legal responsibility only of the mother, the statute also made the father responsible for the child's support. *Thorpe v. Collins*, 245 Ga. 77, 263 S.E.2d 115 (1980).

Strict construction as to liability of father of illegitimate child. — Statutes imposing liability on illegitimate child's father for child's support and education, being in derogation of common law, must be strictly construed. *Washington v. Martin*, 75 Ga. App. 466, 43 S.E.2d 590 (1947).

Support when alleged father is deceased. — Because at the time of father's death child's mother was in the process of establishing deceased as child's father for the purpose of obtaining child support and

because father had responsibly fulfilled his child support obligations to his other child, the child had a reasonable expectation that the deceased father would fulfill his statutorily imposed obligation to support her as well. *In re Adventure Bound Sports, Inc.*, 858 F. Supp. 1192 (S.D. Ga. 1994).

Civil action by mother of illegitimate child for child support. — Mother of an illegitimate child may maintain a civil action to compel the father to support the child. *Poulos v. McMahan*, 250 Ga. 354, 297 S.E.2d 451 (1982); *Evans v. State*, 178 Ga. App. 1, 341 S.E.2d 865 (1986); *Coxwell v. Matthews*, 263 Ga. 444, 435 S.E.2d 33 (1993).

When there is an absent parent who does not provide support, and the payment of public assistance is for the support of both the dependent child and the custodial parent who is not able, without the benefit of public assistance, to provide support and maintenance for the child, it is inconsistent with both the goals of the Public Assistance Act and the Child Support Recovery Act to conclude that the payment of Aid to Families with Dependent Children imposes upon the custodial parent a debt due and owing the state under O.C.G.A. § 19-11-5. *Cox v. Cox ex rel. State Dep't of Human Resources*, 255 Ga. 6, 334 S.E.2d 683 (1985).

Adequate pre-natal medical care. — Duty to protect and maintain a child in-

cludes the duty to ensure that the child receives adequate medical care prior to and during birth. *Coxwell v. Matthews*, 263 Ga. 444, 435 S.E.2d 33 (1993).

Health care insurance. — In a mother's paternity suit to establish the legitimation, custody, and support of her minor child by the father, the trial court did not err in failing to require the father to pay for the child's health insurance under O.C.G.A. § 19-7-24 if not employed by the NFL. *Jackson v. Irvin*, 316 Ga. App. 560, 730 S.E.2d 48 (2012).

Cited in *Sybilla v. Connally*, 66 Ga. App. 678, 18 S.E.2d 783 (1942); *Colson v. Huber*, 74 Ga. App. 339, 39 S.E.2d 539 (1946); *Gray v. Plummer*, 87 Ga. App. 331, 73 S.E.2d 569 (1952); *Pasley v. State*, 215 Ga. 768, 113 S.E.2d 454 (1960); *Clark v. Buttry*, 121 Ga. App. 492, 174 S.E.2d 356 (1970); *Simmons v. Chambliss*, 128 Ga. App. 218, 196 S.E.2d 183 (1973); *Warner v.*

Burke, 137 Ga. App. 185, 223 S.E.2d 234 (1976); *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); *Parham v. Hughes*, 441 U.S. 347, 99 S. Ct. 1742, 60 L. Ed. 2d 269 (1979); *Nelson v. Taylor*, 244 Ga. 657, 261 S.E.2d 579 (1979); *State v. Causey*, 246 Ga. 735, 273 S.E.2d 6 (1980); *Mabry v. Tadlock*, 157 Ga. App. 257, 277 S.E.2d 688 (1981); *Worthington v. Worthington*, 162 Ga. App. 813, 292 S.E.2d 861 (1982); *Worthington v. Worthington*, 250 Ga. 730, 301 S.E.2d 44 (1983); *Pooler v. Taylor*, 173 Ga. App. 859, 328 S.E.2d 749 (1985); *Cox v. Department of Human Resources*, 174 Ga. App. 377, 330 S.E.2d 120 (1985); *Strickland v. State*, 211 Ga. App. 48, 438 S.E.2d 161 (1993); *Haddon v. Department of Human Resources*, 220 Ga. App. 338, 469 S.E.2d 434 (1996); *Department of Human Resources v. Mitchell*, 232 Ga. App. 560, 501 S.E.2d 508 (1998).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, *Illegitimate Children*, § 90 et seq.

C.J.S. — 14 C.J.S., *Children Out-of-Wedlock*, § 39 et seq.

ALR. — Criminal responsibility for abandonment or nonsupport of children who are being cared for by charitable institution, 24 ALR 1075.

Nonstatutory duty of father to support illegitimate child, 30 ALR 1069.

Illegitimate child as within statute relating to duty to support child, 30 ALR 1075.

Civil liability of father for necessities furnished to child taken from home by mother, 32 ALR 1466.

Liability of parent for necessities furnished to adult child, 42 ALR 150.

Criminal responsibility of parent under desertion or nonsupport statutes, as affected by child's possession of independent means, or by fact other persons supply his needs or are able to do so, 131 ALR 482.

Construction and application of statute charging father and mother jointly with child's care and support, 131 ALR 862.

Temporary allowance for support or costs pending action or proceeding for declaration of paternity of an illegitimate child, 136 ALR 1264.

Award in bastardy proceedings as provable or dischargeable in bankruptcy, 162 ALR 789.

Foreign filiation or support order in bastardy proceedings, requiring periodic payments, as extraterritorially enforceable, 16 ALR2d 1098.

Maintainability of bastardy proceedings by infant prosecutrix in her own name and right, 50 ALR2d 1029.

Right of nonresident mother to maintain bastardy proceedings, 57 ALR2d 689.

Liability of mother's husband, not the father of her illegitimate child, for its support, 90 ALR2d 583.

Nature of care contemplated by statute imposing general duty to care for indigent relatives, 92 ALR2d 348.

Effect of marriage of woman to one other than defendant upon her right to institute or maintain bastardy proceeding, 98 ALR2d 256.

Application, to illegitimate children, of criminal statutes relating to abandonment, and nonsupport of children, 99 ALR2d 746.

Validity and construction of putative father's promise to support or provide for illegitimate child, 20 ALR3d 500.

Power of divorce court, after child at-

tained majority, to enforce by contempt proceedings payment of arrears of child support, 32 ALR3d 888.

Right of child to enforce provisions for his benefit in parents' separation or property settlement agreement, 34 ALR3d 1357.

Death of putative father as precluding action for determination of paternity or for child support, 58 ALR3d 188.

Insurance: term "children" as used in beneficiary clause of life insurance policy as including illegitimate child, 62 ALR3d 1329.

Validity, construction, and application of statute imposing upon stepparent obligation to support child, 75 ALR3d 1129.

Parent's obligation to support unmar-

ried minor child who refuses to live with parent, 98 ALR3d 334.

Child's right of action for loss of support, training, parental attention, or the like, against third person negligently injuring parent, 11 ALR4th 549.

Right to credit on child support payments for social security or other government dependency payments made for benefit of child, 34 ALR5th 447.

What voluntary acts of child, other than marriage or entry into military service, terminate parent's obligation to support, 55 ALR5th 557.

Liability of father for retroactive child support on judicial determination of paternity, 87 ALR5th 361.

19-7-25. In whom parental power over child born out of wedlock lies.

Only the mother of a child born out of wedlock is entitled to custody of the child, unless the father legitimates the child as provided in Code Section 19-7-21.1 or 19-7-22. Otherwise, the mother may exercise all parental power over the child. (Orig. Code 1863, § 1750; Code 1868, § 1790; Code 1873, § 1799; Code 1882, § 1799; Civil Code 1895, § 2509; Civil Code 1910, § 3028; Code 1933, § 74-203; Ga. L. 1988, p. 1720, § 8; Ga. L. 2008, p. 667, § 5/SB 88.)

Cross references. — Parental power, generally, § 19-7-1.

Editor's notes. — Ga. L. 2008, p. 667, § 1/SB 88, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Care of a Grandchild Act.'"

Ga. L. 2008, p. 667, § 2, not codified by the General Assembly, provides: "The General Assembly finds that:

"(1) An increasing number of relatives in Georgia, including grandparents and great-grandparents, are providing care to children who cannot reside with their parents due to the parent's incapacity or inability to perform the regular and expected functions to provide such care and support;

"(2) Parents need a means to confer to grandparents or great-grandparents the authority to act on behalf of grandchildren without the time and expense of a court proceeding; and

"(3) Providing a statutory mechanism for granting such authority enhances family preservation and stability."

Law reviews. — For survey article on domestic relations cases for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 223 (2003). For annual survey of wills, trusts, guardianships, and fiduciary administration, see 57 Mercer L. Rev. 403 (2005).

For note, "In re Baby Girl Eason: Expanding the Constitutional Rights of Unwed Fathers," see 39 Mercer L. Rev. 997 (1988).

For comment on statutes requiring consent of mother, but not of father, as prerequisite to adoption of illegitimate child, violating the fourteenth amendment equal protection clause, see 29 Emory L.J. 833 (1981).

JUDICIAL DECISIONS

Constitutionality of section. — Statute did not violate U.S. Const., amends. 5 and 14. *Quilloin v. Walcott*, 238 Ga. 230, 232 S.E.2d 246 (1977), *aff'd*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978).

Statute did not necessarily deprive natural father of his parental rights under due process and equal protection under U.S. Const., amends. 5 and 14. *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978).

Consideration of custody issues is not precluded in a situation when that claim as well as legitimation is pending before the court by consent of the parties and there is jurisdiction of the parents, child, and subject matter in the court. *Ganny v. Ganny*, 238 Ga. App. 123, 518 S.E.2d 148 (1999).

When mother has prima facie rights conferred by statute. — Unless child is illegitimate, mother does not prima facie have rights conferred by statute. Therefore, a contract which mother alone entered into with her aunt, consenting for custody and adoption of child, does not constitute a superior right which would prevent trial judge in action for habeas corpus to award child to another aunt, and her husband. *Connor v. Rainwater*, 200 Ga. 866, 38 S.E.2d 805 (1946).

Prima facie right to custody was in mother. *Kilgore v. Tiller*, 194 Ga. 527, 22 S.E.2d 150 (1942); *Skinner v. Skinner*, 204 Ga. 635, 51 S.E.2d 420 (1949).

Former Code 1933, § 74-203 (see now O.C.G.A. § 19-7-25) must be construed in connection with former Code 1933, § 50-121 (see now O.C.G.A. § 9-14-2). *Kilgore v. Tiller*, 194 Ga. 527, 22 S.E.2d 150 (1942).

Discretion reposed in trial judge was inapplicable unless parental rights have been lost. *Skinner v. Skinner*, 204 Ga. 635, 51 S.E.2d 420 (1949).

Mother is entitled to custody as against third parties. — Mother under former Code 1933, § 74-203 (see now O.C.G.A. § 19-7-25) cannot be denied custody of child in habeas corpus proceeding against third parties unless it was shown that parental power was lost under provisions of former Code 1933,

§§ 74-108—74-110 (see now O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4). *McMillan v. McMillan*, 224 Ga. 790, 164 S.E.2d 839 (1968).

Mother within definition of former Code 1933, § 74-203 (see now O.C.G.A. § 19-7-25) cannot be denied custody of child at habeas corpus proceeding against third parties unless it was shown her parental rights were lost under provisions of former Code 1933, § 74-108—74-110 (see now O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4) or that she was unfit. *Pettiford v. Mott*, 230 Ga. 692, 198 S.E.2d 662 (1973).

Control of minor illegitimate child not legitimated by father belongs exclusively to mother. *Perry v. State*, 113 Ga. 936, 39 S.E. 315 (1901); *Blakemore v. Blakemore*, 217 Ga. 174, 121 S.E.2d 642 (1961).

Standing of father of illegitimate child. — Father of illegitimate child, unless he legitimates the child, has no standing with reference to child. *Hall v. Hall*, 222 Ga. 820, 152 S.E.2d 737 (1966).

Because an alleged legal father failed to provide the juvenile court with sufficient evidence that the father legitimated the child at issue, the father lacked standing to contest both the custody of the child and the court's order granting custody to DFCS; thus, the custody order was vacated and the case was remanded for further proceedings in which the father could legitimate the child, and if that occurred the court should enter a further order addressing the father's request for custody. *In the Interest of A.D.*, 286 Ga. App. 352, 648 S.E.2d 786 (2007).

Husband could not legitimize child. — Former husband was improperly awarded the former wife's biological child; the husband was unable to legitimize the child under O.C.G.A. §§ 19-7-22 and 19-7-25 as those legitimation procedures only applied to biological fathers, and the husband and wife always acknowledged that the child, born before the parties' marriage, was not the husband's biological father. *Veal v. Veal*, 281 Ga. 128, 636 S.E.2d 527 (2006).

Convicting putative father of cruelty by depriving sustenance. — Even

though the mother of an illegitimate child is entitled to custody, the putative father has rights and duties with respect to the child; thus, evidence supported conviction of the father of a four-year-old illegitimate child for cruelty by depriving the child of necessary sustenance. *Strickland v. State*, 211 Ga. App. 48, 438 S.E.2d 161 (1993).

Mother of illegitimate child was not the only recognized parent under the law; the putative father was also a parent. *Nelson v. Taylor*, 244 Ga. 657, 261 S.E.2d 579 (1979).

Mother may relinquish control to father. — When mother of illegitimate children relinquishes all of her rights to father of such children, she cannot thereafter regain possession of children in habeas corpus proceeding, when condition of father to maintain and support them is unchanged. *Kirkland v. Canty*, 122 Ga. 261, 50 S.E. 90 (1905).

Contest between father of illegitimate child and third persons to whom mother relinquished control. See *Day v. Hatton*, 210 Ga. 749, 83 S.E.2d 6 (1954).

Appellate court reversed the trial court's judgment awarding custody of a father's daughters to the daughters' grandmother because the trial court did not find that awarding custody to the father, who legitimized his daughters after he learned that their mother had died, would harm the children physically or emotionally. *Jones v. Burks*, 267 Ga. App. 390, 599 S.E.2d 322 (2004).

When father has prima facie right of custody. — When mother of child is dead, father has prima facie right of custody, and in order to sustain contention that he has lost his parental power by reason of failure to provide necessities for his child or by abandonment of his family, a clear and strong case must be made.

Chambers v. Lee, 215 Ga. 629, 112 S.E.2d 614 (1960).

Mother's right to recover for homicide of illegitimate son. — See *Robinson v. Georgia R.R. & Banking Co.*, 117 Ga. 168, 43 S.E. 452, 97 Am. St. R. 156, 60 L.R.A. 555 (1903).

Best interest standard applied after child legitimized. — Trial court erred in applying the change in circumstances standard to a father's custody petition as the father had legitimized the child, but no previous custody determination had been made; the best interest of the child standard set forth in O.C.G.A. § 19-9-3(a) should have been used. *Braynon v. Hilbert*, 275 Ga. App. 511, 621 S.E.2d 529 (2005).

Cited in *Stuckey v. Jones*, 212 Ga. 495, 93 S.E.2d 719 (1956); *Pasley v. State*, 215 Ga. 768, 113 S.E.2d 454 (1960); *Queen v. Ballew*, 221 Ga. 1, 142 S.E.2d 841 (1965); *Toole v. Gallion*, 221 Ga. 494, 144 S.E.2d 360 (1965); *Cooper v. Melvin*, 223 Ga. 239, 154 S.E.2d 373 (1967); *Smith v. Smith*, 224 Ga. 442, 162 S.E.2d 379 (1968); *Clark v. Buttry*, 121 Ga. App. 492, 174 S.E.2d 356 (1970); *Sanchez v. Walker County Dep't of Family & Children Servs.*, 237 Ga. 406, 229 S.E.2d 66 (1976); *Berry v. Samuels*, 145 Ga. App. 687, 244 S.E.2d 593 (1978); *Mabry v. Tadlock*, 157 Ga. App. 257, 277 S.E.2d 688 (1981); *Williams v. Davenport*, 159 Ga. App. 531, 284 S.E.2d 45 (1981); *Jordan v. Goff*, 160 Ga. App. 636, 287 S.E.2d 640 (1981); *In re Ashmore*, 163 Ga. App. 194, 293 S.E.2d 457 (1982); *In re M.A.F.*, 254 Ga. 748, 334 S.E.2d 668 (1985); *Kennedy v. Adams*, 218 Ga. App. 120, 460 S.E.2d 540 (1995); *Mezquita v. Campbell*, 238 Ga. App. 396, 519 S.E.2d 27 (1999); *In the Interest of V.M.T.*, 243 Ga. App. 732, 534 S.E.2d 452 (2000); *Allen v. State*, 284 Ga. 310, 667 S.E.2d 54 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, *Illegitimate Children*, § 98.

C.J.S. — 14 C.J.S., *Children Out-of-Wedlock*, §§ 36, 37.

ALR. — Attempt to bastardize child as affecting right to custody of the child, 37 ALR 531.

Right of mother of illegitimate child to appeal from order or judgment entered in bastardy proceedings, 18 ALR2d 948.

Necessity of securing consent of parents of illegitimate child to its adoption, 51 ALR2d 497.

Right of mother to custody of illegiti-

mate child, 98 ALR2d 417.

Right of putative father to visit illegitimate child, 15 ALR3d 887.

Award of custody of child where contest is between child's father and grandparent, 25 ALR3d 7.

Right of putative father to custody of illegitimate child, 45 ALR3d 216.

Right of natural parent to withdraw valid consent to adoption of child, 74 ALR3d 421.

Mistake or want of understanding as ground for revocation of consent to adoption or of agreement releasing infant to adoption placement agency, 74 ALR3d 489.

What constitutes "duress" in obtaining parent's consent to adoption of child or surrender of child to adoption agency, 74 ALR3d 527.

Power of parent to have mentally defective child sterilized, 74 ALR3d 1224.

Rights and obligations resulting from human artificial insemination, 83 ALR4th 295.

Parental rights of man who is not biological or adoptive father of child but was husband or cohabitant of mother when child was conceived or born, 84 ALR4th 655.

19-7-26. Mother of child born out of wedlock not to be discriminated against in action to recover for injury or death of the child.

In an action brought by the mother of a child born out of wedlock in her own right or in her capacity as guardian, executor, or administrator for damages for the child's injury or death, the mother shall not be discriminated against because of her child's having been born out of wedlock. (Ga. L. 1943, p. 538, § 2; Ga. L. 1988, p. 1720, § 9.)

Cross references. — Wrongful death actions generally, T. 51, C. 4.

Law reviews. — For article, "Actions for Wrongful Death in Georgia: Part Two," see 19 Ga. B.J. 439 (1957). For article, "Actions for Wrongful Death in Georgia:

Part Two," section two, see 20 Ga. B.J. 152 (1957).

For table covering actions for wrongful death in Georgia, see 10 Ga. B.J. 28 (1947).

JUDICIAL DECISIONS

Cited in Brinkley v. Dixie Constr. Co., 205 Ga. 415, 54 S.E.2d 267 (1949); Garden City Cab Co. v. Ransom, 86 Ga. App. 247,

71 S.E.2d 443 (1952); In re Ashmore, 163 Ga. App. 194, 293 S.E.2d 457 (1982).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 19 Am. Jur. Pleading and Practice Forms, Parent and Child, § 153.

ALR. — Right of mother of illegitimate child to appeal from order or judgment entered in bastardy proceedings, 18 ALR2d 948.

Right of illegitimate child, after Levy v.

Louisiana, to recover under state wrongful death statute for death of putative father, 78 ALR3d 1230.

Sexual child abuser's civil liability to child's parent, 54 ALR4th 93.

Parent's right to recover for loss of consortium in connection with injury to child, 54 ALR4th 112.

19-7-27. Hospital program for establishment of paternity.

Upon the birth of a child to an unmarried woman in a public or private hospital, the hospital that provides perinatal services shall:

(1) Provide the child's mother and alleged father if he is present at the hospital the opportunity to acknowledge paternity consistent with the requirements of Code Section 19-7-46.1; and

(2) Provide to the mother and alleged father:

(A) Written materials about paternity establishment;

(B) The forms necessary to voluntarily acknowledge paternity;

(C) A written description of the rights and responsibilities of acknowledging paternity; and

(D) The opportunity, prior to discharge from the hospital, to speak with staff, either by telephone or in person, who are trained to clarify information and answer questions about paternity establishment. (Code 1981, § 19-7-27, enacted by Ga. L. 1994, p. 1270, § 2; Ga. L. 1999, p. 81, § 19.)

ARTICLE 3**DETERMINATION OF PATERNITY**

Editor's notes. — Section 3 of Ga. L. 1980, p. 1374, § 1 of which enacted this article, provided as follows: "The provisions of this Act and the remedy provided herein [see § 19-10-1] are intended to be in addition to and cumulative of all other

existing laws related to paternity, child support, or other subjects covered herein; and this Act shall not be construed to limit the operation of or repeal any such existing law."

JUDICIAL DECISIONS

Neither illegitimate child nor mother barred from bringing paternity suit. — An illegitimate child cannot be barred from bringing a paternity suit under O.C.G.A. Art. 3, Ch. 7, T. 19, and because the natural mother should be made a party to such a suit, notwithstanding a private contract to the contrary, the natural mother is prevented neither from initiating, nor from participating as a party in an action under that article. *Worthington v. Worthington*, 250 Ga. 730, 301 S.E.2d 44 (1983).

Illegitimate child precluded from relitigating paternity. — When the issue of paternity of a child had previously

been adjudicated pursuant to divorce proceedings, the principles of estoppel by judgment and *res judicata* applied. *Macuch v. Pettey*, 170 Ga. App. 467, 317 S.E.2d 262 (1984).

Finality of paternity determination. — When the parties were divorced in 1982 with the former husband contesting paternity, the trial court erred in 1990 in finding the former husband was not the child's father, and relieving him from his support obligation. Once there has been a final determination of paternity, a party may not relitigate that issue without first showing, *inter alia*, that his failure to contest paternity earlier was not the re-

sult of a lack of due diligence. *Gearing v. Gearing*, 261 Ga. 250, 403 S.E.2d 809 (1991).

RESEARCH REFERENCES

Am. Jur. Trials. — Disputed Paternity Cases, 10 Am. Jur. Trials 653.

ALR. — Statutes limiting time for commencement of action to establish paternity of illegitimate child as violating child's constitutional rights, 16 ALR4th 926.

Right of illegitimate child to maintain action to determine paternity, 19 ALR4th 1082.

Paternity proceedings: right to jury trial, 51 ALR4th 565.

19-7-40. Jurisdiction; administrative determination of paternity.

(a) The superior and state courts of the several counties shall have concurrent jurisdiction in all proceedings for the determination of paternity of children who are residents of this state. The state courts shall have such concurrent jurisdiction notwithstanding any contrary provision of local law. Parties to an action to establish paternity shall not be entitled to a trial by jury.

(b) Whenever the Department of Human Services seeks to establish paternity of a child, the Office of State Administrative Hearings shall have authority to adjudicate the issue of paternity, pursuant to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act"; provided, however, that if the putative father demands a trial in the superior court, it shall be the duty of the judge to cause an issue to be made and tried at the first session of the next term of court succeeding the putative father's demand for trial. The administrative determination shall have the same force and effect as a judicial decree. (Code 1933, § 74-301, enacted by Ga. L. 1980, p. 1374, § 1; Ga. L. 1994, p. 1270, § 3; Ga. L. 1997, p. 1613, § 15; Ga. L. 2009, p. 453, § 2-2/HB 228.)

Editor's notes. — Ga. L. 1980, p. 1374, § 3, which enacted this article, provides that this article and the remedy provided herein are intended to be in addition to and cumulative of all other existing laws related to paternity, child support, or other subjects covered herein and that this article shall not be construed to limit the operation of or repeal any such existing law.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

For a note on the role of a judicial determination of paternity in the inheritance rights of illegitimate children in Georgia, see 16 Ga. L. Rev. 171 (1981).

JUDICIAL DECISIONS

Superior Court lacked jurisdiction under O.C.G.A. § 19-7-40 to hear a child's

complaint that the defendant administrator's decedent was the child's father and

the child was the sole heir to his estate; the case was not a paternity action, it was a matter of descent and distribution subject to the exclusive jurisdiction of the probate court. *Rodriguez v. Nunez*, 252 Ga. App. 56, 555 S.E.2d 514 (2001).

Trial by jury. — Retroactive application of the 1997 amendment, Ga. L. 1997, p. 1613, § 15, which extinguished the right to a jury trial in a paternity suit, was unconstitutional. *Hargis v. Department of Human Resources*, 272 Ga. 617, 533 S.E.2d 712 (2000).

O.C.G.A. § 19-7-40 expressly prohibited jury trials in paternity actions, and since the mother and former boyfriend consolidated a paternity action with a legitimation proceeding, which did allow for a jury trial, the right to a jury trial under the legitimation statute, O.C.G.A. § 19-7-22, had to give way because otherwise the goals of the paternity statute

would be thwarted; accordingly, the mother had no right to a jury trial in the consolidated action. *Banks v. Hopson*, 275 Ga. 758, 571 S.E.2d 730 (2002).

Residency requirement. — Georgia court does not have jurisdiction in a paternity action if neither the former husband, former wife, nor child are Georgia residents. *Meredith v. Meredith*, 257 Ga. 458, 360 S.E.2d 586 (1987).

O.C.G.A. § 19-7-40 does not limit paternity actions in Georgia to cases in which the child is a Georgia resident. Rather, the section broadens the jurisdiction to allow an action on behalf of a child who is a resident against a putative father who is a nonresident. *Jones v. Alfone*, 261 Ga. 258, 404 S.E.2d 119 (1991).

Cited in *Allen v. Howard*, 185 Ga. App. 758, 365 S.E.2d 546 (1988); *Crowther v. Estate of Crowther*, 258 Ga. App. 498, 574 S.E.2d 607 (2002).

OPINIONS OF THE ATTORNEY GENERAL

No right to a jury trial exists in a civil action for the establishment of paternity. 1997 Op. Att'y Gen. No. 97-5.

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, *Illegitimate Children*, § 47.

C.J.S. — 14 C.J.S., *Children Out-of-Wedlock*, §§ 72, 77, 97, 124.

19-7-41. Service outside state.

In a proceeding under this article, the court, pursuant to Chapter 11 of Title 9, may order service upon a person outside the state upon a finding that there is a constitutionally permissible basis for jurisdiction over the person, including those enumerated in Article 3 of Chapter 11 of this title. (Code 1933, § 74-302, enacted by Ga. L. 1980, p. 1374, § 1; Ga. L. 1997, p. 1613, § 16.)

Law reviews. — For survey article on domestic relations, see 34 *Mercer L. Rev.* 113 (1982). For article commenting on the

1997 amendment of this Code section, see 14 *Ga. St. U.L. Rev.* 121 (1997).

JUDICIAL DECISIONS

Section satisfies minimum contacts test for judgment against out-of-state defendant. — Now that the *capias ad respondendum* has given way to personal

service of summons or other form of notice, due process requires only that in order to subject defendant to judgment in personam, if defendant is not present

within territory of forum, he must have certain minimum contacts such that maintenance of suit does not offend traditional notions of fair play and substantial justice. O.C.G.A. § 19-7-41 satisfies this requirement. *Bell v. Arnold*, 248 Ga. 9, 279 S.E.2d 449 (1981).

Service based on statute's requirements not inconsistent with ends of justice. — When it was shown that the minor child was conceived as a result of sexual intercourse between the child's mother and the defendant in Georgia and that the child's mother continued to reside in Georgia, the trial court erred in finding that out-of-state service upon the defendant pursuant to O.C.G.A. § 19-7-41 would be inconsistent with the ends of justice. *Department of Human Resources v. Estes*, 208 Ga. App. 872, 432 S.E.2d 613 (1993).

No bar to paternity action by natural mother or child. — Illegitimate child cannot be barred from bringing a paternity suit under O.C.G.A. Art. 3, Ch. 7, T. 19, and because the natural mother should be made a party to such a suit, notwithstanding a private contract to the contrary, the natural mother is prevented neither from initiating, nor from partici-

pating as a party in an action under that article. *Worthington v. Worthington*, 250 Ga. 730, 301 S.E.2d 44 (1983).

Service barred if conception was outside state. — When the plaintiff asserted that her child was conceived as a result of an act of sexual intercourse in California, the essential fact necessary to support personal service of process outside Georgia was absent. *Garvey v. Mendenhall*, 199 Ga. App. 241, 404 S.E.2d 613, cert. denied, 199 Ga. App. 906, 404 S.E.2d 613 (1991).

Denial of motion to order service held error. — Denial of a motion made under O.C.G.A. § 19-7-41 in connection with an action to determine paternity and establish child support obligations of the putative, nonresident father was error since there was no question that the child was conceived as a result of an act of sexual intercourse within this state while either parent was a resident of this state and since it appeared that the trial court's ruling was based solely on a URESA (O.C.G.A. § 19-11-1 et seq.) analysis, although § 19-7-41 does not require the court to order service. *Department of Human Resources v. McCormick*, 208 Ga. App. 751, 431 S.E.2d 740 (1993).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Illegitimate Children, § 48. 24A Am. Jur. 2d, Divorce and Separation, § 862.

C.J.S. — 27C C.J.S., Divorce, §§ 611, 612.

ALR. — Right of illegitimate child to maintain action to determine paternity, 19 ALR4th 1082.

19-7-42. Venue.

The action shall be brought in the county in which the alleged father resides, except that, if the alleged father is not a resident of this state, the action shall be brought in the county in which the child resides. (Code 1933, § 74-303, enacted by Ga. L. 1980, p. 1374, § 1.)

JUDICIAL DECISIONS

Transfer of paternity portion of case. — Although a petition for determination of paternity must be brought where the child resides when the father lives out of the state, the superior court should not

have dismissed an entire motion/petition, which included a motion to set aside the judgment for want of jurisdiction, simply because one aspect of the case should have been heard elsewhere; the superior court

should have transferred the paternity portion of the case, not dismissed it. *Suggs v. Suggs*, 204 Ga. App. 72, 418 S.E.2d 427 (1992).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Illegitimate Children, §§ 45, 47, 56.

C.J.S. — 14 C.J.S., Children Out-of-Wedlock, § 87.

19-7-43. Petition; by whom brought; effect of agreement on right to bring petition; stay pending birth of child; court order for blood tests; genetic tests.

(a) A petition to establish the paternity of a child may be brought by:

(1) The child;

(2) The mother of the child;

(3) Any relative in whose care the child has been placed;

(4) The Department of Human Services in the name of and for the benefit of a child for whom public assistance is received or in the name of and for the benefit of a child not the recipient of public services whose custodian has applied for services for the child; or

(5) One who is alleged to be the father.

(b) Regardless of its terms, an agreement, other than an agreement approved by the court in accordance with this article, between an alleged or presumed father and the mother or child does not bar a petition under this Code section.

(c) If a petition under this article is brought before the birth of the child, all proceedings shall be stayed until after the birth except service of process, discovery, and the taking of depositions.

(d) In any case in which the paternity of a child or children has not been established, any party may make a motion for the court to order the mother, the alleged father, and the child or children to submit to genetic tests as specified in Code Section 19-7-45. Such motion shall be supported by a sworn statement (1) alleging paternity and setting forth facts establishing a reasonable possibility of the requisite sexual contact between the parties; or (2) denying paternity and setting forth facts establishing a reasonable possibility of the nonexistence of sexual contact between the parties. Appropriate orders shall be issued in accordance with the provisions of this article. The court shall grant the motion unless it finds good cause as defined by the federal Social Security Act or if other good excuse for noncooperation is established.

(e) In any case for the collection of child support involving the Department of Human Services in which the paternity of a child or

children has not been established or in which the individual receiving services alleges that paternity rests in a person other than the previously established father, the Department of Human Services shall order genetic testing of the mother, the alleged father, and the child or children as specified in Code Section 19-7-45. No genetic testing shall be undertaken by the Department of Human Services if the child was adopted either by the applicant for services or other alleged parent or if the child was conceived by means of artificial insemination. The need for genetic testing shall be supported by a sworn statement alleging paternity and setting forth facts establishing a reasonable possibility of the requisite sexual contact between the parties. The parties shall be given notice and an opportunity to contest the order before the Department of Human Services prior to the testing or the imposition of any noncooperation sanction.

(f) In any case in which the court or the Department of Human Services orders genetic testing and one or both of the parties to the action is receiving child support services pursuant to Code Section 19-11-6, the Department of Human Services shall pay the costs of such tests subject to recoupment from the alleged father if paternity is established. If the genetic test excludes the possibility of the alleged father being the biological father, then the applicant for services who named the alleged father shall be liable to the Department of Human Services for reimbursement of the paternity testing fee. Upon completion of the first test, but prior to the entry of any order, a second genetic test shall be ordered if the person making the request tenders payment in full of the cost of the initial test as well as the cost of the second test at the time of the request. Any party who, after notice sent by mail to his or her last known address, fails to cooperate with paternity testing or fails to make any child available for paternity testing may be sanctioned by the Department of Human Services. Such sanctions may include but shall not be limited to loss of the opportunity for paternity testing, loss of state benefits, denial of services, and administrative case closure. The Department of Human Services may bring a petition for contempt in the event of such noncooperation in violation of any court order. (Code 1933, § 74-304, enacted by Ga. L. 1980, p. 1374, § 1; Ga. L. 1985, p. 279, § 3; Ga. L. 1997, p. 1613, § 17; Ga. L. 2002, p. 1247, § 4; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2015, p. 1433, § 1/HB 568.)

The 2015 amendment, effective July 1, 2015, substituted the present provisions of subsections (e) and (f) for the former provisions, which read: “(e) In any case in which the paternity of a child or children has not been established, the Department of Human Services may order the mother, the alleged father, and the

child or children to submit to genetic tests as specified in Code Section 19-7-45. The request for the order shall be supported by a sworn statement alleging paternity and setting forth facts establishing a reasonable possibility of the requisite sexual contact between the parties. The parties shall be given notice and an opportunity

to contest the order before the department prior to the testing or the imposition of any noncooperation sanction.

“(f) In any case in which the court or the department orders genetic testing and one or both of the parties to the action is receiving child support services pursuant to Code Section 19-11-6, the department shall pay the costs of such tests subject to recoupment from the alleged father if paternity is established. A second genetic test shall be ordered by the department if an order for paternity has not been issued

and if the person making the request tenders payment of the cost of the test at the time of the request.”

Law reviews. — For article, “Georgia Inheritance Rights of Children Born Out of Wedlock,” see 23 Ga. St. B.J. 28 (1986). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

For note, “Surrogate Mother Agreements in Georgia: Conflict and Accord with Statutory and Case Law,” see 4 Ga. St. U.L. Rev. 153 (1988).

JUDICIAL DECISIONS

Constitutionality. — Statutory scheme for paternity actions set forth in O.C.G.A. § 19-7-43 et seq. is not unconstitutional, notwithstanding the contention that the statutes create an improper gender-based classification that permits a male to be adjudged to be the father of a child and ordered to make corresponding child support payments without according him the same parental rights which automatically enure to the mother of that same child since: (1) the paternity statutes recognize the intrinsic differences in the circumstances of fathers and mothers of illegitimate children and eliminated the gender-based discrimination of the common law, which placed a duty of support on the mother, but not on the father; and (2) a father can achieve the same benefits as the mother by acknowledging a child as his own and filing a counterclaim for legitimation. *Palmer v. Bertrand*, 273 Ga. 475, 541 S.E.2d 360 (2001), cert. denied, 534 U.S. 951, 122 S. Ct. 346, 151 L. Ed. 2d 262 (2001).

Not applicable to probate court proceedings involving descent and distribution. — In a proceeding for year’s support by the purported widow of a decedent on behalf of herself and her child, the widow incorrectly relied on O.C.G.A. § 19-7-43 to support her claim that the administrator of the decedent’s estate did not have standing to bring a petition to establish the paternity of the widow’s child as that statute was not applicable to probate court proceedings involving estate descent and distribution issues. *Crowther v. Estate of Crowther*, 258 Ga. App. 498, 574 S.E.2d 607 (2002).

Putative father waived venue rights by choosing the county of the residence of the mother and the child and deciding to forego filing his action in the county of his own residence. *Holcomb v. Ellis*, 259 Ga. 625, 385 S.E.2d 670 (1989).

Delay in pursuing paternity. — After the lapse of thirteen years, public policy forbids the court from becoming involved in a paternity suit when the plaintiff had an opportunity in 1983 to establish paternity even though the plaintiff alleges that the delay was partially a result of his reliance on counsel’s correspondence. *Grice v. Detwiler*, 227 Ga. App. 280, 488 S.E.2d 755 (1997).

Delay in filing legitimation petition. — Appellate court rejected a father’s contention that the juvenile court erred in holding that a delay in instituting legitimation proceedings justified a finding that the father abandoned his opportunity interest as the father’s reason for the delay, specifically, waiting to obtain the results of genetic testing, was not a condition precedent to filing a legitimation petition; moreover, even with the delay, the father could have filed his legitimation petition and then sought court-ordered genetic testing. In the Interest of J.L.E., 281 Ga. App. 805, 637 S.E.2d 446 (2006).

Order requiring a parent to submit to genetic testing erroneous and not supported. — In an action wherein a juvenile court approved the state’s plan for nonreunification of two twin children, the juvenile court erred by ordering a parent to submit to genetic testing and by holding that the parent lacked standing in

any future related proceedings until that parent submitted to such testing as the parent had married the children's other parent and recognized the children as the parent's own. Further, the Department of Family and Children Services failed to fully comply with O.C.G.A. § 19-7-43(d) by not supporting the motion with a sworn statement either alleging or denying the parent's paternity. *In the Interest of T.W.*, 288 Ga. App. 386, 654 S.E.2d 218 (2007).

Trial court's order requiring that an alleged father and a mother submit to paternity blood testing was erroneous because the doctrine of *res judicata* clearly proscribed the trial court's reconsideration of the issue of paternity; an unappealed and unmodified final order establishing paternity and child support, which was predicated on the parties' settlement agreement and paternity acknowledgment expressly consented to by the father, adjudged that he was the father of the mother's child, and while the father moved to set aside the final order, the trial court found that he had failed to

meet his burden of disestablishing paternity under O.C.G.A. § 19-7-54 and denied the motion. *Venable v. Parker*, 307 Ga. App. 880, 706 S.E.2d 211 (2011).

Agreement waiving support following artificial insemination. — Because the trial court by the court's judgment of dismissal enforced a contract under which a mother relinquished her right to hold a sperm donor responsible for any resulting child as a valid contract, there was no violation of O.C.G.A. § 19-7-43(b) for lack of a court order approving the contract. *Brown v. Gadson*, 288 Ga. App. 323, 654 S.E.2d 179 (2007), cert. denied, 2008 Ga. LEXIS 236 (Ga. 2008).

Cited in Georgia Dep't of Human Resources ex rel. *Jackson v. Jackson*, 252 Ga. 403, 314 S.E.2d 105 (1984); *Peterson v. Moffitt ex rel. Dep't of Human Resources*, 253 Ga. 253, 319 S.E.2d 449 (1984); *LaBrec v. Davis*, 243 Ga. App. 307, 534 S.E.2d 84 (2000); *Henry v. Beacham*, 301 Ga. App. 160, 686 S.E.2d 892 (2009); *Brewton v. Poss*, 316 Ga. App. 704, 728 S.E.2d 837 (2012).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, *Illegitimate Children*, §§ 45, 55, 56.

C.J.S. — 14 C.J.S., *Children Out-of-Wedlock*, § 88 et seq. 27C C.J.S., *Divorce*, § 648 et seq.

ALR. — *Admissibility or compellability*

of blood test to establish testee's nonpaternity for purpose of challenging testee's parental rights, 87 ALR4th 572.

Right of illegitimate child to maintain action to determine paternity, 86 ALR5th 637.

19-7-44. Appointment of guardian ad litem; payment of guardian; notice to natural mother.

(a) The court may, in its discretion, appoint a guardian ad litem to represent a minor child who is the subject of a paternity petition. Payment of the guardian ad litem shall be as ordered by the court. Neither the child's mother nor the alleged or presumed father may represent the child as guardian ad litem.

(b) The natural mother shall be made a party or, if not subject to the jurisdiction of the court, shall be given notice in a manner prescribed by the court and an opportunity to be heard. (Code 1933, § 74-305, enacted by Ga. L. 1980, p. 1374, § 1; Ga. L. 1992, p. 1833, § 3; Ga. L. 1996, p. 923, § 1.)

Law reviews. — For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 234 (1992).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Illegitimate Children, § 55.

ALR. — Necessity or propriety of ap-

pointment of independent guardian for child who is subject of paternity proceedings, 70 ALR4th 1033.

19-7-45. Genetic tests.

(a) All orders requiring parties to submit to genetic tests shall be issued in conformance with Code Sections 19-7-43, 19-7-46, and 19-7-54. In all cases such tests shall be conducted by a laboratory certified by the American Association of Blood Banks and shall be conducted so that the results meet the standards the American Association of Blood Banks requires in order for such results to be admitted as evidence in a court of law.

(b) When an action to determine paternity is initiated prior to the birth of a child, the court shall order that the genetic tests be made as soon as medically feasible after the birth.

(c) Genetic tests shall be performed by a duly qualified licensed practicing physician, duly qualified immunologist, or other qualified person. In all cases, however, the court shall determine the number and qualifications of the experts. In all cases the results shall be made known to all parties at interest as soon as available.

(d) An order issued under this Code section is enforceable by contempt, provided that, if the petitioner refuses to submit to an order for a genetic test, the court may dismiss the action upon motion of the respondent.

(e)(1) The Department of Human Services and any court issuing an order with respect to a determination of paternity shall not, insofar as possible, attach the written results from a genetic test to any pleading or court order.

(2) The genetic material collected for a genetic test shall be destroyed within a reasonable time, as set forth by rule of the Department of Human Services.

(3) The genetic material collected for a genetic test shall not be shared with any other person or entity. (Code 1933, § 74-306, enacted by Ga. L. 1980, p. 1374, § 1; Ga. L. 1982, p. 3, § 19; Ga. L. 1991, p. 950, § 3; Ga. L. 1993, p. 1980, § 1; Ga. L. 1997, p. 1613, § 18; Ga. L. 2015, p. 1433, § 2/HB 568.)

The 2015 amendment, effective July 1, 2015, substituted the present provisions of this Code section for the former provisions, which read: "All orders requiring parties to submit to genetic tests shall be issued in conformance with Code Sections 19-7-43 and 19-7-46. In all cases such tests must be conducted by a laboratory certified by the American Association of Blood Banks. When an action to determine paternity is initiated prior to the birth of a child, the court shall order that the genetic tests be made as soon as medically feasible after the birth. The tests shall be performed by a duly qualified licensed practicing physician, duly qualified immunologist, or other qualified person. In all cases, however, the court

shall determine the number and qualifications of the experts. In all cases the results shall be made known to all parties at interest as soon as available. An order issued under this Code section is enforceable by contempt, provided that, if the petitioner refuses to submit to an order for a genetic test, the court may dismiss the action upon motion of the respondent."

Law reviews. — For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 128 (1993).

JUDICIAL DECISIONS

Not applicable to probate court proceedings involving descent and distribution. — In a proceeding for year's support by the purported widow of a decedent on behalf of herself and her child, the widow incorrectly relied on O.C.G.A. § 19-7-45 to challenge the validity of a genetic test establishing the paternity of her child as that statute was not applicable to probate court proceedings involving estate descent and distribution issues. *Crowther v. Estate of Crowther*, 258 Ga. App. 498, 574 S.E.2d 607 (2002).

Requiring submission to blood test. — Requiring individual to submit to a blood test for purpose of proving or disproving paternity, pursuant to O.C.G.A. § 19-7-45, does not compel him to be a witness against himself within the meaning of U.S. Const., amend. 5, nor would such procedure compel him "to give testimony tending in any manner to incriminate himself" within the meaning of the Georgia Constitution. *Raines v. White*, 248 Ga. 406, 284 S.E.2d 7 (1981); *Pinson v. State*, 194 Ga. App. 506, 391 S.E.2d 28 (1990).

State was entitled to compel the defendant to submit to a second blood test when the previous test was in connection with a civil action and when there was no indication that repetition of the test was unusually burdensome to the defendant or caused by negligence on the part of the

state. *Rainwater v. State*, 210 Ga. App. 594, 436 S.E.2d 772 (1993).

Requiring putative father to pay costs of blood test. — It is a violation of due process for the state to require a putative father to pay the costs of a blood test for the purpose of determining paternity when no hearing has been conducted on the merits of the case. *Boone v. State, Dep't of Human Resources ex rel. Carter*, 250 Ga. 379, 297 S.E.2d 727 (1982).

Enforcement of motion to compel testing. — Claims of the Department of Human Resources against a putative father for reimbursement of public assistance and future support and a contempt complaint for the father's failure to appear for a court-ordered paternity test were not barred by the equitable doctrine of laches. *Department of Human Resources v. Mitchell*, 232 Ga. App. 560, 501 S.E.2d 508 (1998).

Delay in filing legitimation petition. — Appellate court rejected a father's contention that the juvenile court erred in holding that a delay in instituting legitimation proceedings justified a finding that the father abandoned his opportunity interest as the father's reason for the delay, specifically, waiting to obtain the results of genetic testing, was not a condition precedent to filing a legitimation petition; moreover, even with the delay, the father could have filed his legitimation petition

and then sought court-ordered genetic testing. In the Interest of J.L.E., 281 Ga. App. 805, 637 S.E.2d 446 (2006).

Cited in Britten v. State, 173 Ga. App. 840, 328 S.E.2d 556 (1985); Roddenbery v.

Roddenbery, 255 Ga. 715, 342 S.E.2d 464 (1986); Department of Human Resources v. Crosby, 193 Ga. App. 330, 387 S.E.2d 608 (1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Illegitimate Children, § 78.

ALR. — Blood-grouping tests, 163 ALR 939; 46 ALR2d 1000.

Emotional manifestations by victim or family of victim during criminal trial as ground for reversal, new trial, or mistrial, 31 ALR4th 229.

Admissibility, weight and sufficiency of human leukocyte antigen (HLA) tissue

typing tests in paternity cases, 37 ALR4th 167.

Admissibility and weight of blood-grouping tests in disputed paternity cases, 43 ALR4th 579.

Authentication of blood sample taken from human body for purposes other than determining blood alcohol content, 77 ALR5th 201.

19-7-46. Evidence at trial.

(a) The results of medical tests and comparisons ordered by the court, including the statistical likelihood of the alleged parent's parentage, if available, unless a party to the paternity genetic test objects in writing at least 30 days prior to a hearing at which the results of the testing may be introduced into evidence, shall be admitted in evidence without the need for foundation testimony or other proof of authenticity or accuracy. When an objection is filed at least 30 days prior to a hearing at which the results may be introduced into evidence, the results of medical tests and comparisons ordered by the court including the statistical likelihood of the alleged parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist, duly qualified geneticist, or other duly qualified person.

(b) There shall exist a rebuttable presumption of paternity of a child born out of wedlock if there has been performed scientifically credible parentage-determination genetic testing which establishes at least a 97 percent probability of paternity. The rebuttable presumption of paternity can be overcome by the presentation of clear and convincing evidence as determined by the trier of fact. Parentage-determination testing shall include, but not necessarily be limited to, red cell antigen, human leukocyte antigen (HLA), red cell enzyme, and serum protein electrophoresis tests or testing by deoxyribonucleic acid (DNA) probes.

(c) Evidence of a refusal to submit to a genetic test or other ordered medical or anthropological test is admissible to show that the alleged father is not precluded from being the father of the child.

(d) An expert's opinion concerning the time of conception is as admissible as is other expert testimony.

(e) Testimony relating to sexual access to the mother by any person on or about the probable time of conception of the child is admissible in evidence.

(f) Other relevant evidence shall be admitted as is appropriate. (Code 1933, § 74-307, enacted by Ga. L. 1980, p. 1374, § 1; Ga. L. 1991, p. 950, § 4; Ga. L. 1993, p. 1980, § 2; Ga. L. 1994, p. 1270, § 4; Ga. L. 1997, p. 1613, § 19.)

Cross references. — Expert opinion testimony in criminal proceedings, § 24-7-707. Medical reports in narrative form, § 24-8-826. Identification of medical bills, § 24-9-921. When medical information may be released, § 24-12-1. Disclosure of medical records, § 24-12-11 et seq.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 128 (1993).

JUDICIAL DECISIONS

Laboratory report containing expert opinions. — Even if a proper foundation was laid to introduce a laboratory report as a business record, it was still not admissible as a whole if the report contained the opinions or conclusion of a third party not before the court. *Department of Human Resources v. Corbin*, 202 Ga. App. 10, 413 S.E.2d 484 (1991), cert. denied, 202 Ga. App. 905, 413 S.E.2d 484 (1992).

Court orders. — Failure of an alleged father to obtain a court order for a blood test did not render the results of the test inadmissible. *Smith v. Department of Human Resources*, 226 Ga. App. 491, 487 S.E.2d 94 (1997).

Cited in *Pinson v. State*, 194 Ga. App. 506, 391 S.E.2d 28 (1990); *Hall v. Coleman*, 242 Ga. App. 576, 530 S.E.2d 485 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, *Illegitimate Children*, § 66 et seq.

C.J.S. — 14 C.J.S., *Children Out-of-Wedlock*, § 102 et seq.

ALR. — Admissibility and weight of evidence of resemblance on question of paternity or other relationship, 95 ALR 314.

Admissibility in prosecution for bastardy of evidence of prosecutrix's acquaintance or association with men other than defendant, on issue of paternity of child, 104 ALR 84.

Bastardy proceedings: propriety of exhi-

bition of child to jury to show family resemblance, or lack of it, on issue of paternity, 55 ALR3d 1087.

Admissibility and weight of blood-grouping tests in disputed paternity cases, 43 ALR4th 579.

Admissibility or compellability of blood test to establish testee's nonpaternity for purpose of challenging testee's parental rights, 87 ALR4th 572.

Authentication of blood sample taken from human body for purposes other than determining blood alcohol content, 77 ALR5th 201.

19-7-46.1. Name or social security number on birth certificate or other record as evidence of paternity; signed voluntary acknowledgment of paternity.

(a) The appearance of the name or social security account number of the father, entered with his written consent, on the certificate of birth or a certified copy of such certificate or records on which the name of the alleged father was entered with his written consent from the vital records department of another state or the registration of the father, entered with his written consent, in the putative father registry of this state, pursuant to subsection (d) of Code Section 19-11-9, shall constitute a prima-facie case of establishment of paternity and the burden of proof shall shift to the putative father to rebut such in a proceeding for the determination of paternity.

(b) When both the mother and father have signed a voluntary acknowledgment of paternity and the acknowledgment is recorded in the putative father registry established by subsection (d) of Code Section 19-11-9, the acknowledgment shall constitute a legal determination of paternity, subject to the right of any signatory to rescind the acknowledgment prior to the date of the support order, any other order adjudicating paternity, or 60 days from the signing of the agreement, whichever is earlier. Recording such information in the putative father registry shall constitute a legal determination of paternity for purposes of establishing a future order for support, visitation privileges, and other matters under Code Section 19-7-51. Acknowledgment of paternity shall not constitute a legal determination of legitimation pursuant to Code Section 19-7-21.1 or 19-7-22.

(c) After the 60 day rescission period specified in subsection (b) of this Code section, the signed voluntary acknowledgment of paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof on the person challenging the acknowledgment. The legal responsibilities of any signatory, including child support obligations, arising from the acknowledgment may not be suspended during the challenge, except for good cause shown. (Code 1981, § 19-7-46.1, enacted by Ga. L. 1992, p. 1266, § 1; Ga. L. 1997, p. 1613, § 20; Ga. L. 2008, p. 667, § 6/SB 88.)

Editor's notes. — Ga. L. 2008, p. 667, § 1/SB 88, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Care of a Grandchild Act.'"

Ga. L. 2008, p. 667, § 2/SB 88, not codified by the General Assembly, provides: "The General Assembly finds that:

"(1) An increasing number of relatives

in Georgia, including grandparents and great-grandparents, are providing care to children who cannot reside with their parents due to the parent's incapacity or inability to perform the regular and expected functions to provide such care and support;

"(2) Parents need a means to confer to grandparents or great-grandparents the

authority to act on behalf of grandchildren without the time and expense of a court proceeding; and

“(3) Providing a statutory mechanism for granting such authority enhances family preservation and stability.”

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997). For article on domestic relations, see 66 Mercer L. Rev. 65 (2014).

JUDICIAL DECISIONS

Order requiring a parent to submit to genetic testing. — In an action wherein a juvenile court approved the state’s plan for nonreunification of two twin children, the juvenile court erred by ordering a parent to submit to genetic testing and by holding that the parent lacked standing in any future related proceedings until that parent submitted to such testing as the parent had married the children’s other parent and recognized the children as the parent’s own. Further, the Department of Family and Children Services failed to fully comply with O.C.G.A. § 19-7-43(d) by not supporting the motion with a sworn statement either alleging or denying the parent’s paternity. In the Interest of T.W., 288 Ga. App. 386, 654 S.E.2d 218 (2007).

Trial court’s order requiring that an alleged father and a mother submit to paternity blood testing was erroneous because the doctrine of res judicata clearly proscribed the trial court’s reconsideration of the issue of paternity; an unappealed and unmodified final order

establishing paternity and child support, which was predicated on the parties’ settlement agreement and paternity acknowledgment expressly consented to by the father, adjudged that he was the father of the mother’s child, and while the father moved to set aside the final order, the trial court found that he had failed to meet his burden of disestablishing paternity under O.C.G.A. § 19-7-54 and denied the motion. Venable v. Parker, 307 Ga. App. 880, 706 S.E.2d 211 (2011).

Denial of petition for legitimation improperly set aside. — Trial court erred by setting aside the denial of a biological father’s petition for legitimation because the voluntary acknowledgment of paternity preempted the denial as the father failed to make the trial court aware of the acknowledgment and could not subsequently use the document to set aside the trial court’s final judgment. Allifi v. Raider, 323 Ga. App. 510, 746 S.E.2d 763 (2013).

Cited in LaBrec v. Davis, 243 Ga. App. 307, 534 S.E.2d 84 (2000); Ray v. Hann, 323 Ga. App. 45, 746 S.E.2d 600 (2013).

19-7-46.2. Temporary order of support.

(a) Upon motion by a party to a paternity action, a temporary order shall be issued in accordance with the guidelines prescribed in Code Section 19-6-15 if there is clear and convincing evidence of paternity. Such temporary order will be valid pending an administrative or judicial determination of parentage.

(b) All child support payments made pursuant to the temporary order prescribed in subsection (a) of this Code section shall be paid to the court which shall deposit the amount of the payment in a separate account in a bank approved as a federal depository. Such bank shall hold the amount as a special escrow fund and, except as provided in this Code section, shall not distribute any portion of the payment to any party to the action. Each full payment made into the escrow account

pursuant to this Code section shall be effective to discharge any duty of the putative father to pay the ordered child support amount.

(c) Upon final judgment in a paternity action that the alleged putative father is the father of the child, the court shall order that the amount retained in the special escrow fund shall be paid to the appropriate person or entity along with any interest that may have accrued.

(d) Upon final judgment in a paternity action that the alleged putative father is not the father of the child, the amount retained in the special escrow fund shall be returned to the putative father along with any interest that may have accrued. (Code 1981, § 19-7-46.2, enacted by Ga. L. 1997, p. 1613, § 21.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-7-47. Civil action; testimony of mother and alleged father; default judgments.

(a) Any proceeding brought under this article is a civil action governed by the rules of civil procedure. The mother of the child and the alleged father are competent to testify and may be compelled to appear and testify.

(b) If in any paternity action an answer has not been filed within the time required by Chapter 11 of Title 9, the “Georgia Civil Practice Act,” the case shall automatically become in default unless the time for filing the answer has been extended as provided by law. The default may be opened as a matter of right by the filing of such defenses within 15 days of the day of default, upon the payment of costs. If the case is still in default after the expiration of the period of 15 days, the plaintiff at any time thereafter shall be entitled to verdict and judgment by default, in open court or in chambers, as if every item and paragraph of the complaint or other original pleading were supported by proper evidence. (Code 1933, § 74-308, enacted by Ga. L. 1980, p. 1374, § 1; Ga. L. 1994, p. 1270, § 5; Ga. L. 1999, p. 81, § 19.)

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Illegitimate Children, §§ 70, 73.

C.J.S. — 14 C.J.S., Children Out-of-Wedlock, § 103 et seq.

19-7-48. Settlement, dismissal, or termination.

The child must be a party to a settlement agreement with the alleged father. The court must approve any settlement agreement, dismissal, or

termination of the action which does not adjudicate the merits of the case. (Code 1933, § 74-309, enacted by Ga. L. 1980, p. 1374, § 1.)

JUDICIAL DECISIONS

Voluntary dismissal of a paternity complaint did not deprive the court of jurisdiction since, pursuant to O.C.G.A. § 19-7-48, the dismissal required the court's approval. *Patterson v. Whitehead*, 224 Ga. App. 636, 481 S.E.2d 621 (1997).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, *Illegitimate Children*, § 64.
C.J.S. — 14 C.J.S., *Children Out-of-Wedlock*, § 118.
ALR. — Lump-sum compromise and settlement, or release, of bastardy claim or of bastardy or paternity proceedings, 84 ALR2d 524.
Avoidance of lump-sum settlement or release of bastardy claim on grounds of fraud, mistake, or duress, 84 ALR2d 593.

19-7-49. Decree; jury instructions on test results; costs.

(a) On a finding that the alleged father is the father of the child, the court shall issue an order designating the alleged father as the father of the child. The sole effect of the order shall be to establish the duty of the father to support the child.

(b) On a finding that the alleged father is not the father of the child, the court shall issue an order declaring this finding.

(c) The trier of fact shall receive without foundation or the need for third-party testimony evidence of costs of pregnancy, child birth, and genetic testing. The evidence so presented shall constitute prima-facie evidence of amounts incurred for such services or for testing on behalf of the child. The court may award such costs as part of its final decree. (Code 1933, § 74-310, enacted by Ga. L. 1980, p. 1374, § 1; Ga. L. 1997, p. 1613, § 22.)

Cross references. — Issuance or registration of new birth certificate upon order declaring paternity of child, §§ 31-10-12, 31-10-14.
Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).
For a note on the role of a judicial determination of paternity in the inheritance rights of illegitimate children in Georgia, see 16 Ga. L. Rev. 171 (1981).

JUDICIAL DECISIONS

Credibility of expert is question for jury. — O.C.G.A. § 19-7-49 plainly requires the jury to determine whether the expert presenting the test results is credible. Until the jury makes the decision that the tests were properly conducted and that the expert presenting the results testified truthfully, the test results are not entitled to any greater deference than any other evidence of paternity. *Howard v. Howard*, 258 Ga. 846, 375 S.E.2d 852 (1989).

Test results not binding on jury. — In divorce action, the issue of parentage is to be decided by the jury, and the fact that a human leukocyte antigen typing test concluded that the alleged father could not be the biological father of the child was not conclusive on the question of parentage; thus, the jury decision finding paternity could not be overturned on appeal. *Jackson v. Jackson*, 253 Ga. 576, 322 S.E.2d 725 (1984).

When the jury was instructed in accordance with O.C.G.A. § 19-7-49(c), and there was at least some basis upon which the jurors could have discounted the results of the prior testing as being unreliable, the jurors were authorized to reject those test results and to rely instead on the other evidence tending to show that the defendant was the child's father. *Williamson v. Ward*, 192 Ga. App. 857, 386 S.E.2d 727 (1989).

Paternity disproven pursuant to subsection (b). — Ending a previously established duty to support or ordering a retroactive rescission of previously awarded child support may be in the best interest of the putative father who has proven his nonpaternity, but it is hardly in the best interest of the child. Thus, the issue of child support obligations that is conferred upon the trial court by O.C.G.A. § 19-7-51 would seemingly extend only to the case wherein paternity has been initially established pursuant to subsection (a) of O.C.G.A. § 19-7-49 not to the case wherein paternity has been disproven pursuant to subsection (b) of § 19-7-49. *Department of Human Resources v. Morton*, 204 Ga. App. 638, 420 S.E.2d 89 (1992).

Cited in *Families First v. Gooden*, 211 Ga. App. 272, 439 S.E.2d 34 (1993).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, *Illegitimate Children*, § 87.

C.J.S. — 14 C.J.S., *Children Out-of-Wedlock*, § 116 et seq.

ALR. — Judgment in bastardy proceeding as conclusive of issues in subsequent bastardy proceeding, 37 ALR2d 836.

19-7-50. Costs.

The court may order reasonable fees of counsel, experts, and the child's guardian ad litem and other costs of the action and pretrial proceedings, including blood and other tests, to be paid by the parties in proportions and at times determined by the court. (Code 1933, § 74-311, enacted by Ga. L. 1980, p. 1374, § 1.)

JUDICIAL DECISIONS

Requiring payment of costs prior to trial violates constitution. — To the extent that O.C.G.A. § 19-7-50 allows the state to compel prepayment of court costs without a hearing on the merits, the statute is unconstitutional under the provisions of Ga. Const. 1976, Art. I, Sec. I, Para. I (see now Ga. Const. 1983, Art. I, Sec. I, Para. I). *Boone v. State*, Dep't of Human Resources ex rel. *Carter*, 250 Ga. 379, 297 S.E.2d 727 (1982).

Court may place initial burden on state for blood test costs. — In cases involving determinations of paternity, the

court is authorized to initially place the burden of paying the cost of blood tests upon the state. *Georgia Dep't of Human Resources ex rel. Jackson v. Jackson*, 252 Ga. 403, 314 S.E.2d 105 (1984).

Denying request that state pay for blood tests. — Trial court's denial of a putative father's request to require the state to make pretrial payment of the costs of the blood tests to determine paternity effectively denied the putative father access to blood test evidence and amounted to a violation of due process. *Peterson v. Moffitt ex rel. Dep't of Human*

Resources, 253 Ga. 253, 319 S.E.2d 449 (1984).

Requiring putative father to pay costs of blood test. — It is a violation of due process for the state to require a putative father to pay the costs of a blood test for the purpose of determining paternity when no hearing has been conducted on the merits of the case. *Boone v. State, Dep't of Human Resources ex rel. Carter*, 250 Ga. 379, 297 S.E.2d 727 (1982).

Attorney's fees award could not be sustained on record. — In a paternity proceeding, an award of attorney fees to the mother that did not specify a contractual or statutory basis for the award could not be sustained based on O.C.G.A. § 19-7-50 as the record did not contain the petition for attorney fees, the evidence considered by the trial court, or a transcript of the fee hearing. Accordingly, re-

mand was required to determine whether the mother could recover attorney fees under § 19-7-50. *Sinkwich v. Conner*, 288 Ga. App. 320, 654 S.E.2d 182 (2007).

Trial court did not fail to award adequate fees. — In a mother's paternity suit to establish the legitimation, custody, and support of her minor child by the father, the mother asked for an award of \$20,000 in attorney fees. The trial court recognized that the court had awarded the mother \$5,000 in fees during the pendency of the action; therefore, the court did not abuse the court's discretion by awarding the mother an additional \$5,000 in fees under the authority of O.C.G.A. § 19-7-50 at the final hearing. *Jackson v. Irvin*, 316 Ga. App. 560, 730 S.E.2d 48 (2012).

Cited in *Avren v. Garten*, 289 Ga. 186, 710 S.E.2d 130 (2011).

RESEARCH REFERENCES

C.J.S. — 14 C.J.S., Children Out-of-Wedlock, §§ 141, 142.

ALR. — Right of indigent defendant in paternity suit to have assistance of counsel at state expense, 4 ALR4th 363.

Entitlement to attorney's fees under Uniform Parentage Act of 1973, 72 ALR6th 413.

19-7-51. Order of support, visitation privileges, and other provisions.

The decree or order may contain any other provisions concerning the duty to support the child by periodic or lump sum payments, visitation privileges with the child, or any other matter in the best interest of the child. (Code 1933, § 74-312, enacted by Ga. L. 1980, p. 1374, § 1.)

JUDICIAL DECISIONS

Custody not determined in legitimation action. — In a proceeding on a father's petition for custody, when the issue of custody had not been determined in a prior legitimation action, the court erred in requiring the father to show a material change of condition affecting the

well being of the child; rather, the dispute must be resolved under the best interest of the child test. *Kennedy v. Adams*, 218 Ga. App. 120, 460 S.E.2d 540 (1995).

Cited in *Mullin v. Roy*, 287 Ga. 810, 700 S.E.2d 370 (2010).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Illegitimate Children, §§ 84, 85.

C.J.S. — 14 C.J.S., Children Out-of-Wedlock, §§ 123, 124.

ALR. — Rights and obligations resulting from human artificial insemination, 83 ALR4th 295.

Liability of father for retroactive child support on judicial determination of paternity, 87 ALR5th 361.

19-7-52. To whom support payments made; enforcement and modification of orders.

(a) The court may order that support payments be made to the mother or other interested party, the child support receiver, the prosecuting attorney, the community supervision officer, or the clerk of court, provided that, in those cases where the action has been brought by the Department of Human Services on behalf of a child, the support payment shall be made to the Department of Human Services for distribution or to the child support receiver if the Department of Human Services so requests.

(b) The same remedies and procedures shall apply for enforcement and modification of visitation and support orders as apply to enforcement and modification of such orders arising from divorce proceedings. (Code 1933, § 74-313, enacted by Ga. L. 1980, p. 1374, § 1; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2015, p. 422, § 5-43/HB 310.)

The 2015 amendment, effective July 1, 2015, substituted “community supervision officer” for “probation officer” in the middle of subsection (a). See editor’s note for applicability.

Editor’s notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that the amendment by this Act shall apply to sentences entered on or after July 1, 2015.

19-7-53. Confidentiality of hearings.

Upon motion of any party, any hearing or trial held under this article may be held in closed court without the admittance of any person other than those necessary to the action or proceeding. (Code 1933, § 74-314, enacted by Ga. L. 1980, p. 1374, § 1.)

Cross references. — Exclusion of public from courtroom in civil trials generally, § 9-10-3.

19-7-54. Motion to set aside determination of paternity.

(a) Unless otherwise specified in this Code section, in any action in which a male is required to pay child support as the father of a child, a motion to set aside a determination of paternity may be made at any time upon the grounds set forth in this Code section. Any such motion shall be filed in the superior or state court that entered the order and shall include:

(1) An affidavit executed by the movant that the newly discovered evidence has come to movant's knowledge since the entry of judgment; and

(2) The results from scientifically credible parentage-determination genetic testing, as authorized under Code Section 19-7-46 and administered within 90 days prior to the filing of such motion, that finds that there is a 0 percent probability that the male ordered to pay such child support is the father of the child for whom support is required.

(b) The court shall grant relief on a motion filed in accordance with subsection (a) of this Code section upon a finding by the court of all of the following:

(1) The genetic test required in paragraph (2) of subsection (a) of this Code section was properly conducted;

(2) The male ordered to pay child support has not adopted the child;

(3) The child was not conceived by artificial insemination while the male ordered to pay child support and the child's mother were in wedlock;

(4) The male ordered to pay child support did not act to prevent the biological father of the child from asserting his paternal rights with respect to the child; and

(5) The male ordered to pay child support with knowledge that he is not the biological father of the child has not:

(A) Married the mother of the child and voluntarily assumed the parental obligation and duty to pay child support;

(B) Acknowledged his paternity of the child in a sworn statement;

(C) Been named as the child's biological father on the child's birth certificate with his consent;

(D) Been required to support the child because of a written voluntary promise;

(E) Received written notice from the Department of Human Services, any other state agency, or any court directing him to submit to genetic testing which he disregarded;

(F) Signed a voluntary acknowledgment of paternity as provided in Code Section 19-7-46.1; or

(G) Proclaimed himself to be the child's biological father.

(c) In the event movant fails to make the requisite showing provided in subsection (b) of this Code section, the court may grant the motion or enter an order as to paternity, duty to support, custody, and visitation privileges as otherwise provided by law.

(d) In any case when the underlying child support order was issued by a court of this state or by the Department of Human Services and is being enforced by the Department of Human Services, a movant may request a genetic test from the Department of Human Services, contingent upon advance payment of the genetic test fee by such movant. In any case when the custodian of the child does not consent to testing, a movant may petition the court to ask for testing of the other parent and the child or children.

(e) In the event relief is granted pursuant to subsection (b) of this Code section, relief shall be limited to the issues of prospective child support payments, past due child support payments, termination of parental rights, custody, and visitation rights. In any case when the underlying order was obtained by the Department of Human Services, a court granting the motion to set aside a determination of paternity may relieve the obligor of responsibility for any future or past due amounts, or both, owed to the state. The court may also relieve the obligor of the same that is owed to any other person or entity so long as the obligor adds that person or entity to the underlying motion and provides that person or entity with notice of the action. In all motions brought under this Code section when there is any amount owed to the state, the Department of Human Services shall be made a party. Failure to include the Department of Human Services as a party shall prevent the waiver of any amount owed to the state.

(f) The duty to pay child support and other legal obligations for the child shall not be suspended while the motion is pending except for good cause shown; however, the court may order the child support be held in the registry of the court until final determination of paternity has been made.

(g)(1) In any action brought pursuant to this Code section, if the genetic test results submitted in accordance with paragraph (2) of subsection (a) of this Code section are provided solely by the male ordered to pay child support, the court on its own motion may, and on the motion of any party shall, order the child's mother, the child, and the male ordered to pay child support to submit to genetic tests. The court shall provide that such genetic testing be done no more than 30 days after the court issues its order.

(2) If the mother of the child or the male ordered to pay child support willfully fails to submit to genetic testing, or if either such party is the custodian of the child and willfully fails to submit the

child for testing, the court shall issue an order determining the relief on the motion against the party so failing to submit to genetic testing. If a party shows good cause for failing to submit to genetic testing, such failure shall not be considered willful.

(3) The party requesting genetic testing shall pay any fees charged for the tests. If the custodian of the child is receiving services from an administrative agency in its role as an agency providing enforcement of child support orders, such agency shall pay the cost of genetic testing if it requests the test and may seek reimbursement for the fees from the person against whom the court assesses the costs of the action.

(h) If relief on a motion filed in accordance with this Code section is not granted, the court shall assess the costs of the action and attorney's fees against the movant. (Code 1981, § 19-7-54, enacted by Ga. L. 2002, p. 596, § 1; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2015, p. 1433, § 3/HB 568.)

The 2015 amendment, effective July 1, 2015, in subsection (a), in the introductory paragraph, substituted "Unless otherwise specified in this Code section, in any action" for "In any action" at the beginning of the first sentence, and substituted "or state court that entered the order" for "court" in the last sentence;

added subsection (d); and redesignated former subsections (d) through (g) as present subsections (e) through (h), respectively; and, in subsection (e), added the second, third, fourth, and fifth sentences.

Law reviews. — For note on the 2002 enactment of this Code section, see 19 Ga. St. U.L. Rev. 132 (2002).

JUDICIAL DECISIONS

Attempt to rebut presumption of legitimacy by mother. — Mother failed to rebut the presumption of legitimacy raised by a child's birth during the marriage pursuant to O.C.G.A. §§ 19-7-20 and 19-8-1(6) since the mother and husband knew that another man was the biological father of the child, the husband was listed with the mother's consent on the child's birth certificate as the child's father and had always provided financial and emotional support for the child, and since, if the husband had attempted to rebut the presumption of legitimacy the husband would have still been required to make child support payments. *Baker v. Baker*, 276 Ga. 778, 582 S.E.2d 102 (2003).

Child's best interest must be considered. — Trial court did not err in denying a wife's motion for genetic testing of her husband in order to delegitimize their child based on a determination of the child's best interest pursuant to O.C.G.A.

§ 19-7-54. The wife came forward with no evidence that delegitimization would be in the child's best interest, and the husband and son shared a very strong bond. *Williamson v. Williamson*, 302 Ga. App. 115, 690 S.E.2d 257 (2010).

Res judicata proscribed reconsideration of paternity. — Trial court's order requiring that an alleged father and a mother submit to paternity blood testing was erroneous because the doctrine of res judicata clearly proscribed the trial court's reconsideration of the issue of paternity; an unappealed and unmodified final order establishing paternity and child support, which was predicated on the parties' settlement agreement and paternity acknowledgment expressly consented to by the father, adjudged that he was the father of the mother's child, and while the father moved to set aside the final order, the trial court found that he had failed to meet his burden of disestablishing pater-

nity under O.C.G.A. § 19-7-54 and denied the motion. Venable v. Parker, 307 Ga. App. 880, 706 S.E.2d 211 (2011).

Cited in Cothran v. Mehosky, 286 Ga. App. 640, 649 S.E.2d 838 (2007).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Illegitimate Children, §§ 23 et seq., 89.

C.J.S. — 14 C.J.S., Children Out-of-Wedlock, §§ 71, 72, 94 et seq., 124.

CHAPTER 8

ADOPTION

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19-8-41.	Release of responsibility by legal embryo custodian; proce-		

Cross references. — Issuance of new birth certificate following adoption and legitimacy or paternity determination, § 31-10-14. Powers and duties of Department of Human Resources regarding children and youth services generally, § 49-5-1 et seq.

Editor’s notes. — Ga. L. 1990, p. 1572, § 5, effective July 1, 1990, repealed the Code sections formerly codified at this chapter and enacted the current chapter. The former chapter consisted of §§ 19-8-1 through 19-8-19 and was based on Ga. L. 1855-56, p. 260, § 3; Ga. L. 1859, p. 36, § 2; Ga. L. 1882-83, p. 59, § 1; Ga. L. 1889, p. 69, § 1; Ga. L. 1927, p. 142, § 1; Ga. L. 1941, p. 300, §§ 1-11, 14-17; Ga. L. 1950, p. 289, § 1; Ga. L. 1951, p. 679, § 1; Ga. L. 1956, p. 695, § 1; Ga. L. 1957, p. 339, § 1; Ga. L. 1957, p. 367, § 1; Ga. L. 1960, p. 791, § 1; Ga. L. 1961, p. 219, § 1; Ga. L. 1966, p. 212, §§ 1, 3; Ga. L. 1967, p. 107, § 1; Ga. L. 1967, p. 778, § 1; Ga. L. 1967, p. 803, § 1; Ga. L. 1969, p. 927, § 1; Ga. L. 1970, p. 497, § 10; Ga. L. 1971, p. 403, § 1; Ga. L. 1971, p. 699, § 2; Ga. L. 1972, p. 664, § 2; Ga. L. 1975, p. 797, § 1; Ga. L. 1977, p. 201, § 1; Ga. L. 1979, p. 1182, §§ 1-14; Ga. L. 1982, p. 3, § 19; Ga. L. 1983, p. 3, § 15; Ga. L. 1984, p. 22, § 19; Ga. L. 1984, p. 1433, § 1; Ga. L. 1986, p. 687, § 1; Ga. L. 1986, p. 1516, §§ 2, 3; Ga.

L. 1987, p. 992, § 1; Ga. L. 1988, p. 864, § 2; and Ga. L. 1988, p. 1720, § 10.

Administrative rules and regulations. — Rules and regulations for child placing agencies, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Human Resources, Chapter 290-9-2.

Law reviews. — For article on virtual adoption, see 15 Mercer L. Rev. 335 (1964). For article advocating revision of former adoption statute governing inheritance by an adopted child, see 4 Ga. L. Rev. 505 (1970). For article surveying legislative and judicial developments in Georgia’s divorce, alimony and child custody laws for 1978-79, see 31 Mercer L. Rev. 75 (1979). For annual survey of law of domestic relations, see 38 Mercer L. Rev. 179 (1986). For annual survey article on domestic relations, see 50 Mercer L. Rev. 217 (1998).

For note on permissive intervention of grandparents in divorce proceedings, see 26 Ga. L. Rev. 787 (1992). For note on 1991 amendments to this chapter, see 8 Ga. St. U.L. Rev. 57 (1992). For note on 1999 amendments to sections in this chapter, see 16 Ga. St. U.L. Rev. 62 (1999).

For comment, “Surrogate Mother Contracts: Analysis of a Remedial Quagmire,” see 37 Emory L.J. 721 (1988).

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the statutory provisions, decisions under former Chapter 8 of Title 19 are included in the annotations for this chapter.

Adoption statutes should be strictly construed and meticulously followed so that beyond all preadventure the adoption will not later be subject to attack. Nelson v. Taylor, 244 Ga. 657, 261 S.E.2d

579 (1979); *Johnson v. Smith*, 251 Ga. 1, 302 S.E.2d 542 (1983) (decided under former chapter 8 of title 19).

Rights and obligations not altered until date of final order. — General intent appears to be that rights and obligations of a natural parent, and those of an adopting parent, to a child are not conclusively altered until the date of a final order of adoption. *Johnson v. Parrish*, 159 Ga. App. 613, 284 S.E.2d 111 (1981) (decided under former chapter 8 of title 19).

Attorney for child not required. — Adoption statutes do not require the appointing of an attorney for the child. *Arrington v. Hand*, 193 Ga. App. 457, 388 S.E.2d 52 (1989) (decided under former chapter 8 of title 19).

Appeal of adoption decision. — When a father's petition for legitimation was denied, the appellate court did not

have jurisdiction to review the order because the father had failed to follow the discretionary procedures to appeal pursuant to O.C.G.A. § 5-6-35(a)(2), nor did he file his application for such review within the time period allowed by § 5-6-35(d); his appeal from an order terminating his parental rights and allowing adoption of the minor by the stepfather, pursuant to O.C.G.A. § 19-8-1 et seq., was also denied since the issues that the father raised related to the lack of a hearing on his legitimation proceeding, which was already determined to not be reviewable. *In the Interest of C.M.L.*, 260 Ga. App. 502, 580 S.E.2d 276 (2003).

Cited in *Beasley v. Burt*, 201 Ga. 144, 39 S.E.2d 51 (1946); *Herrin v. Graham*, 87 Ga. App. 291, 73 S.E.2d 572 (1952); *Jones v. Harrison*, 210 Ga. 373, 80 S.E.2d 155 (1954).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Chapter 8 of Title 19 are included in the annotations for this chapter.

Effect of 1977 revision of chapter on Ch. 10 of T. 31. — Although 1977 revision of this chapter did not deal with legitima-

tion or subsequent marriage of parents, interpretation of relevant birth certificate provisions in Ch. 10 of T. 31 must take into account this latest legislative statement of public policy. 1980 Op. Att'y Gen. No. 80-58 (decided under former chapter 8 of title 19).

RESEARCH REFERENCES

ALR. — Modern status of law as to equitable adoption or adoption by estoppel, 97 ALR3d 347.

Natural parent's parental rights as affected by consent to child's adoption by other natural parent, 37 ALR4th 724.

Required parties in adoption proceedings, 48 ALR4th 860.

Action for wrongful adoption based on misrepresentation of child's mental or physical condition or parentage, 56 ALR4th 375.

Postadoption visitation by natural parent, 78 ALR4th 218.

Liability of public or private agency or its employees to prospective adoptive parents in contract or tort for failure to complete arrangement for adoption, 8 ALR5th 860.

Attorney malpractice in connection with services related to adoption of child, 18 ALR5th 892.

Adoption of child by same-sex partners, 27 ALR5th 54.

ARTICLE 1

GENERAL PROVISIONS

Editor's notes. — The existing provisions of Chapter 8 were designated as

Article 1 by Ga. L. 2009, p. 800, § 1, effective July 1, 2009.

19-8-1. Definitions.

For purposes of this chapter, the term:

(1) “Biological father” means the male who impregnated the biological mother resulting in the birth of the child.

(2) “Child” means a person who is under 18 years of age and who is sought to be adopted.

(3) “Child-placing agency” means an agency licensed as a child-placing agency pursuant to Chapter 5 of Title 49.

(4) “Department” means the Department of Human Services.

(4.1) “Evaluator” means the person or agency that conducts a home study. An evaluator shall be a licensed child-placing agency, the department, or a licensed professional with at least two years of adoption related professional experience, including a licensed clinical social worker, licensed master social worker, licensed marriage and family therapist, or licensed professional counselor; provided, however, that where none of the foregoing evaluators are available, the court may appoint a guardian ad litem or court appointed special advocate to conduct the home study.

(5) “Guardian” means a legal guardian of the person of a child.

(5.1) “Home study” means an evaluation by an evaluator of the petitioner’s home environment for the purpose of determining the suitability of the environment as a prospective adoptive home for a child. Such evaluation shall consider the petitioner’s physical health, emotional maturity, financial circumstances, family, and social background and shall conform to the rules and regulations established by the department for child-placing agencies for adoption home studies.

(5.2) “Home study report” means the written report generated as a result of the home study.

(6) “Legal father” means a male who:

(A) Has legally adopted a child;

(B) Was married to the biological mother of that child at the time the child was conceived or was born, unless such paternity was disproved by a final order pursuant to Article 3 of Chapter 7 of this title;

(C) Married the legal mother of the child after the child was born and recognized the child as his own, unless such paternity was disproved by a final order pursuant to Article 3 of Chapter 7 of this title;

(D) Has legitimated the child by a final order pursuant to Code Section 19-7-22; or

(E) Has legitimated the child pursuant to Code Section 19-7-21.1 and who has not surrendered or had terminated his rights to the child.

(7) “Legal mother” means the female who is the biological or adoptive mother of the child and who has not surrendered or had terminated her rights to the child.

(8) “Parent” means either the legal father or the legal mother of the child.

(9) “Petitioner” means a person who petitions to adopt or terminate rights to a child pursuant to this chapter.

(10) “Putative father registry” means the registry established and maintained pursuant to subsections (d) and (e) of Code Section 19-11-9. (Code 1981, § 19-8-1, enacted by Ga. L. 1990, p. 1572, § 5; Ga. L. 1997, p. 1686, § 4; Ga. L. 2008, p. 667, § 7/SB 88; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2011, p. 573, § 1/SB 172.)

Editor’s notes. — Ga. L. 2008, p. 667, § 1/SB 88, not codified by the General Assembly, provides: “This Act shall be known and may be cited as the ‘Care of a Grandchild Act.’”

Ga. L. 2008, p. 667, § 2/SB 88, not codified by the General Assembly, provides: “The General Assembly finds that:

“(1) An increasing number of relatives in Georgia, including grandparents and great-grandparents, are providing care to children who cannot reside with their parents due to the parent’s incapacity or inability to perform the regular and expected functions to provide such care and support;

“(2) Parents need a means to confer to

grandparents or great-grandparents the authority to act on behalf of grandchildren without the time and expense of a court proceeding; and

“(3) Providing a statutory mechanism for granting such authority enhances family preservation and stability.”

Ga. L. 2011, p. 573, § 8, not codified by the General Assembly, provides that the amendment to this Code section shall apply to all placements of children for adoption and all petitions for adoption filed on or after July 1, 2011.

Law reviews. — For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004).

JUDICIAL DECISIONS

Bona fide resident. — Phrase bona fide resident, as used in O.C.G.A. § 19-8-3(a)(3), requires a showing of status as a state of Georgia domiciliary for at least six months immediately before the filing of the petition for adoption with domicile referring to a single fixed place of abode with the intention of remaining there indefinitely, or the single fixed place of abode where a person intends to return,

even though the person may in fact be residing elsewhere. *Sastre v. McDaniel*, 293 Ga. App. 671, 667 S.E.2d 896 (2008).

“Guardian.” — Grandmother who was temporary legal custodian of child under juvenile court deprivation order was not a legal guardian for purposes of surrendering rights in adoption proceedings. *Edgar v. Shave*, 205 Ga. App. 337, 422 S.E.2d 234 (1992).

“Legal father.” — Maternal great aunt and uncle had standing to file objections to an adoption petition of aunt and uncle who had obtained a written surrender of rights from the child’s putative biological father; the latter was not the “legal father” as defined by O.C.G.A. § 19-8-1. *Echols v. Cochran*, 214 Ga. App. 348, 447 S.E.2d 700 (1994).

Plaintiff was the legal father of a child under O.C.G.A. § 19-8-1 because the plaintiff was married to the mother at the time of the child’s birth, before the marriage was declared void. *Hall v. Coleman*, 242 Ga. App. 576, 530 S.E.2d 485 (2000).

Mother failed to rebut the presumption of legitimacy raised by a child’s birth during the marriage pursuant to O.C.G.A. §§ 19-7-20 and 19-8-1(6) since the mother and husband knew that another man was the biological father of the child, the husband was listed with the mother’s consent on the child’s birth certificate as the child’s father and had always provided financial and emotional support for the child, and since, if the husband had attempted to rebut the presumption of legitimacy the husband would have still been required to make child support payments. *Baker v. Baker*, 276 Ga. 778, 582 S.E.2d 102 (2003).

Adoptive parents. — Limiting language of O.C.G.A. § 19-7-3(b), forbidding original actions for grandparent visitation if the parents are together and living with the child, includes adoptive parents because in the absence of language limiting the term “parent” to only “natural parents” or “biological parents,” there is no legislative intent to withhold from adoptive parents the same constitutionally protected status enjoyed by biological parents to raise their children without state interference; in construing § 19-7-3(b), the definition of parent in the adoption statute, O.C.G.A. § 19-8-1(6) and (8), which gives full legal status to adoptive parents, cannot be ignored, and the clear intent of the adoption statute is to give adoptive parents full legal rights. *Bailey v. Kunz*, 307 Ga. App. 710, 706 S.E.2d 98 (2011), *aff’d*, 290 Ga. 361, 720 S.E.2d 634 (2012).

Grandmother was not a “parent” of the child within the meaning of O.C.G.A. § 19-8-1 or O.C.G.A. § 19-11-3(7). *Stills v. Johnson*, 272 Ga. 645, 533 S.E.2d 695 (2000).

Cited in *In re Adoption of D.J.F.M.*, 284 Ga. App. 420, 643 S.E.2d 879 (2007); *Ray v. Hann*, 323 Ga. App. 45, 746 S.E.2d 600 (2013).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 1B Am. Jur. Pleading and Practice Forms, Adoption, § 3.

ALR. — “Wrongful adoption” causes of action against adoption agencies where

children have or develop mental or physical problems that are misrepresented or not disclosed to adoptive parents, 74 ALR5th 1.

19-8-2. Jurisdiction and venue of adoption proceedings.

(a) The superior courts of the several counties shall have exclusive jurisdiction in all matters of adoption, except such jurisdiction as may be granted to the juvenile courts.

(b) All petitions under this chapter shall be filed in the county in which any petitioner resides, except that:

(1) Upon good cause being shown, the court of the county of the child’s domicile or of the county in which is located any child-placing agency having legal custody of the child sought to be adopted may, in its discretion, allow the petition to be filed in that court; and

(2) Any person who has been a resident of any United States Army post or military reservation within this state for six months next preceding the filing of the petition for adoption may file the petition in any county adjacent to the United States Army post or military reservation. (Code 1981, § 19-8-2, enacted by Ga. L. 1990, p. 1572, § 5.)

Law reviews. — For article, "An Outline of Juvenile Court Jurisdiction with Focus on Child Custody," see 10 Ga. St. B.J. 275 (1973). For article surveying developments in Georgia domestic relations law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 109 (1981).

For note discussing problems with venue in Georgia, and proposing statutory revisions to improve the resolution of venue questions, see 9 Ga. St. B.J. 254 (1972).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 74-405 and former § 19-8-2 are included in the annotations for this Code section.

In matters of adoption, superior courts have very broad discretion which will not be controlled by appellate courts except in cases of plain abuse. *Johnson v. Taylor*, 153 Ga. App. 15, 264 S.E.2d 512 (1980) (decided under former Code 1933, § 74-405).

Proceeding instituted under this chapter is purely statutory and does not fall within classification of any cases of which Supreme Court has jurisdiction. *Criswell v. Jones*, 187 Ga. 55, 199 S.E. 804 (1938) (decided under former Code 1933, § 74-405); *Herrin v. Graham*, 209 Ga. 281, 71 S.E.2d 550 (1952) (decided under former Code 1933, § 74-405); *Hendrix v. Hunter*, 214 Ga. 722, 107 S.E.2d 195 (1959) (decided under former Code 1933, § 74-405).

Natural parent is not a party defendant to adoption proceedings. Thus, the requirement that the petition for adoption be filed in the county where the adopting parents reside, as provided for in former Code 1933, § 74-405, was not in conflict with the provisions of Ga. Const. 1976, Art. VI, Sec. XIV, Para. VI (see now Ga. Const. 1983, Art. VI, Sec. II, Para. VI) which requires that venue in civil cases be in the county where the defendants reside. *Chandler v. Cochran*, 247 Ga. 184, 275 S.E.2d 23, cert. denied, 454 U.S. 872,

102 S. Ct. 342, 70 L. Ed. 2d 177 (1981) (decided under former Code 1933, § 74-405).

Natural parents' residence immaterial. — Venue is proper when the adoption petition has been filed in the county in which the adopting parents reside, regardless of where the natural parents reside. *Spires v. Bittick*, 171 Ga. App. 914, 321 S.E.2d 407 (1984) (decided under former § 19-8-2).

Residence or domicile of child in this state is not a jurisdictional prerequisite to adoption if adoption proceeding is brought in county of adopting parents' residence. *Davey v. Evans*, 156 Ga. App. 698, 275 S.E.2d 769 (1980) (decided under former Code 1933, § 74-405).

Jurisdiction of adoption during deprivation proceeding in juvenile court. — Superior court has exclusive jurisdiction in adoption matters and had jurisdiction to entertain adoption petition notwithstanding pendency of deprivation proceedings in the juvenile court involving the same child. *Edgar v. Shave*, 205 Ga. App. 337, 422 S.E.2d 234 (1992).

Trial court did not err in concluding that the court had jurisdiction over adoption and termination of parental rights proceeding as statutory law granted the trial court jurisdiction over adoption proceedings and other proceedings that were not granted exclusively to the juvenile courts; since the juvenile courts were granted exclusive jurisdiction over deprivation proceedings, those types of matters

were to be heard by the juvenile courts, but the trial court had the authority to hear adoption and other matters, such as the adoptive parents' adoption petition filed to adopt the biological parents' minor child. *Snyder v. Carter*, 276 Ga. App. 426, 623 S.E.2d 241 (2005).

Jurisdiction properly exercised. — Trial court did not err in exercising jurisdiction in a petition for adoption because the Georgia Uniform Child Custody Jurisdiction Enforcement Act, O.C.G.A. § 19-9-40 et seq., did not govern adoption proceedings. *Barr v. Gregor*, 316 Ga. App. 269, 728 S.E.2d 868 (2012).

Actions not brought in connection with adoption proceeding. — Proceeding for termination of parental rights brought for the purpose of awarding custody to the Department of Family and Children Services so that children could be placed for adoption some time in the future was not brought in connection with a petition for adoption; therefore, jurisdiction was proper in the juvenile court. In re C.D.C., 230 Ga. App. 237, 495 S.E.2d 872 (1998).

Welfare and best interests of child in custody disputes. — Court, having jurisdiction, has jurisdiction to fullest extent granted the court under adoption statute, and is confronted with one paramount question, which, in all controversies or proceedings for custody of children, is welfare and best interests of child. *Herrin v. Graham*, 87 Ga. App. 291, 73 S.E.2d 572 (1952), overruled on other grounds, *Davey v. Evans*, 156 Ga. App. 698, 275 S.E.2d 769 (1980) (decided under former Code 1933, § 74-405).

Termination of father's parental rights. — Trial court had jurisdiction over an action to terminate a father's parental rights pursuant to O.C.G.A. § 19-8-2, which granted exclusive jurisdiction to

superior courts in all adoption proceedings, and made venue proper in the county in which the adopting parents reside. *Rokowski v. Gilbert*, 275 Ga. App. 305, 620 S.E.2d 509 (2005).

Error to grant adoption petition. — Because the evidence showed that the child's needs could be equally met in either the mother's or the grandparent's home, the trial court abused the court's discretion in terminating the mother's parental rights under O.C.G.A. §§ 19-8-10(a), (b)(1), (2), and § 15-11-94(b)(4) and granting the grandmother's and the step-grandfather's petition for adoption under O.C.G.A. § 19-8-2. *McCollum v. Jones*, 274 Ga. App. 815, 619 S.E.2d 313 (2005).

Construction with other law. — Trial court erred in denying an aunt and uncle's petition to adopt their nephew under O.C.G.A. § 19-8-8, and should have applied O.C.G.A. § 19-8-7 as: (1) the former was not intended to be a general rule regarding the adoption of foreign children; (2) the aunt and uncle satisfied the jurisdictional and venue requirements of O.C.G.A. § 19-8-2 by filing the adoption petition in the superior court of their county of residence; and (3) as the child's aunt and uncle, they were relatives eligible to adopt under O.C.G.A. § 19-8-7(a). In re Adoption of D.J.F.M., 284 Ga. App. 420, 643 S.E.2d 879 (2007).

Cited in *Weems v. Saul*, 52 Ga. App. 470, 183 S.E. 661 (1936); *Mulligan v. Wingard*, 72 Ga. App. 539, 34 S.E.2d 305 (1945); *Cons v. Wipert*, 207 Ga. 621, 63 S.E.2d 370 (1951); *Wheeler v. Howard*, 212 Ga. 553, 93 S.E.2d 723 (1956); *Carpenter v. Forshee*, 103 Ga. App. 758, 120 S.E.2d 786 (1961); *McCall v. VanPopering*, 124 Ga. App. 149, 183 S.E.2d 411 (1971); *Quilloin v. Walcott*, 238 Ga. 230, 232 S.E.2d 246 (1977); *Hill v. Kaminsky*, 160 Ga. App. 630, 287 S.E.2d 639 (1981).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under former Code 1933, § 74-405 are included in the annotations for this Code section.

When superior court may terminate parent-child relationship in adoption proceeding. — Although both superior and juvenile courts have jurisdiction to terminate parent-child relation-

ship, the superior court may do so only in conjunction with an adoption proceeding which has been filed in that court. 1977 Op. Att'y Gen. No. U77-52 (decided under former Code 1933, § 74-405).

Juvenile court termination of parental rights. — Only juvenile court can

terminate parental rights without concomitant adoption proceeding in process. 1977 Op. Att'y Gen. No. U77-52 (decided under former Code 1933, § 74-405).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Adoption, §§ 53, 56.

C.J.S. — 2 C.J.S., Adoption of Persons, § 78.

ALR. — Requirements as to residence or domicile of adoptee or adoptive parent for purposes of adoption, 33 ALR3d 176.

19-8-3. Who may adopt a child; when petition must be filed in names of both spouses.

(a) Any adult person may petition to adopt a child if the person:

(1) Is at least 25 years of age or is married and living with his spouse;

(2) Is at least ten years older than the child;

(3) Has been a bona fide resident of this state for at least six months immediately preceding the filing of the petition; and

(4) Is financially, physically, and mentally able to have permanent custody of the child.

(b) Any adult person, including but not limited to a foster parent, meeting the requirements of subsection (a) of this Code section shall be eligible to apply to the department or a child-placing agency for consideration as an adoption applicant in accordance with the policies of the department or the agency.

(c) If a person seeking to adopt a child is married, the petition must be filed in the name of both spouses; provided, however, that, when the child is the stepchild of the party seeking to adopt, the petition shall be filed by the stepparent alone. (Code 1981, § 19-8-3, enacted by Ga. L. 1990, p. 1572, § 5.)

Cross references. — Foster Parents Bill of Rights, T. 49, C. 5, Art. 14.

Law reviews. — For note, "Surrogate Mother Agreements in Georgia: Conflict and Accord with Statutory and Case Law," see 4 Ga. St. U.L. Rev. 153 (1988).

For comment discussing In re Adoption

of "E," 59 N.J. 36, 279 A.2d 785 (1971), as to the constitutionality of state court's refusal to approve adoption of child solely because of adopting parent's lack of religious beliefs, see 6 Ga. L. Rev. 221 (1971). For comment on adoptions by homosexuals, see 55 Mercer L. Rev. 1415 (2004).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 74-402 and former § 19-8-3 are included in the annotations for this Code section.

Bona fide resident defined. — Phrase bona fide resident, as used in O.C.G.A. § 19-8-3(a)(3), requires a showing of status as a state of Georgia domiciliary for at least six months immediately before the filing of the petition for adoption with domicile referring to a single fixed place of abode with the intention of remaining there indefinitely, or the single fixed place of abode where a person intends to return, even though the person may in fact be residing elsewhere. *Sastre v. McDaniel*, 293 Ga. App. 671, 667 S.E.2d 896 (2008).

Adoption laws of this state do not preclude adoption of child by the child's natural parents. *McDonald v. Hester*, 115 Ga. App. 740, 155 S.E.2d 720 (1967) (decided under former Code 1933, § 74-402).

Foster parents have no standing to contest legal custodian's discretion. — Although foster parents may have standing to bring adoption petition in sense that they are legally eligible to apply to agency, they have no standing to contest legal custodian's absolute discretion whether to give consent requisite to successful petition for adoption. *Drummond v. Fulton County Dep't of Family & Children Servs.*, 237 Ga. 449, 228 S.E.2d 839 (1976), cert. denied, 432 U.S. 905, 97 S. Ct. 2949, 53 L. Ed. 2d 1077 (1977) (decided under former Code 1933, § 74-402).

Statute or policy precluding adoption of biracial children unconstitutional. — State statute or policy that every child having mixed black and white parentage cannot be adopted by a white family cannot be countenanced under United States Constitution. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 547 F.2d 835 (5th Cir.), on rehearing, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910, 98 S. Ct. 3103, 57 L. Ed. 2d 1141 (1978) (decided under former Code 1933, § 74-402).

Stepparent may petition without spouse. — Petitioner, who had been the child's stepfather until he and the natural mother divorced, could petition to adopt the child without joining his current spouse. *In re J.S.G.*, 233 Ga. App. 690, 505 S.E.2d 70 (1998) (decided under former § 19-8-3).

No prohibition against denying single individual right to adopt. — Trial court abused the court's discretion by denying a foster parent's petition to adopt the parent's foster child on the ground that placing the child with the foster parent, who was not married to the individual with whom the foster parent lived, violated the state's public policy because all of the evidence showed that the adoption would be in the child's best interest, and the trial court failed to apply the law as written and determine whether it was in the child's best interest to allow the adoption; all of the witnesses, including the guardian ad litem the trial court appointed to represent the child's interests and the Department of Family and Children's Services adoption specialist, testified that the adoption was in the child's best interest and that to remove the child from the only family the child had ever known would be devastating to the child, and O.C.G.A. § 19-8-3 clearly did not prohibit the adoption because the General Assembly did not prohibit unmarried couples from adopting. *In re Goudeau*, 305 Ga. App. 718, 700 S.E.2d 688 (2010).

Nonresidents cannot institute adoption proceedings in the courts of this state. *H.C.S. v. Grebel*, 253 Ga. 404, 321 S.E.2d 321 (1984) (decided under former Code Section 19-8-3); *In re Stroh*, 240 Ga. App. 835, 523 S.E.2d 887 (1999) (decided under former Code Section 19-8-3).

Adequate showing of domicile for six months preceding adoption petition. — Trial court erred by dismissing a couple's adoption petition upon finding that the couple were not residents of Georgia under the adoption statute, O.C.G.A. § 19-8-3(a)(3), based on moving out-of-state for one to attend a seminary and intending to move back after those studies were complete since the statute

required only a showing of domiciliary for the six months preceding the petition, which the couple established. *Sastre v. McDaniel*, 293 Ga. App. 671, 667 S.E.2d 896 (2008).

Construction with other law. — Superior court properly dismissed a grandmother's adoption petition on collateral estoppel grounds based on the juvenile court's previous order granting temporary custody to the maternal grandfather and grant of visitation rights to the grandmother; as a result, the superior court was not authorized to readjudicate the issue of permanent custody involving the child at issue. *Smith v. Hutcheson*, 283 Ga. App. 117, 640 S.E.2d 690 (2006).

Trial court erred in denying an aunt and uncle's petition to adopt their nephew under O.C.G.A. § 19-8-8, and should have applied O.C.G.A. § 19-8-7 as: (1) the for-

mer was not intended to be a general rule regarding the adoption of foreign children; (2) the aunt and uncle satisfied the jurisdictional and venue requirements of O.C.G.A. § 19-8-2 by filing the adoption petition in the superior court of their county of residence; and (3) as the child's aunt and uncle, they were relatives eligible to adopt under O.C.G.A. § 19-8-7(a). *In re Adoption of D.J.F.M.*, 284 Ga. App. 420, 643 S.E.2d 879 (2007).

Cited in *Weems v. Saul*, 52 Ga. App. 470, 183 S.E. 661 (1936); *Jones v. Harrison*, 210 Ga. 373, 80 S.E.2d 155 (1954); *Young v. Foster*, 148 Ga. App. 737, 252 S.E.2d 680 (1979); *Roberts v. Muscogee County Dep't of Family & Children Servs.*, 150 Ga. App. 750, 258 S.E.2d 689 (1979); *Moore v. Pope*, 196 Ga. App. 475, 396 S.E.2d 243 (1990) (decided prior to 1990 revision of Title 19, Chapter 8).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Adoption, § 15 et seq.

C.J.S. — 2 C.J.S., Adoption of Persons, §§ 15 et seq., 81, 82.

ALR. — Validity and effect of preadoption agreement derogating from the status or rights of an adopted child as fixed by statute, 9 ALR 1627.

Requirements as to residence or domicil of adoptee or adoptive parent for purposes of adoption, 33 ALR3d 176.

Religion as factor in adoption proceedings, 48 ALR3d 383.

Validity, construction, and application of statute imposing upon stepparent obligation to support child, 75 ALR3d 1129.

Validity and enforcement of agreement by foster parents that they will not attempt to adopt foster child, 78 ALR3d 770.

Age of prospective adoptive parent as factor in adoption proceedings, 84 ALR3d 665.

Marital status of prospective adopting parents as factor in adoption proceedings, 2 ALR4th 555.

Race as factor in adoption proceedings, 34 ALR4th 167.

Marital or sexual relationship between parties as affecting right to adopt, 42 ALR4th 776.

Validity and construction of surrogate parenting agreement, 77 ALR4th 70.

19-8-4. When surrender or termination of parental or guardian's rights required; consent of child of 14 or older necessary; acknowledgment of surrender; compliance with Interstate Compact on Placement of Children.

(a) Except as otherwise authorized in this chapter, a child who has any living parent or guardian may be adopted through the department or any child-placing agency only if each such parent and each such guardian:

(1) Has voluntarily and in writing surrendered all of his rights to the child to the department or to a child-placing agency as provided

in this Code section and the department or agency thereafter consents to the adoption; or

(2) Has had all of his rights to the child terminated by order of a court of competent jurisdiction, the child has been committed by the court to the department or to a child-placing agency for placement for adoption, and the department or agency thereafter consents to the adoption.

(b) In the case of a child 14 years of age or older, the written consent of the child to his adoption must be given and acknowledged in the presence of the court.

(c) The surrender to the department or to a child-placing agency specified in paragraphs (1) and (2) of subsection (e) of this Code section shall be executed following the birth of the child, and the pre-birth surrender to the department or to a child-placing agency specified in paragraph (3) of subsection (e) of this Code section shall be executed prior to the birth of the child. Each surrender shall be executed in the presence of a representative of the department or the agency and a notary. A copy shall be delivered to the individual signing the surrender at the time of the execution thereof.

(d) A person signing a surrender pursuant to this Code section shall have the right to withdraw the surrender as provided in subsection (b) of Code Section 19-8-9.

(e)(1) The surrender by a parent or guardian specified in paragraph (1) of subsection (a) of this Code section shall meet the requirements of subsection (a) of Code Section 19-8-26.

(2) The biological father who is not the legal father of a child may surrender all his rights to the child for the purpose of an adoption pursuant to this Code section. That surrender shall meet the requirements of subsection (d) of Code Section 19-8-26.

(3)(A) The biological father who is not the legal father of a child may execute a surrender of his rights to the child prior to the birth of the child for the purpose of an adoption pursuant to this Code section. A pre-birth surrender, when signed under oath by the alleged biological father, shall serve to relinquish the alleged biological father's rights to the child and to waive the alleged biological father's right to notice of any proceeding with respect to the child's adoption, custody, or guardianship. The court in any adoption proceeding shall have jurisdiction to enter a final order of adoption of the child based upon the pre-birth surrender and in other proceedings to determine the child's legal custody or guardianship shall have jurisdiction to enter an order for those purposes.

(B) The responsibilities of an alleged biological father are permanently terminated only upon the entry of a final order of

adoption. A person executing a pre-birth surrender pursuant to this Code section shall have the right to withdraw the surrender within ten days from the date of execution thereof, notwithstanding the date of birth of the child.

(C) If a final order of adoption is not entered after the execution of a pre-birth surrender and paternity is established by acknowledgment, by administrative order, or by judicial order, then the alleged biological father shall be responsible for child support or other financial obligations to the child or to the child's mother, or to both.

(D) The pre-birth surrender shall not be valid for use by a legal father as defined under paragraph (6) of Code Section 19-8-1 or for any man who has executed either a voluntary acknowledgment of legitimation pursuant to the provisions of paragraph (2) of subsection (g) of Code Section 19-7-22 or a voluntary acknowledgment of paternity pursuant to the provisions of Code Section 19-7-46.1.

(E) The pre-birth surrender may be executed at any time after the biological mother executes a sworn statement identifying such person as an alleged biological father of the biological mother's unborn child.

(F) The pre-birth surrender shall meet the requirements of subsection (f) of Code Section 19-8-26.

(f) A surrender of rights shall be acknowledged by the person who surrenders those rights by also signing an acknowledgment meeting the requirements of subsection (g) of Code Section 19-8-26.

(g) Whenever the legal mother surrenders her parental rights pursuant to this Code section, she shall execute an affidavit meeting the requirements of subsection (h) of Code Section 19-8-26.

(h) Whenever rights are surrendered to the department or to a child-placing agency, the department or agency representative before whom the surrender is signed shall execute an affidavit meeting the requirements of subsection (j) of Code Section 19-8-26.

(i) A surrender pursuant to this Code section may be given by any parent or biological father who is not the legal father of the child irrespective of whether such parent or biological father has arrived at the age of majority. The surrender given by any such minor shall be binding upon him as if the individual were in all respects sui juris.

(j) In any surrender pursuant to this Code section, the provisions of Chapter 4 of Title 39, relating to the Interstate Compact on the Placement of Children, if applicable, shall be complied with. (Code 1981, § 19-8-4, enacted by Ga. L. 1990, p. 1572, § 5; Ga. L. 1999, p. 252, § 3; Ga. L. 2007, p. 342, §§ 1, 2/HB 497.)

Cross references. — Termination of parental rights, T. 15, C. 11. Adoption — Expediting uncontested agency adoption hearings, Ga. Unif. Sup. Ct. R. 47.

Editor's notes. — Ga. L. 1999, p. 252, § 11, not codified by the General Assembly, provides that: "The provisions of this Act shall apply to petitions for adoption filed on or after July 1, 1999, except that each surrender of rights filed pursuant to a petition filed on or after July 1, 1999, shall be effective if such surrender of rights complies with the provisions of law in effect on the date of the execution of such surrender of rights."

Ga. L. 2007, p. 342, § 10/HB 497, not codified by the General Assembly, provides that the amendment to this Code section shall apply to proceedings under this chapter on or after July 1, 2007.

Law reviews. — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969). For

article surveying Georgia cases dealing with domestic relations from June 1977 through May 1978, see 30 Mercer L. Rev. 59 (1978).

For a note on the role of a judicial determination of paternity in the inheritance rights of illegitimate children in Georgia, see 16 Ga. L. Rev. 171 (1981). For note, "In re Baby Girl Eason: Expanding the Constitutional Rights of Unwed Fathers," see 39 Mercer L. Rev. 997 (1988). For note, "Surrogate Mother Agreements in Georgia: Conflict and Accord with Statutory and Case Law," see 4 Ga. St. U.L. Rev. 153 (1988).

For comment on statutes requiring consent of mother, but not of father, as prerequisite to adoption of illegitimate child, violating the fourteenth amendment equal protection clause, see 29 Emory L.J. 833 (1981). For comment on "Grandparents' Visitation Rights in Georgia," see 29 Emory L.J. 1083 (1980).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1941, p. 300, § 3 prior to revision of this chapter by Ga. L. 1977, p. 201 and former § 19-8-3 are included in the annotations for this Code section.

Judge hearing adoption case has wide discretion which will not be overturned unless the judge's discretion has been abused so that even slight evidence will support the judgment denying the petition. *Owens v. Griggs*, 151 Ga. App. 730, 261 S.E.2d 463 (1979) (decided under Ga. L. 1941, p. 300, § 3).

In adoption proceedings, best interest of child is always a prime factor to be considered. *Owens v. Griggs*, 151 Ga. App. 730, 261 S.E.2d 463 (1979) (decided under Ga. L. 1941, p. 300, § 3).

Consent of child's legal custodian is an absolute requirement. — Absolute requirement that consent of legal custodian be obtained as prerequisite to adoption applies as fully when Department of Family and Children Services is custodian as it does when natural parents have custody. *Roberts v. Muscogee County Dep't of Family & Children Servs.*, 150

Ga. App. 750, 258 S.E.2d 689 (1979) (decided under Ga. L. 1941, p. 300, § 3).

Termination of parental right requires parent's consent or forfeiture. — Evidence terminating parental right of living parent must be legally sufficient to authorize finding of fact by court that consent has been given or that parent has forfeited right to relationship. *Owens v. Griggs*, 151 Ga. App. 730, 261 S.E.2d 463 (1979) (decided under Ga. L. 1941, p. 300, § 3).

Intervention of county agency in adoption proper after parental rights terminated. — County Department of Family and Children Services was properly permitted to intervene with regard to a couple's petition seeking to adopt a child as the child was adjudicated deprived and placed in the temporary custody of the Department. While the biological parents' surrender of their parental rights was the basis for the adoption petition, the Department remained the temporary legal custodian of the child and, given that the Department's interest in the child, the juvenile court did not err by allowing the Department to intervene through the De-

partment's objection to the adoption. *Sastre v. McDaniel*, 293 Ga. App. 671, 667 S.E.2d 896 (2008).

When court is required to deny adoption. — If there is no parental consent and the natural parent has not abandoned the child, the court is required to deny the adoption. *Spires v. Bittick*, 171 Ga. App. 914, 321 S.E.2d 407 (1984) (decided under former § 19-8-3).

No time limitation in filing adoption petition. — Because a parent's written surrender of parental rights did not expire, and O.C.G.A. § 19-8-4 did not have a time limitation for filing an adoption petition, the appeals court rejected that parent's argument that such became invalid when the Department of Family and Children Services did not pursue adoption. *In the Interest of A.C.*, 283 Ga. App. 743, 642 S.E.2d 418 (2007).

Failure to pay child support. — Mere failure to pay child support does not in and of itself evince such abandonment of the child as to render the natural parent's consent to adoption unnecessary; however, abandonment is a separate issue from failure to pay child support, which though admittedly a type of abandonment, constitutes a separate ground for terminating parental rights under the law. *Ward v. Weymouth*, 151 Ga. App. 341, 259 S.E.2d 727 (1979) (decided under Ga. L. 1941, p. 300, § 3).

Failure to pay child support. — Mere failure to promptly pay child support or to be persistent in exercising visitation rights is insufficient to terminate parental rights. *Spires v. Bittick*, 171 Ga. App. 914, 321 S.E.2d 407 (1984) (decided under former § 19-8-3).

Revocation of consent to adoption. — Consent for adoption given freely and voluntarily may not be revoked as matter of right, but revocation may be had for good and sufficient cause. *Wellfort v. Bowick*, 147 Ga. App. 565, 249 S.E.2d 363 (1978) (decided under Ga. L. 1941, p. 300, § 3).

Father, after giving consent to third party to adopt, cannot consent to adoption by grandparents. *Irwin v. Smith*, 240 Ga. 553, 242 S.E.2d 64 (1978) (decided under Ga. L. 1941, p. 300, § 3).

Unwed father entitled to same fitness test afforded unwed mothers. — Because Georgia law affords an unwed mother a fitness test or veto power under the same circumstances the law must also afford an unwed father a fitness test or veto power, provided he has not abandoned his opportunity interest. *In re Baby Girl Eason*, 257 Ga. 292, 358 S.E.2d 459 (1987) (decided under former § 19-8-3).

Virtual adoption. — Law of virtual adoption does not require technical words or formality in execution of agreements and it is not necessary that the parties be much acquainted with the law; the nature of the parties' intended and agreed upon provision for the child in question is controlling. *Anderson v. Maddox*, 257 Ga. 478, 360 S.E.2d 590 (1987) (decided under former § 19-8-3).

Assignment of adoption rights not authorized. — There is nothing in the adoption statute which authorizes an assignment of adoption rights from one third party to another. *Tyson v. Department of Human Resources*, 165 Ga. App. 414, 301 S.E.2d 485 (1983) (decided under former § 19-8-3).

Intent of phrase "failed significantly ... to provide ... support" contained in former § 19-8-6(b) was to require more, or significant, support before parental consent would be required as provided in former § 19-8-3. *Prescott v. Judy*, 157 Ga. App. 735, 278 S.E.2d 493 (1981) (decided under former § 19-8-3).

If any evidence supports judgment in adoption proceeding, the judgment must be affirmed by the Court of Appeals. *Prescott v. Judy*, 157 Ga. App. 735, 278 S.E.2d 493 (1981) (decided under former § 19-8-3).

Amendment of petition to cure omission of marriage certificate. — Although when appellees filed their petition for adoption, their marriage certificate was not attached, it was supplied by amendment which related back to date pleading was filed, thus curing omission from the petition. *Owens v. Worley*, 163 Ga. App. 488, 295 S.E.2d 199 (1982) (decided under former § 19-8-3).

Adoption laws are to be strictly construed in favor of natural parents. *Johnson v. Strickland*, 88 Ga. App. 281, 76

S.E.2d 533 (1953) (decided under Ga. L. 1941, p. 300, § 3).

Adoption is a right which did not exist at common law. Thus, since it is statutory in nature, it must be strictly construed in favor of natural parents. *Johnson v. Edison*, 235 Ga. 820, 221 S.E.2d 813 (1976) (decided under Ga. L. 1941, p. 300, § 3).

Consideration given to natural parents. — Although best interest of child is ultimate concern, focus must first be on natural parents. *Johnson v. Edison*, 235 Ga. 820, 221 S.E.2d 813 (1976) (decided under Ga. L. 1941, p. 300, § 3).

Written consent of living parents freely and voluntarily given is essential prerequisite to adoption proceedings. *Ritchie v. Dillon*, 103 Ga. App. 7, 118 S.E.2d 115 (1961) (decided under Ga. L. 1941, p. 300, § 3).

Natural fathers have rights in their children and termination of those rights is required in adoption proceeding. *Wojciechowski v. Allen*, 238 Ga. 556, 234 S.E.2d 325 (1977) (decided under Ga. L. 1941, p. 300, § 3).

When inducements securing consent prevent free exercise of parents' will, court must deny adoption. *Keheley v. Koonce*, 85 Ga. App. 893, 70 S.E.2d 522 (1952) (decided under Ga. L. 1941, p. 300, § 3).

Failure to obtain father's consent to adoption of legitimate child. — If child is legitimate, failure to obtain father's consent to the child's adoption will bar adoption. *Ellis v. Woods*, 214 Ga. 105, 103 S.E.2d 297 (1958) (decided under Ga. L. 1941, p. 300, § 3).

Consent by one who has lost parental rights by order of a court of competent jurisdiction is not required. *McDonald v. Hester*, 115 Ga. App. 740, 155 S.E.2d 720 (1967) (decided under Ga. L. 1941, p. 300, § 3).

When one parent's rights have been forfeited. — Both parents need not be in same category respecting adoption of their child, that is, both consenting or both being in position of having abandoned child. If either parent consents, that is sufficient to meet requirements of section as to consent so far as that parent is concerned, and if either parent has aban-

doned child that, too, would meet requirements of exception to statute as to that parent. Therefore, if one parent consents to the adoption and the other parent has abandoned the child so that consent of such parent is not necessary, the essential provisions of the law relating to parental rights are satisfied. *Phillips v. Massey*, 74 Ga. App. 239, 39 S.E.2d 493 (1946) (decided under Ga. L. 1941, p. 300, § 3).

Adoption agency as legal custodian stands in loco parentis and has all legal rights of natural parent, including benefit of prima facie right to custody. *Drummond v. Fulton County Dep't of Family & Children Servs.*, 237 Ga. 449, 228 S.E.2d 839 (1976), cert. denied, 432 U.S. 905, 97 S. Ct. 2949, 53 L. Ed. 2d 1077 (1977) (decided under Ga. L. 1941, p. 300, § 3).

Placement agency has right to choose adoptive parents by giving or refusing consent to adopt. *Drummond v. Fulton County Dep't of Family & Children Servs.*, 237 Ga. 449, 228 S.E.2d 839 (1976), cert. denied, 432 U.S. 905, 97 S. Ct. 2949, 53 L. Ed. 2d 1077 (1977) (decided under Ga. L. 1941, p. 300, § 3).

Child has no right to choose adoptive parents or consent to adoption until age of 14. *Drummond v. Fulton County Dep't of Family & Children Servs.*, 237 Ga. 449, 228 S.E.2d 839 (1976), cert. denied, 432 U.S. 905, 97 S. Ct. 2949, 53 L. Ed. 2d 1077 (1977) (decided under Ga. L. 1941, p. 300, § 3).

Contract of adoption is irrelevant and immaterial in adoption case other than on question of consent. *Wheeler v. Little*, 113 Ga. App. 106, 147 S.E.2d 352 (1966) (decided under Ga. L. 1941, p. 300, § 3).

When consent not free and voluntary. — After child's natural mother was offered plane fare if she would sign adoption agreement, consent to adoption, at least as to natural mother, was not freely and voluntarily given as required so as to preclude right to withdraw such consent as a matter of right because consent was based upon a contract which was void as against public policy. *Downs v. Wortman*, 228 Ga. 315, 185 S.E.2d 387 (1971) (decided under Ga. L. 1941, p. 300, § 3).

Consent given before mother saw offspring. — Mere fact that natural

mother consented to adoption before seeing her offspring would not permit her, as a matter of right, to repudiate contract under which her child had received valuable benefits, and to withdraw her consent. *Hendrix v. Hunter*, 99 Ga. App. 785, 110 S.E.2d 35 (1959) (decided under Ga. L. 1941, p. 300, § 3).

Mother's knowledge of who adoptive parents are. — While it is true that it is certainly best for all concerned that the natural mother not know who the adoptive parents are, and while it is generally true that welfare agencies will not recommend adoption when such is the case, nevertheless, such knowledge on the part of the natural mother is not, in and of itself, sufficient cause to withdraw her consent. *Hendrix v. Hunter*, 99 Ga. App. 785, 110 S.E.2d 35 (1959) (decided under Ga. L. 1941, p. 300, § 3).

Consent to adoption in exchange for money is void. — Contract wherein mother of child agrees to adoption by another in consideration of monetary consideration to herself is void as against public policy. *Downs v. Wortman*, 228 Ga. 315, 185 S.E.2d 387 (1971) (decided under Ga. L. 1941, p. 300, § 3).

If monetary consideration flows to child, contract is not void. — Contract wherein mother of child agrees to adoption of her child by another in consideration of monetary consideration which is to flow to child is not void as against public policy. *Downs v. Wortman*, 228 Ga. 315, 185 S.E.2d 387 (1971) (decided under Ga. L. 1941, p. 300, § 3).

Photostatic copy of mother's purported consent to adoption was prop-

erly admitted in evidence. *Smith v. Smith*, 224 Ga. 442, 162 S.E.2d 379 (1968) (decided under Ga. L. 1941, p. 300, § 3).

Admissibility of translation of consent from German to English. — Admission in evidence of translation into English from German of mother's written consent was not error when the witness, a university professor of the German language, submitted the document, which the professor swore was a correct translation of written consent. *Smith v. Smith*, 224 Ga. 442, 162 S.E.2d 379 (1968) (decided under Ga. L. 1941, p. 300, § 3).

Cited in *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); *Berry v. Samuels*, 145 Ga. App. 687, 244 S.E.2d 593 (1978); *Fulton County Dep't of Family & Children Servs. v. Perkins*, 244 Ga. 237, 259 S.E.2d 427 (1978); *Mead v. Owens*, 149 Ga. App. 303, 254 S.E.2d 431 (1979); *Nelson v. Taylor*, 244 Ga. 657, 261 S.E.2d 579 (1979); *Farmer v. Pressley*, 152 Ga. App. 288, 262 S.E.2d 499 (1979); *Hinkins v. Francis*, 154 Ga. App. 716, 270 S.E.2d 33 (1980); *Baker v. Nicholson*, 158 Ga. App. 267, 279 S.E.2d 717 (1981); *Curtis v. Jones*, 160 Ga. App. 904, 288 S.E.2d 615 (1982); *In re A.J.A.*, 164 Ga. App. 210, 296 S.E.2d 103 (1982); *In re C.C.B.*, 164 Ga. App. 3, 296 S.E.2d 198 (1982); *In re S.B.P.*, 164 Ga. App. 50, 296 S.E.2d 236 (1982); *In re S.D.S.*, 166 Ga. App. 344, 304 S.E.2d 85 (1983); *Ridgley v. Helms*, 168 Ga. App. 435, 309 S.E.2d 375 (1983); *Cain v. Lane*, 168 Ga. App. 405, 309 S.E.2d 401 (1983); *Baugh v. Robinson*, 179 Ga. App. 571, 346 S.E.2d 918 (1986); *In re J.S.J.*, 180 Ga. App. 873, 350 S.E.2d 843 (1986).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under Ga. L. 1941, p. 300, § 3 and former § 19-8-3 are included in the annotations for this Code section.

Minor mother's consent to adoption of illegitimate child. — Minor mother may give binding consent to adoption of her illegitimate child. 1948-49 Op. Att'y Gen. p. 615 (decided under Ga. L. 1941, p. 300, § 3).

Parental rights must be addressed. — If an adoption petition is presented to the court, and the rights of the natural parents or putative father have never been addressed, the court is required to deny the petition. 1985 Op. Att'y Gen. No. U85-34 (decided under former § 19-8-3).

Foreign adoptions. — When the only documentation submitted by a child-placing agency is a statement of consent to overseas adoption presumably

signed by the foreign guardian of the child, it is not sufficient to comply with the requirements of Georgia adoption law.

1985 Op. Att'y Gen. No. U85-34 (decided under former § 19-8-3).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Adoption, § 65 et seq.

C.J.S. — 2 C.J.S., Adoption of Persons, § 49 et seq.

ALR. — Consent by public authority or by person other than parents having control of child as necessary to valid adoption, 104 ALR 1464.

Right of natural parent, or other person whose consent is necessary to adoption of child, to withdraw consent previously given, 138 ALR 1038; 156 ALR 1011.

Sufficiency of parent's consent to adoption of child, 24 ALR2d 1127; 15 ALR5th 1.

Consent of natural parents as essential to adoption where parents are divorced, 47 ALR2d 824.

Necessity of securing consent of parents of illegitimate child to its adoption, 51 ALR2d 497.

What constitutes undue influence in obtaining a parent's consent to adoption of child, 50 ALR3d 918.

Right of adopted child to inherit from intestate natural grandparent, 60 ALR3d 631.

Right of natural parent to withdraw valid consent to adoption of child, 74 ALR3d 421.

Mistake or want of understanding as ground for revocation of consent to adoption or of agreement releasing infant to adoption placement agency, 74 ALR3d 489.

What constitutes "duress" in obtaining parent's consent to adoption of child or surrender of child to adoption agency, 74 ALR3d 527.

Parent's involuntary confinement, or failure to care for child as a result thereof, as permitting adoption without parental consent, 78 ALR3d 712.

Parent's involuntary confinement, or failure to care for child as result thereof, as evincing neglect, unfitness, or the like in dependency or divestiture proceeding, 79 ALR3d 417.

Adoption of child in absence of statutorily required consent of public or private agency or institution, 83 ALR3d 373.

Rights of unwed father to obstruct adoption of his child by withholding consent, 22 ALR4th 774; 61 ALR5th 151.

Necessity and sufficiency of consent to adoption by spouse of adopting parent, 38 ALR4th 768.

Natural parent's indigence as precluding finding that failure to support child waived requirement of consent to adoption, 71 ALR4th 305.

Postadoption visitation by natural parent, 78 ALR4th 218.

Validity of birth parent's "blanket" consent to adoption which fails to identify adoptive parent, 15 ALR5th 1.

Legal malpractice in defense of parents at proceedings to terminate parental rights over dependent or neglected children, 18 ALR5th 902.

Natural parent's indigence as precluding finding that failure to support child waived requirement of consent to adoption — general principles, 82 ALR5th 443.

Parents' mental illness or mental deficiency as ground for termination of parental rights — Constitutional issues, 110 ALR5th 579.

19-8-5. Surrender or termination of parental or guardian's rights where child to be adopted by third party.

(a) Except as otherwise authorized in this chapter, a child who has any living parent or guardian may be adopted by a third party who is neither the stepparent nor relative of that child, as described in subsection (a) of Code Sections 19-8-6 and 19-8-7, only if each such living parent and each such guardian has voluntarily and in writing

surrendered all of his or her rights to such child to that third party for the purpose of enabling that third party to adopt such child. Except as provided in subsection (m) of this Code section, no child shall be placed with a third party for purposes of adoption unless prior to the date of placement a home study shall have been completed, and the home study report recommends placement of a child in such third party's home.

(b) In the case of a child 14 years of age or older, the written consent of the child to his adoption must be given and acknowledged in the presence of the court.

(c) The surrender specified in paragraphs (1) and (2) of subsection (e) of this Code section shall be executed following the birth of the child, and the pre-birth surrender specified in paragraph (3) of subsection (e) of this Code section shall be executed prior to the birth of the child. Each surrender shall be executed in the presence of a notary. The name and address of each person to whom the child is surrendered may be omitted to protect confidentiality, provided the surrender sets forth the name and address of his agent for purposes of notice of withdrawal as provided for in subsection (d) of this Code section. A copy shall be delivered to the individual signing the surrender at the time of the execution thereof.

(d) A person signing a surrender pursuant to this Code section shall have the right to withdraw the surrender as provided in subsection (b) of Code Section 19-8-9.

(e)(1) The surrender by a parent or guardian specified in subsection (a) of this Code section shall meet the requirements of subsection (c) of Code Section 19-8-26.

(2) The biological father who is not the legal father of a child may surrender all his rights to the child for purposes of an adoption pursuant to this Code section. That surrender shall meet the requirements of subsection (d) of Code Section 19-8-26.

(3)(A) The biological father who is not the legal father of a child may execute a surrender of his rights to the child prior to the birth of the child for the purpose of an adoption pursuant to this Code section. A pre-birth surrender, when signed under oath by the alleged biological father, shall serve to relinquish the alleged biological father's rights to the child and to waive the alleged biological father's right to notice of any proceeding with respect to the child's adoption, custody, or guardianship. The court in any adoption proceeding shall have jurisdiction to enter a final order of adoption of the child based upon the pre-birth surrender and in other proceedings to determine the child's legal custody or guardianship shall have jurisdiction to enter an order for those purposes.

(B) The responsibilities of an alleged biological father are permanently terminated only upon the entry of a final order of

adoption. A person executing a pre-birth surrender pursuant to this Code section shall have the right to withdraw the surrender within ten days from the date of execution thereof, notwithstanding the date of birth of the child.

(C) If a final order of adoption is not entered after the execution of a pre-birth surrender and paternity is established by acknowledgment, by administrative order, or by judicial order, then the alleged biological father shall be responsible for child support or other financial obligations to the child or to the child's mother, or to both.

(D) The pre-birth surrender shall not be valid for use by a legal father as defined under paragraph (6) of Code Section 19-8-1 or for any man who has executed either a voluntary acknowledgment of legitimation pursuant to the provisions of paragraph (2) of subsection (g) of Code Section 19-7-22 or a voluntary acknowledgment of paternity pursuant to the provisions of Code Section 19-7-46.1.

(E) The pre-birth surrender may be executed at any time after the biological mother executes a sworn statement identifying such person as an alleged biological father of the biological mother's unborn child.

(F) The pre-birth surrender shall meet the requirements of subsection (f) of Code Section 19-8-26.

(f) A surrender of rights shall be acknowledged by the person who surrenders those rights by also signing an acknowledgment meeting the requirements of subsection (g) of Code Section 19-8-26.

(g) Whenever the legal mother surrenders her parental rights pursuant to this Code section, she shall execute an affidavit meeting the requirements of subsection (h) of Code Section 19-8-26.

(h) Whenever rights are surrendered pursuant to this Code section, the representative of each petitioner shall execute an affidavit meeting the requirements of subsection (k) of Code Section 19-8-26.

(i) A surrender pursuant to this Code section may be given by any parent or biological father who is not the legal father of the child sought to be adopted irrespective of whether such parent or biological father has arrived at the age of majority. The surrender given by any such minor shall be binding upon him as if the individual were in all respects sui juris.

(j) A copy of each surrender specified in subsection (a) of this Code section, together with a copy of the acknowledgment specified in subsection (f) of this Code section and a copy of the affidavits specified in subsections (g) and (h) of this Code section and the name and address

of each person to whom the child is surrendered, shall be mailed, by registered or certified mail or statutory overnight delivery, return receipt requested, to the

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Atlanta, Georgia

within 15 days from the execution thereof. Upon receipt of the copy the department may commence its investigation as required in Code Section 19-8-16.

(k) A petition for adoption pursuant to subsection (a) of this Code section shall be filed within 60 days from the date of the surrender. If the petition is not filed within the time period specified by this subsection or if the proceedings resulting from the petition are not concluded with an order granting the petition, the surrender shall operate as follows according to the election made therein by the legal parent or guardian of the child:

(1) In favor of that legal parent or guardian, with the express stipulation that neither this nor any other provision of the surrender shall be deemed to impair the validity, absolute finality, or totality of the surrender under any other circumstance, once the revocation period has elapsed;

(2) In favor of the licensed child-placing agency designated in the surrender of rights, if any; or

(3) If the legal parent or guardian is not designated and no child-placing agency is designated in the surrender of rights, or if the designated child-placing agency declines to accept the child for placement for adoption, in favor of the department for placement for adoption pursuant to subsection (a) of Code Section 19-8-4. The court may waive the 60 day time period for filing the petition for excusable neglect.

(l) In any surrender pursuant to this Code section, the provisions of Chapter 4 of Title 39, relating to the Interstate Compact on the Placement of Children, if applicable, shall be complied with.

(m) If the home study for a third-party adoption has not occurred prior to the date of placement, then the third party shall, at the time of the filing of the petition for adoption, file a motion with the court seeking an order authorizing placement of such child prior to the completion of the home study. Such motion shall identify the evaluator that the petitioner has selected to perform the home study. The court may waive the requirement of a preplacement home study in cases when a child to be adopted already resides in the prospective adoptive

home pursuant to a court order of guardianship, testamentary guardianship, or custody.

(n) The court may grant the motion for placement prior to the completion of a home study if the court finds that such placement is in the best interest of the child.

(o) If the court grants the motion for placement prior to the completion of a home study and authorizes placement of a child prior to the completion of the home study, then:

(1) Such child shall be permitted to remain in the home of the third party with whom the parent or guardian placed such child pending further order of the court;

(2) A copy of the order authorizing placement of such child prior to the completion of the home study shall be delivered to the department and the evaluator selected to perform the home study by the clerk of the court within 15 days of the date of the entry of such order; and

(3) The home study, if not already in process, shall be initiated by the evaluator selected by the petitioner or appointed by the court within ten days of such evaluator's receipt of the court's order. (Code 1981, § 19-8-5, enacted by Ga. L. 1990, p. 1572, § 5; Ga. L. 1991, p. 1640, § 1; Ga. L. 1999, p. 252, § 4; Ga. L. 2000, p. 1589, § 3; Ga. L. 2003, p. 503, § 2; Ga. L. 2007, p. 342, §§ 3, 4/HB 497; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2011, p. 573, §§ 2, 3/SB 172.)

Editor's notes. — Ga. L. 1999, p. 252, § 11, not codified by the General Assembly, provides that: "The provisions of this Act shall apply to petitions for adoption filed on or after July 1, 1999, except that each surrender of rights filed pursuant to a petition filed on or after July 1, 1999, shall be effective if such surrender of rights complies with the provisions of law in effect on the date of the execution of such surrender of rights."

Ga. L. 2007, p. 342, § 10/HB 497, not codified by the General Assembly, provides that the amendment to this Code section shall apply to proceedings under this chapter on or after July 1, 2007.

Ga. L. 2011, p. 573, § 8/SB 172, not codified by the General Assembly, provides that the amendment to this Code section shall apply to all placements of children for adoption and all petitions for adoption filed on or after July 1, 2011.

Law reviews. — For article, "Who is Georgia's Mother? Gestational Surrogacy: A Formulation for Georgia's Legislature," see 38 Ga. L. Rev. 395 (2003).

For comment on *In re Baby Girl Clausen*, 496 N.W.2d 239 (Iowa 1992), and discussion of Georgia law, see 11 Ga. St. U.L. Rev. 737 (1995).

JUDICIAL DECISIONS

Custodian not legal guardian. — Grandmother who was temporary legal custodian of child under juvenile court deprivation order was not a legal guardian for purposes of surrendering rights in adoption proceedings. *Edgar v. Shave*, 205

Ga. App. 337, 422 S.E.2d 234 (1992).

Foster parents did not have right to adopt child when rights were surrendered in favor of grandmother. — Foster parents did not have standing to pursue an adoption of a foster child that had been living happily with the child's grandmother for three years because the biological parents did not surrender their rights in favor of the foster parents under O.C.G.A. § 19-8-5, and the Foster Par-

ent's Bill of Rights, O.C.G.A. § 49-5-281, did not grant adoption rights. *Owen v. Watts*, 303 Ga. App. 867, 695 S.E.2d 62, cert. denied, U.S. , 131 S. Ct. 156, 178 L. Ed. 2d 93 (2010).

Cited in *Mabou v. Eller*, 232 Ga. App. 635, 502 S.E.2d 760 (1998); *In re Stroh*, 240 Ga. App. 835, 523 S.E.2d 887 (1999); *In the Interest of A.C.*, 283 Ga. App. 743, 642 S.E.2d 418 (2007).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 1B Am. Jur. Pleading and Practice Forms, Adoption, § 93.

ALR. — Parents' mental illness or men-

tal deficiency as ground for termination of parental rights — Constitutional issues, 110 ALR5th 579.

19-8-6. Surrender of parental rights where father and mother not still married; surrender of rights where only one parent still living.

(a) Except as otherwise authorized in this chapter:

(1) A child whose legal father and legal mother are both living but are not still married to each other may be adopted by the spouse of either parent only when the other parent voluntarily and in writing surrenders all of his rights to the child to that spouse for the purpose of enabling that spouse to adopt the child and the other parent consents to the adoption and, where there is any guardian of that child, each such guardian has voluntarily and in writing surrendered to such spouse all of his rights to the child for purposes of such adoption; or

(2) A child who has only one parent still living may be adopted by the spouse of that parent only if that parent consents to the adoption and, where there is any guardian of that child, each such guardian has voluntarily and in writing surrendered to such spouse all of his rights to the child for the purpose of such adoption.

(b) In the case of a child 14 years of age or older, the written consent of the child to his adoption must be given and acknowledged in the presence of the court.

(c) The surrender specified in this Code section shall be executed, following the birth of the child, in the presence of a notary. A copy shall be delivered to the individual signing the surrender at the time of the execution thereof.

(d) A person signing a surrender pursuant to this Code section shall have the right to withdraw the surrender as provided in subsection (b) of Code Section 19-8-9.

(e)(1) The surrender by a parent or guardian specified in subsection (a) of this Code section shall meet the requirements of subsection (e) of Code Section 19-8-26.

(2) The biological father who is not the legal father of a child may surrender all his rights to the child for purposes of an adoption pursuant to this Code section. That surrender shall meet the requirements of subsection (d) of Code Section 19-8-26.

(f) A surrender of rights shall be acknowledged by the person who surrenders those rights by also signing an acknowledgment meeting the requirements of subsection (g) of Code Section 19-8-26.

(g) Whenever the legal mother surrenders her parental rights or consents to the adoption of her child by her spouse pursuant to this Code section, she shall execute an affidavit meeting the requirements of subsection (h) of Code Section 19-8-26.

(h) Whenever rights are surrendered pursuant to this Code section, the representative of each petitioner shall execute an affidavit meeting the requirements of subsection (k) of Code Section 19-8-26.

(i) A surrender or consent pursuant to this Code section may be given by any parent or biological father who is not the legal father of the child sought to be adopted irrespective of whether such parent or biological father has arrived at the age of majority. The surrender given by any such minor shall be binding upon him as if the individual were in all respects sui juris.

(j) The parental consent by the spouse of a stepparent seeking to adopt a child of that spouse and required by subsection (a) of this Code section shall be as provided in subsection (l) of Code Section 19-8-26. (Code 1981, § 19-8-6, enacted by Ga. L. 1990, p. 1572, § 5; Ga. L. 1991, p. 1640, § 2; Ga. L. 1999, p. 252, § 5.)

Editor's notes. — Ga. L. 1999, p. 252, § 11, not codified by the General Assembly, provides that: "The provisions of this Act shall apply to petitions for adoption filed on or after July 1, 1999, except that each surrender of rights filed pursuant to a petition filed on or after July 1, 1999, shall be effective if such surrender of

rights complies with the provisions of law in effect on the date of the execution of such surrender of rights."

Law reviews. — For annual survey on law of domestic relations, see 42 Mercer L. Rev. 201 (1990).

For comment on adoptions by homosexuals, see 55 Mercer L. Rev. 1415 (2004).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former § 19-8-6 are included in the annotations for this Code section.

Constitutionality. — Grant of adoption pursuant to former § 19-8-6(b), prior

to the Supreme Court's ruling in *Thorne v. Padgett*, 259 Ga. 650, 386 S.E.2d 155 (1990), must be reversed because former subsection (b) foreclosed an inquiry into a parent's reasons for failure to support the child to be adopted, thus denying due

process. *Moore v. Butler*, 195 Ga. App. 1, 392 S.E.2d 285 (1990) (decided under former § 19-8-6).

Findings of fact and conclusions of law are mandatory. — Adoption decree terminating a father's parental rights failed to set forth mandatory findings of fact and conclusions of law, pursuant to O.C.G.A. § 19-8-18(b), based on the criteria of O.C.G.A. § 19-8-10(b)(1) as to whether the father's failure to communicate with the child for two years occurred immediately prior to the filing of the petition for adoption, whether the father made a bona fide attempt to communicate with the child, whether the father's failure to communicate was without justifiable cause, and the basis for the opinion regarding the best interests of the child. *Maynard v. Brown*, 276 Ga. App. 229, 622 S.E.2d 901 (2005).

Trial court erred by terminating a biological father's parental rights and ordering step-father adoption because the court failed to set forth specific findings of fact to support the conclusion that the requisites of O.C.G.A. § 19-8-10(b) as to abandonment of the child had been met. *Ray v. Hann*, 323 Ga. App. 45, 746 S.E.2d 600 (2013).

Stepparent adoption. — Trial court erred by holding a biological father, who was not the legal father of the child, could not surrender all his rights to the child for purposes of adoption by the child's stepfather. *In re C.N.W.*, 274 Ga. 765, 560 S.E.2d 1 (2002).

Because a father failed to communicate with the children or to pay the court-ordered support for more than one year, the father's consent to the adoption of the children by their stepparent, the mother's new husband, was not required. *McCurry v. Harding*, 270 Ga. App. 416, 606 S.E.2d 639 (2004).

Trial court did not abuse the court's broad discretion in finding the adoption of a child by a stepparent to be in the child's best interest and thereby terminating a biological parent's parental rights as the evidence established that the biological parent failed to see the child for over five years, never provided financial support for the child, and failed to communicate with the child with no justifiable cause for such

failure shown. *Johnson v. Taylor*, 292 Ga. App. 354, 665 S.E.2d 49 (2008).

Stepparent adoption reversed when natural parent without notice. — Trial court erred by granting a stepparent's petition to adopt an eight-year-old child and by terminating the parental rights of one of the child's natural parents as the trial court failed to make any finding in the court's adoption decree as to whether the natural parent's lack of communication with the child was without justifiable cause as required by O.C.G.A. § 19-8-18(b). Further, the trial court erred by basing the court's adoption decision, in part, on O.C.G.A. § 19-8-10(a)(4) as the stepparent's petition did not assert any claim pursuant to § 19-8-10(a) and, instead, relied exclusively on § 19-8-10(b); thus, the natural parent was not served with a petition making allegations under subsection (a) and, therefore, received no notification that the natural parent had to prepare to show cause why the natural parent's parental rights should not be terminated pursuant to subsection (a). *Smallwood v. Davis*, 292 Ga. App. 173, 664 S.E.2d 254 (2008).

Mother's affidavit containing knowingly false statements purporting to address the material issues of the natural father's lack of parental involvement does not substantially comply with the requirements of O.C.G.A. §§ 19-8-6(g) and 19-8-26(h) so as to sustain a judgment terminating the father's parental rights based thereon. *Coleman v. Grimes*, 250 Ga. App. 880, 553 S.E.2d 185 (2001).

Although a mother failed to provide an affidavit as required by O.C.G.A. § 19-8-26(h) in an adoption petition by the new husband over the mother's three minor children, such was deemed immaterial and therefore harmless because the statutory requisites had been met because the mother alleged that the father did not live with the children, that he failed to pay the court-ordered support for them for more than a year, and the mother asserted that the father provided no financial assistance. *McCurry v. Harding*, 270 Ga. App. 416, 606 S.E.2d 639 (2004).

Cited in *Moore v. Pope*, 196 Ga. App. 475, 396 S.E.2d 243 (1990) (decided prior to 1990 revision of Title 19, Chapter 8).

RESEARCH REFERENCES

ALR. — Rights of unwed father to obstruct adoption of his child by withholding consent, 61 ALR5th 151.

Natural parent's indigence as precluding finding that failure to support child waived requirement of consent to adoption — general principles, 82 ALR5th 443.

Natural parent's indigence resulting from unemployment or underemployment as precluding finding that failure to support child waived requirement of consent to adoption, 83 ALR5th 375.

19-8-7. Surrender or termination of parental or guardian's rights where child adopted by relative.

(a) Except as otherwise authorized in this Code section, a child who has any living parent or guardian may be adopted by a relative who is related by blood or marriage to the child as a grandparent, great-grandparent, aunt, uncle, great aunt, great uncle, or sibling only if each such living parent and each such guardian has voluntarily and in writing surrendered to that relative and any spouse of such relative all of his or her rights to the child for the purpose of enabling that relative and any such spouse to adopt the child.

(b) In the case of a child 14 years of age or older, the written consent of the child to his adoption must be given and acknowledged in the presence of the court.

(c) The surrender specified in paragraphs (1) and (2) of subsection (e) of this Code section shall be executed following the birth of the child, and the pre-birth surrender specified in paragraph (3) of subsection (e) of this Code section shall be executed prior to the birth of the child. Each surrender shall be executed in the presence of a notary. A copy shall be delivered to the individual signing the surrender at the time of the execution thereof.

(d) A person signing a surrender pursuant to this Code section shall have the right to withdraw the surrender as provided in subsection (b) of Code Section 19-8-9.

(e)(1) The surrender by a parent or guardian specified in subsection (a) of this Code section shall meet the requirements of subsection (e) of Code Section 19-8-26.

(2) The biological father who is not the legal father of the child may surrender all his rights to the child for purposes of an adoption pursuant to this Code section. That surrender shall meet the requirements of subsection (d) of Code Section 19-8-26.

(3)(A) The biological father who is not the legal father of a child may execute a surrender of his rights to the child prior to the birth of the child for the purpose of an adoption pursuant to this Code

section. A pre-birth surrender, when signed under oath by the alleged biological father, shall serve to relinquish the alleged biological father's rights to the child and to waive the alleged biological father's right to notice of any proceeding with respect to the child's adoption, custody, or guardianship. The court in any adoption proceeding shall have jurisdiction to enter a final order of adoption of the child based upon the pre-birth surrender and in other proceedings to determine the child's legal custody or guardianship shall have jurisdiction to enter an order for those purposes.

(B) The responsibilities of an alleged biological father are permanently terminated only upon the entry of a final order of adoption. A person executing a pre-birth surrender pursuant to this Code section shall have the right to withdraw the surrender within ten days from the date of execution thereof, notwithstanding the date of birth of the child.

(C) If a final order of adoption is not entered after the execution of a pre-birth surrender and paternity is established by acknowledgment, by administrative order, or by judicial order, then the alleged biological father shall be responsible for child support or other financial obligations to the child or to the child's mother, or to both.

(D) The pre-birth surrender shall not be valid for use by a legal father as defined under paragraph (6) of Code Section 19-8-1 or for any man who has executed either a voluntary acknowledgment of legitimation pursuant to the provisions of paragraph (2) of subsection (g) of Code Section 19-7-22 or a voluntary acknowledgment of paternity pursuant to the provisions of Code Section 19-7-46.1.

(E) The pre-birth surrender may be executed at any time after the biological mother executes a sworn statement identifying such person as an alleged biological father of the biological mother's unborn child.

(F) The pre-birth surrender shall meet the requirements of subsection (f) of Code Section 19-8-26.

(f) A surrender of rights shall be acknowledged by the person who surrenders those rights by also signing an acknowledgment meeting the requirements of subsection (g) of Code Section 19-8-26.

(g) Whenever the legal mother surrenders her parental rights pursuant to this Code section, she shall execute an affidavit meeting the requirements of subsection (h) of Code Section 19-8-26.

(h) Whenever rights are surrendered pursuant to this Code section the representative of each petitioner shall execute an affidavit meeting the requirements of subsection (k) of Code Section 19-8-26.

(i) A surrender pursuant to this Code section may be given by any parent or biological father who is not the legal father of the child sought to be adopted irrespective of whether such parent or biological father has arrived at the age of majority. The surrender given by any such minor shall be binding upon him as if the individual were in all respects *sui juris*. (Code 1981, § 19-8-7, enacted by Ga. L. 1990, p. 1572, § 5; Ga. L. 1991, p. 1640, § 3; Ga. L. 1999, p. 252, § 6; Ga. L. 2003, p. 503, § 3; Ga. L. 2007, p. 342, §§ 5, 6/HB 497; Ga. L. 2008, p. 324, § 19/SB 455.)

Editor's notes. — Ga. L. 1999, p. 252, § 11, not codified by the General Assembly, provides that: "The provisions of this Act shall apply to petitions for adoption filed on or after July 1, 1999, except that each surrender of rights filed pursuant to a petition filed on or after July 1, 1999, shall be effective if such surrender of rights complies with the provisions of law in effect on the date of the execution of such surrender of rights."

Ga. L. 2007, p. 342, § 10/HB 497, not codified by the General Assembly, provides that the amendment to this Code

section shall apply to proceedings under this chapter on or after July 1, 2007.

Law reviews. — For article, "Who is Georgia's Mother? Gestational Surrogacy: A Formulation for Georgia's Legislature," see 38 Ga. L. Rev. 395 (2003).

For comment, "The Constitutional Rights of Unwed Fathers in Georgia: In re Baby Girl Eason," see 5 Ga. St. U.L. Rev. 591 (1989). For case comment, "In re Baby Girl Eason: Balancing Three Competing Interests in Third Party Adoptions," see 22 Ga. L. Rev. 1217 (1988).

JUDICIAL DECISIONS

Relinquishment not determinative of adoption petition. — Fact that the child's father surrendered his rights to the child over to the paternal grandparents pursuant to O.C.G.A. § 19-8-7(a) was not determinative of the adoption petition filed by the paternal grandparents; since there was evidence to support the trial court's findings that the paternal grandparents would have denied the maternal grandparents contact with the child if the adoption petition were granted, and that the granting of the petition was not in the child's best interests, the denial of the petition was affirmed. *Madison v. Barnett*, 268 Ga. App. 348, 601 S.E.2d 704 (2004).

Relinquishment was sufficient because it met the standards of the state in which it was signed. — Relatives of the mother of a child born with Fetal Alcohol Syndrome were not required to comply with the requirements of O.C.G.A. § 19-8-7 as the father's relinquishment of the father's rights was valid because it was knowingly and voluntarily made in accordance with New Mexico law pursuant to former O.C.G.A. § 24-7-24 (see now

O.C.G.A. § 24-9-922). *Rokowski v. Gilbert*, 275 Ga. App. 305, 620 S.E.2d 509 (2005).

Construction with other law. — Superior court properly dismissed a grandmother's adoption petition on collateral estoppel grounds based on the juvenile court's previous order granting temporary custody to the maternal grandfather and grant of visitation rights to the grandmother; as a result, the superior court was not authorized to readjudicate the issue of permanent custody involving the child at issue. *Smith v. Hutcheson*, 283 Ga. App. 117, 640 S.E.2d 690 (2006).

Trial court erred in denying an aunt and uncle's petition to adopt their nephew under O.C.G.A. § 19-8-8, and should have applied O.C.G.A. § 19-8-7 as: (1) the former was not intended to be a general rule regarding the adoption of foreign children; (2) the aunt and uncle satisfied the jurisdictional and venue requirements of O.C.G.A. § 19-8-2 by filing the adoption petition in the superior court of their county of residence; and (3) as the child's aunt and uncle, they were relatives eligi-

ble to adopt under O.C.G.A. § 19-8-7(a). In re Adoption of D.J.F.M., 284 Ga. App. 420, 643 S.E.2d 879 (2007).

Adoption by stepparent. — Trial court erred by granting a stepparent's petition to adopt an eight-year-old child and by terminating the parental rights of one of the child's natural parents as the trial court failed to make any finding in the court's adoption decree as to whether the natural parent's lack of communication with the child was without justifiable cause as required by O.C.G.A. § 19-8-18(b). Further, the trial court erred

by basing the court's adoption decision, in part, on O.C.G.A. § 19-8-10(a)(4) as the stepparent's petition did not assert any claim pursuant to § 19-8-10(a) and, instead, relied exclusively on § 19-8-10(b); thus, the natural parent was not served with a petition making allegations under subsection (a) and, therefore, received no notification that the natural parent had to prepare to show cause why the natural parent's parental rights should not be terminated pursuant to subsection (a). Smallwood v. Davis, 292 Ga. App. 173, 664 S.E.2d 254 (2008).

RESEARCH REFERENCES

ALR. — Rights and obligations resulting from human artificial insemination, 83 ALR4th 295.

19-8-8. Adoption based upon foreign decrees and valid visa.

A child may be adopted pursuant to the provisions of this chapter based upon:

(1) A decree which has been entered pursuant to due process of law by a court of competent jurisdiction outside the United States establishing the relationship of parent and child by adoption between each petitioner and a child born in such foreign country; and

(2) The child's having been granted a valid visa by the United States Immigration and Naturalization Service. (Code 1981, § 19-8-8, enacted by Ga. L. 1990, p. 1572, § 5; Ga. L. 1991, p. 94, § 19.)

Law reviews. — For note, "Surrogate Mother Agreements in Georgia: Conflict

and Accord with Statutory and Case Law," see 4 Ga. St. U.L. Rev. 153 (1988).

JUDICIAL DECISIONS

Construction with other law. — Trial court erred in denying an aunt and uncle's petition to adopt their nephew under O.C.G.A. § 19-8-8, and should have applied O.C.G.A. § 19-8-7 as: (1) the former was not intended to be a general rule regarding the adoption of foreign children; (2) the aunt and uncle satisfied the juris-

dictional and venue requirements of O.C.G.A. § 19-8-2 by filing the adoption petition in the superior court of their county of residence; and (3) as the child's aunt and uncle, they were relatives eligible to adopt under O.C.G.A. § 19-8-7(a). In re Adoption of D.J.F.M., 284 Ga. App. 420, 643 S.E.2d 879 (2007).

19-8-9. Surrender of parental rights where legal mother puts up for adoption child she previously adopted herself; withdrawal of surrender; expiration of rights.

(a) In those cases where the legal mother of the child being placed for adoption has herself previously adopted such child, said adoptive mother shall execute, in lieu of the affidavit specified in subsection (g) of Code Section 19-8-4, 19-8-5, 19-8-6, or 19-8-7, an affidavit meeting the requirements of subsection (i) of Code Section 19-8-26.

(b) A person signing a surrender pursuant to Code Section 19-8-4, 19-8-5, 19-8-6, or 19-8-7 shall have the right to withdraw the surrender by written notice delivered in person or mailed by registered mail or statutory overnight delivery within ten days after signing; and the surrender document shall not be valid unless it so states. The ten days shall be counted consecutively beginning with the day immediately following the date the surrender is executed, however, if the tenth day falls on a Saturday, Sunday, or legal holiday then the last day on which the surrender may be withdrawn shall be the next day that is not a Saturday, Sunday, or legal holiday. After ten days, a surrender may not be withdrawn. The notice of withdrawal of surrender shall be delivered in person or mailed by registered mail or statutory overnight delivery to the address designated in the surrender document.

(c) If a legal mother has voluntarily and in writing surrendered all of her parental rights pursuant to the provisions of subsection (a) of Code Section 19-8-4, 19-8-5, 19-8-6, or 19-8-7 and has not withdrawn her surrender within the ten-day period after signing as permitted by the provisions of subsection (b) of this Code section, she shall have no right or authority to sign either a voluntary acknowledgment of legitimation pursuant to the provisions of paragraph (2) of subsection (g) of Code Section 19-7-22 or a voluntary acknowledgment of paternity pursuant to the provisions of Code Section 19-7-46.1 regarding the same child. (Code 1981, § 19-8-9, enacted by Ga. L. 1990, p. 1572, § 5; Ga. L. 2000, p. 1589, § 4; Ga. L. 2007, p. 342, § 7/HB 497.)

Editor's notes. — Ga. L. 2007, p. 342, § 10/HB 497, not codified by the General Assembly, provides that subsection (c) shall apply to proceedings under this chapter on or after July 1, 2007.

Law reviews. — For article, "Who is Georgia's Mother? Gestational Surrogacy: A Formulation for Georgia's Legislature," see 38 Ga. L. Rev. 395 (2003).

JUDICIAL DECISIONS

Revocation of consent. — Even though revocation of consent may be allowed more than ten days after consent is given, when the mother had acted freely and voluntarily and the trial court found

her competent, the court did not err in finding that she failed to establish good and sufficient cause to void the surrender. *Schumacher v. Sexton*, 216 Ga. App. 628, 455 S.E.2d 348 (1995).

Parent may not revoke his or her valid surrender after 10 days; such limitation does not limit the right of a surrendering parent to establish that there was no valid, voluntary consent given initially. In re B.G.D., 224 Ga. App. 124, 479 S.E.2d 439 (1996).

Parent seeking to withdraw consent to adoption after 10 days must show duress, fraud, or incapacity, and then, as with all contracts, the consent is invalidated and the surrender becomes voidable. Hicks v. Stargel, 226 Ga. App. 639, 487 S.E.2d 428 (1997).

Mother did not revoke her surrender within the 10 days provided under O.C.G.A. § 19-8-9(b), and a later attempt to revoke her surrender was ineffective; without the transcript of the trial, the appellate court assumed that the evidence supported the trial court's factual finding that the mother showed no cause for invalidating the surrender. Ueal v. AAA Ptnrs. in Adoption, Inc., 269 Ga. App. 258, 603 S.E.2d 672 (2004).

Surrender of parental rights voidable based on caseworker misconduct. — Based upon newly discovered evidence that the caseworker of a parent who surrendered parental rights was a friend of the foster parents and had engaged in fraud and other illegalities, the trial court properly restored the parent's parental rights pursuant to O.C.G.A. § 15-11-40(a)(3). Thus, O.C.G.A. § 19-8-9, requiring a parent to revoke a surrender within 10 days, did not prevent the surrenders from being voidable. In the Interest of K.W., 291 Ga. App. 623, 662 S.E.2d 255 (2008), cert. dismissed, 2008 Ga. LEXIS 767 (Ga. 2008).

Duress not shown. — Even though the mother was under emotional and financial pressure when she made the decision to surrender her parental rights, that pressure did not constitute legal duress. Mabou v. Eller, 232 Ga. App. 635, 502 S.E.2d 760 (1998).

Cited in In the Interest of T.C.D., 281 Ga. App. 517, 636 S.E.2d 704 (2006).

19-8-10. When surrender or termination of parental rights not required; service on parents in such cases.

(a) Surrender or termination of rights of a parent pursuant to subsection (a) of Code Section 19-8-4, 19-8-5, 19-8-6, or 19-8-7 shall not be required as a prerequisite to the filing of a petition for adoption of a child of that parent pursuant to Code Section 19-8-13 where the court determines by clear and convincing evidence that the:

- (1) Child has been abandoned by that parent;
- (2) Parent cannot be found after a diligent search has been made;
- (3) Parent is insane or otherwise incapacitated from surrendering such rights; or
- (4) Parent has failed to exercise proper parental care or control due to misconduct or inability, as set out in paragraph (3), (4), or (5) of subsection (a) of Code Section 15-11-310,

and the court is of the opinion that the adoption is in the best interests of that child, after considering the physical, mental, emotional, and moral condition and needs of the child who is the subject of the proceeding, including the need for a secure and stable home.

(b) Surrender of rights of a parent pursuant to subsection (a) of Code Section 19-8-6 or 19-8-7 shall not be required as a prerequisite to the

filing of a petition for adoption of a child of that parent pursuant to Code Section 19-8-13, if that parent, for a period of one year or longer immediately prior to the filing of the petition for adoption, without justifiable cause, has significantly failed:

(1) To communicate or to make a bona fide attempt to communicate with that child in a meaningful, supportive, parental manner; or

(2) To provide for the care and support of that child as required by law or judicial decree,

and the court is of the opinion that the adoption is for the best interests of that child.

(c) Whenever it is alleged by any petitioner that surrender or termination of rights of a parent is not a prerequisite to the filing of a petition for adoption of a child of that parent in accordance with subsection (a) or (b) of this Code section, that parent shall be personally served with a conformed copy of the adoption petition, together with a copy of the court's order thereon specified in Code Section 19-8-14, or, if personal service cannot be perfected, by registered or certified mail or statutory overnight delivery, return receipt requested, at his last known address. If service cannot be made by either of these methods that parent shall be given notice by publication once a week for three weeks in the official organ of the county where the petition has been filed and of the county of his last known address. A parent who receives notification pursuant to this paragraph may appear in the pending adoption action and show cause why such parent's rights to the child sought to be adopted in that action should not be terminated by that adoption. Notice shall be deemed to have been received the date:

(1) Personal service is perfected;

(2) Of delivery shown on the return receipt of registered or certified mail or statutory overnight delivery; or

(3) Of the last publication. (Code 1981, § 19-8-10, enacted by Ga. L. 1990, p. 1572, § 5; Ga. L. 1991, p. 94, § 19; Ga. L. 1996, p. 474, § 5; Ga. L. 1999, p. 252, § 7; Ga. L. 2000, p. 20, § 11; Ga. L. 2000, p. 1589, § 3; Ga. L. 2013, p. 294, § 4-25/HB 242.)

The 2013 amendment, effective January 1, 2014, substituted “paragraph (3), (4), or (5) of subsection (a) of Code Section 15-11-310” for “paragraph (2), (3), or (4) of subsection (b) of Code Section 15-11-94” in paragraph (a)(4). See editor's note for applicability.

Editor's notes. — Ga. L. 1999, p. 252, § 11, not codified by the General Assembly, provides that: “The provisions of this

Act shall apply to petitions for adoption filed on or after July 1, 1999, except that each surrender of rights filed pursuant to a petition filed on or after July 1, 1999, shall be effective if such surrender of rights complies with the provisions of law in effect on the date of the execution of such surrender of rights.”

Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, pro-

vides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Law reviews. — For article surveying developments in Georgia domestic rela-

tions law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 109 (1981). For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For article, "Continuing Confusion in the Georgia Adoption Process," see 20 Ga. St. B.J. 62 (1983).

For a note on the role of a judicial determination of paternity in the inheritance rights of illegitimate children in Georgia, see 16 Ga. L. Rev. 171 (1981).

For comment discussing *Johnson v. Eidson*, 235 Ga. 820, 221 S.E.2d 813 (1976), and advocating a "deprived child" exception to the parental consent requirement in the adoption laws, see 28 Mercer L. Rev. 553 (1977).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

ABANDONMENT

SIGNIFICANT FAILURE TO COMMUNICATE OR SUPPORT

General Consideration

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1941, p. 300, § 9 and former § 19-8-6 are included in the annotations for this Code section.

Due process requirements. — Due process clause of the Fourteenth Amendment requires that before a state may sever the rights of a parent in the parent's natural child, the state must support its allegations of the parent's unfitness "by at least clear and convincing evidence." *Thorne v. Padgett*, 259 Ga. 650, 386 S.E.2d 155 (1989) (decided under former § 19-8-6).

Because former subsection (b) foreclosed an inquiry into the reasons for a parent's failure to provide care and support, thus depriving that parent of a meaningful opportunity to be heard, it denies due process of law. *Thorne v. Padgett*, 259 Ga. 650, 386 S.E.2d 155 (1989) (decided under former § 19-8-6).

Findings of fact and conclusions of law. — Since a trial court failed to make any specific findings of fact in support of the court's recitation under O.C.G.A. § 19-8-10 that a child's father had failed

without justifiable cause to communicate with the child for a period of one year immediately prior to the filing of the adoption petition, the order did not comply with the requirements of O.C.G.A. § 19-8-18, and the court had to remand the matter to the trial court to make the appropriate findings of fact and conclusions of law. *Sauls v. Atchison*, 316 Ga. App. 792, 730 S.E.2d 459 (2012).

Trial court erred by terminating a biological father's parental rights and ordering adoption because the court failed to set forth specific findings of fact to support the conclusion that the requisites of O.C.G.A. § 19-8-10(b) as to abandonment of the child had been met. *Ray v. Hann*, 323 Ga. App. 45, 746 S.E.2d 600 (2013).

Impact of failing to include findings of fact and conclusions of law. — Mother was entitled to order vacating the grant of the stepmother's petition for adoption because the final order did not include findings of fact and conclusions of law as required to support the termination of parental rights. *Dell v. Dell*, 324 Ga. App. 297, 748 S.E.2d 703 (2013).

Superior court's order was deficient because the order did not address any of the

criteria for termination of parental rights pursuant to O.C.G.A. § 15-11-94, it did not include specific findings of fact showing that the mother abandoned the child, and the order did not include specific factual findings showing that the mother failed to provide care and support for the child without justifiable cause. Moreover, the superior court's conclusion that adoption was in the child's best interest also lacked particularity and, therefore, the mother was entitled to an order vacating the grant of the stepmother's petition for adoption. *Dell v. Dell*, 324 Ga. App. 297, 748 S.E.2d 703 (2013).

Due process and equal protection rights not denied. — Former § 19-8-6 did not deny due process and equal protection by discriminating against incarcerated persons. It would emasculate child-support laws to relieve parents of natural and statutory child-support obligations because they have voluntarily committed offenses resulting in their imprisonment and possible inability to earn funds with which to support their children. *Chandler v. Cochran*, 247 Ga. 184, 275 S.E.2d 23, cert. denied, 454 U.S. 872, 102 S. Ct. 342, 70 L. Ed. 2d 177 (1981) (decided under former § 19-8-6).

Deprivation. — Trial court properly terminated a father's parental rights to the daughter pursuant to O.C.G.A. § 15-11-94(b); the child was deprived as the father had made no attempts to help care for the child, who was born with Fetal Alcohol Syndrome, and the adoption of the child by the mother's relatives pursuant to O.C.G.A. § 19-8-10 was in the best interest of the child. *Rokowski v. Gilbert*, 275 Ga. App. 305, 620 S.E.2d 509 (2005).

Facts rendering section applicable must be alleged. — When applicable, parental rights need not be surrendered or terminated prior to filing of a petition for adoption, but facts demonstrating the applicability of former § 19-8-6 must be alleged. *Chandler v. Cochran*, 247 Ga. 184, 275 S.E.2d 23, cert. denied, 454 U.S. 872, 102 S. Ct. 342, 70 L. Ed. 2d 177 (1981) (decided under former § 19-8-6).

Compliance with service and notice provisions of former § 19-8-6 must be alleged in petition for adoption. *Chandler v. Cochran*, 247 Ga. 184, 275 S.E.2d 23,

cert. denied, 454 U.S. 872, 102 S. Ct. 342, 70 L. Ed. 2d 177 (1981) (decided under former § 19-8-6).

Because the natural father was not afforded the 30-day period mandated as a prerequisite to the termination of his parental rights and the subsequent stepparent adoption of his natural child, vacation of the decree of adoption was required. *McKinney v. Jennings*, 246 Ga. App. 862, 542 S.E.2d 580 (2000).

Trial court erred by granting a stepparent's petition to adopt an eight-year-old child and by terminating the parental rights of one of the child's natural parents as the trial court failed to make any finding as to whether the natural parent's lack of communication with the child was without justifiable cause as required by O.C.G.A. § 19-8-18(b). Further, the trial court erred by basing the court's adoption decision, in part, on O.C.G.A. § 19-8-10(a)(4) as the stepparent's petition did not assert any claim pursuant to § 19-8-10(a) and, instead, relied exclusively on § 19-8-10(b). The natural parent was not served with a petition making allegations under subsection (a) and, therefore, received no notification that the natural parent had to prepare to show cause why the natural parent's parental rights should not be terminated. *Smallwood v. Davis*, 292 Ga. App. 173, 664 S.E.2d 254 (2008).

When mother tells father he need not pay. — Even when father fails to make child support payments as a result of mother telling him that he need not make further payments or the mother and father agreeing that continuance of payments is not required, father has no legal excuse not to pay. *Hix v. Patton*, 147 Ga. App. 14, 248 S.E.2d 28 (1978) (decided under Ga. L. 1941, p. 300, § 9).

When adoption is in child's best interest. — Determination that the adoption is for the best interest of the child, in addition to and separately from the finding of the unfitness of a parent, is a statutory condition precedent to the application of former § 19-8-6. *Cain v. Lane*, 168 Ga. App. 405, 309 S.E.2d 401 (1983) (decided under former § 19-8-6).

Imprisonment as justifiable cause. — For purposes of determining the exis-

General Consideration (Cont'd)

tence of “justifiable cause”, within the meaning of subsection (b) of O.C.G.A. § 19-8-10, incarceration is merely one relevant factor to be considered by the trial court; incarceration does not per se give rise to justifiable cause, although in certain circumstances “justifiable cause” can be shown to arise therefrom. *Jones v. Sauls*, 213 Ga. App. 55, 443 S.E.2d 693 (1994) (decided under former § 19-8-6).

If any evidence supports findings of trial judge in adoption proceedings, Court of Appeals must affirm. *Crumb v. Gordon*, 157 Ga. App. 839, 278 S.E.2d 725 (1981) (decided under former § 19-8-6).

Findings assumed supportable in absence of record. — In the absence of a transcript of the evidence in the record on appeal, it was assumed that the findings of the trial court as to adoption were supported by the evidence. *Gaskins v. Fowler*, 171 Ga. App. 681, 320 S.E.2d 890 (1984) (decided under former § 19-8-6).

Father’s failure to provide a transcript of the trial court proceedings, in which the father’s parental rights were terminated under O.C.G.A. § 19-8-10(a), required the appellate court to assume that the evidence supported the trial court’s findings. *Farley v. Hawkins*, 277 Ga. App. 880, 627 S.E.2d 913 (2006).

Husband of woman at time of conception or birth is party at interest when another man claims fatherhood of the child in a legitimation proceeding; therefore, due process requires that the “legal father” must be served but that service may be perfected in the same manner as provided for in adoption proceedings. *In re White*, 254 Ga. 678, 333 S.E.2d 588 (1985) (decided under former § 19-8-6).

Consideration of enumerations of error on appeal when brief did not comply with rules. — Although a couple’s brief in an adoption case filed under O.C.G.A. § 19-8-10 did not comply with Ga. Ct. App. R. 25(c)(1) because the couple did not number their arguments in their brief so as to correspond with their enumerations of error, the court would address their enumerations of error because the best interest of the child was the

overriding concern in an adoption case. *Thaggard v. Willard*, 285 Ga. App. 384, 646 S.E.2d 479 (2007).

Construction with other law. — Superior court properly dismissed a grandmother’s adoption petition on collateral estoppel grounds based on the juvenile court’s previous order granting temporary custody to the maternal grandfather and grant of visitation rights to the grandmother; as a result, the superior court was not authorized to readjudicate the issue of permanent custody involving the child at issue. *Smith v. Hutcheson*, 283 Ga. App. 117, 640 S.E.2d 690 (2006).

Due process rights of father denied. — Trial court erred in granting the step-father’s petition for stepparent adoption under O.C.G.A. § 19-8-10(b) because the father’s due process rights were violated when, during the presentation of the step-father’s evidence, the trial court sua sponte ended the matter and refused to allow the father to present witnesses and other evidence to show cause why the father’s parental rights should not be terminated. *Hafer v. Lowry*, 320 Ga. App. 76, 739 S.E.2d 84 (2013).

Adoption petition failed to address statutory factors. — In a step-father’s appeal, a trial court erred by denying the step-father’s petition for adoption because the adoption petition did not address the issue of whether the biological father was a parent of the child for purposes of the adoption statutes, O.C.G.A. §§ 19-7-21.1(a)(2)(F) and 19-8-1(6). *Allifi v. Raider*, 323 Ga. App. 510, 746 S.E.2d 763 (2013).

Order deficient. — Superior court’s order in termination of parental rights action was deficient because the order did not include specific findings of fact showing that the mother abandoned the child, and the order did not include specific factual findings showing that the mother failed to provide care and support for the child without justifiable cause. Moreover, the superior court’s conclusion that adoption was in the child’s best interest also lacked particularity. *Dell v. Dell*, 324 Ga. App. 297, 748 S.E.2d 703 (2013).

Cited in *Lanning v. Fiveash*, 147 Ga. App. 290, 248 S.E.2d 553 (1978); *Young v. Foster*, 148 Ga. App. 737, 252 S.E.2d 680

(1979); Moser v. Ehrman, 244 Ga. 112, 259 S.E.2d 634 (1979); Farmer v. Pressley, 152 Ga. App. 288, 262 S.E.2d 499 (1979); Bentley v. McSwain, 153 Ga. App. 451, 265 S.E.2d 360 (1980); Burch v. Terrell, 154 Ga. App. 299, 267 S.E.2d 901 (1980); Hinkins v. Francis, 154 Ga. App. 716, 270 S.E.2d 33 (1980); In re Hilyer, 158 Ga. App. 17, 279 S.E.2d 232 (1981); Hill v. Kaminsky, 160 Ga. App. 630, 287 S.E.2d 639 (1981); In re C.C.B., 164 Ga. App. 3, 296 S.E.2d 198 (1982); Lumpkin v. Cook, 166 Ga. App. 259, 304 S.E.2d 425 (1983); In re C.C.P., 168 Ga. App. 918, 310 S.E.2d 776 (1983); Sapp v. Solomon, 252 Ga. 532, 314 S.E.2d 878 (1984); Jessee v. Nash, 169 Ga. App. 746, 315 S.E.2d 260 (1984); Boyd v. Harvey, 173 Ga. App. 581, 327 S.E.2d 551 (1985); In re Y.R.V., 179 Ga. App. 18, 345 S.E.2d 121 (1986); Baugh v. Robinson, 179 Ga. App. 571, 346 S.E.2d 918 (1986); Tapley v. Veal, 182 Ga. App. 880, 357 S.E.2d 268 (1987); Griffith v. Brooks, 216 Ga. App. 401, 454 S.E.2d 602 (1995); Battaglia v. Duke, 230 Ga. App. 667, 497 S.E.2d 250 (1998); Coleman v. Grimes, 250 Ga. App. 880, 553 S.E.2d 185 (2001).

Abandonment

Abandonment is a separate issue from failure to pay child support which, though admittedly a type of abandonment, constitutes a separate ground for terminating parental rights under the law. Findley v. Sanders, 153 Ga. App. 146, 264 S.E.2d 659 (1980) (decided under Ga. L. 1941, p. 300, § 9).

Finding of abandonment pursuant to former subsection (a) of former § 19-8-6 was not a prerequisite to a consideration of the elements of former subsection (b). Abandonment was a separate issue from the failure to pay support. Dubose v. Richardson, 193 Ga. App. 104, 387 S.E.2d 156 (1989) (decided under former § 19-8-6).

Standard to be used in abandonment cases is whether alleged abandonment is such as to show a settled purpose to forego all parental duties and claims; there must be an actual desertion, accompanied with intention to entirely sever, so far as possible to do so, the parental relation, and throw off all obligations growing out of the relationship. Crumb v. Gordon, 157 Ga. App. 839, 278 S.E.2d 725

(1981) (decided under former § 19-8-6).

Appellate standard of review of a finding of abandonment is whether after reviewing the evidence in the light most favorable to the appellee, any rational trier of fact could have found by clear and convincing evidence that the natural parent's rights to custody were lost in the manner found. Griffith v. Brooks, 193 Ga. App. 762, 389 S.E.2d 246 (1989) (decided under former § 19-8-6).

Evidence sufficient to support abandonment. In re A.J.A., 164 Ga. App. 210, 296 S.E.2d 103 (1982) (decided under former § 19-8-6).

Evidence insufficient to show abandonment. Griffith v. Brooks, 193 Ga. App. 762, 389 S.E.2d 246 (1989) (decided under former § 19-8-6).

When a child's parent pursued litigation concerning the petition of the child's prospective adoptive parents to adopt the child, it was incorrect to grant the petition on the basis of the parent's abandonment, under O.C.G.A. § 19-8-10(a) because the parent's pursuit of litigation did not show the parent's intent to entirely sever the parent's relations with the child as was a prerequisite for a finding of abandonment. Hall v. Coleman, 264 Ga. App. 650, 592 S.E.2d 120 (2003).

Significant Failure to Communicate or Support

In applying former subsection (b) of Ga. L. 1941, p. 300, § 9, superior courts have very broad discretion which will not be controlled by appellate courts except in cases of plain abuse. Johnson v. Taylor, 153 Ga. App. 15, 264 S.E.2d 512 (1980) (decided under Ga. L. 1941, p. 300, § 9).

Construction with O.C.G.A. § 19-8-18(b). — When the trial court denied a couple's petition to adopt a child and to terminate the parental rights of the child's legal father, it was not required to enter findings in accordance with O.C.G.A. § 19-8-18(b), which applied when an adoption petition was granted and parental rights terminated. The court had entered findings and conclusions sufficient to satisfy O.C.G.A. § 19-8-10(b) when the court found that the father had paid child support and had communicated

Significant Failure to Communicate or Support (Cont'd)

with the child and that the adoption was not in the child's best interest. *Thaggard v. Willard*, 285 Ga. App. 384, 646 S.E.2d 479 (2007).

Failure to support the child financially was not dispositive of the issue of adoption because subsection (b) of former § 19-8-6 required the trial court to determine, prior to the grant of an adoption, whether adoption was in the best interests of the child, when a natural parent has failed to support his/her child. *Arrington v. Hand*, 193 Ga. App. 457, 388 S.E.2d 52 (1989) (decided under former § 19-8-6).

Failure to provide for care and support. — Paragraph (b)(2) of former § 19-8-6 was applicable in a case where no court order has been entered. *Pacella v. Sanchez*, 191 Ga. App. 611, 382 S.E.2d 371 (1989) (decided under former § 19-8-6).

Father's failure to dispute the stepfather's claim that the father had failed to pay \$ 7,249 in support for the daughter for at least a year before the stepfather's adoption petition was filed provided clear and convincing evidence to support the finding that the father had failed for over a year to provide for the care and support of the daughter under O.C.G.A. § 19-8-10(b)(2). *Meeks v. Thompson*, 277 Ga. App. 346, 626 S.E.2d 564 (2006).

Phrase "failed significantly" allows a degree of latitude for the trial judge's discretion, but such discretion is necessary and desirable in adoption proceedings and was intended by the legislature to be applied to particular facts in each individual case. *Chandler v. Cochran*, 247 Ga. 184, 275 S.E.2d 23, cert. denied, 454 U.S. 872, 102 S. Ct. 342, 70 L. Ed. 2d 177 (1981) (decided under former § 19-8-6).

Clear and convincing evidence required. — Former § 19-8-6 did not require proof of wanton and willful failure to communicate with a child prior to adoption, but "clear and convincing" evidence was required. *In re S.D.S.*, 166 Ga. App. 344, 304 S.E.2d 85, cert. denied, 464 U.S. 997, 104 S. Ct. 496, 78 L. Ed. 2d 689 (1983) (decided under former § 19-8-6).

Proof of willfulness unnecessary. — In seeking to establish that the father

failed significantly to communicate with the child or to provide for the child's support, it was not necessary to demonstrate that he willfully failed in these respects. Proof of willfulness was not necessary in order to find a significant failure under subsection (b) of former § 19-8-6. *Allen v. Helewski*, 184 Ga. App. 450, 361 S.E.2d 711 (1987) (decided under former § 19-8-6).

Necessary specific and articulated findings. — Order granting adoption need only contain specific and articulated findings that parent "has failed significantly" for one-year period to communicate with or provide support for that parent's child and that adoption would be in the child's "best interest." *Kirkland v. Lee*, 160 Ga. App. 446, 287 S.E.2d 365 (1981); *Keys v. Ankerich*, 193 Ga. App. 107, 386 S.E.2d 736 (1989) (decided under former § 19-8-6).

Findings of fact and conclusions of law are mandatory. — Adoption decree terminating the father's parental rights failed to set forth mandatory findings of fact and conclusions of law, pursuant to O.C.G.A. § 19-8-18(b), based on the criteria of O.C.G.A. § 19-8-10(b)(1) as to whether the father's failure to communicate with the child for two years occurred immediately prior to the filing of the petition for adoption, whether the father made a bona fide attempt to communicate with the child, whether the father's failure to communicate was without justifiable cause, and the basis for the opinion regarding the best interests of the child. *Maynard v. Brown*, 276 Ga. App. 229, 622 S.E.2d 901 (2005).

Discretion of trial judge. — Question of significant failure to communicate or to provide support for a one-year period, as well as an additional question of best interests of child, are all threshold matters of discretion with the trial court who has opportunity to observe parties and hear evidence. *Westberg v. Stamm*, 162 Ga. App. 369, 291 S.E.2d 439 (1982) (decided under former § 19-8-6).

While the trial judge might determine in the court's discretion that the evidence did not authorize an adoption, and thus deny the adoption, it was improper to grant a directed verdict to the mother and

to then say no exercise of discretion was authorized. *Westberg v. Stamm*, 162 Ga. App. 369, 291 S.E.2d 439 (1982) (decided under former § 19-8-6).

Because the evidence showed that the child's needs could be equally met in either the mother's or the grandparent's home, the trial court abused the court's discretion in terminating the mother's parental rights under O.C.G.A. §§ 15-11-94(b)(4) and 19-8-10(a), (b)(1), (2), and in granting the grandmother's and the step-grandfather's petition for adoption under O.C.G.A. § 19-8-2. *McCollum v. Jones*, 274 Ga. App. 815, 619 S.E.2d 313 (2005).

Trial court did not abuse the court's broad discretion in finding the adoption of a child by a stepparent to be in the child's best interest and thereby terminating a biological parent's parental rights as the evidence established that the biological parent failed to see the child for over five years, never provided financial support for the child, and failed to communicate with the child with no justifiable cause for such failure shown. *Johnson v. Taylor*, 292 Ga. App. 354, 665 S.E.2d 49 (2008).

Court need not make specific finding as to "significant failure." — Intent of legislature in enacting Ga. L. 1979, p. 1182 clearly was to omit any requirement of a specific finding that a parent's "significant failure" was without justifiable cause as an absolute prerequisite to entry of decree of adoption and to substitute best interest of child as criterion for adoption determination. *Kirkland v. Lee*, 160 Ga. App. 446, 287 S.E.2d 365 (1981) (decided under former § 19-8-6).

Without justifiable cause. — General Assembly intended that no order of adoption ever be reversed for failure of the trial court to make a specific finding on issue of "justifiable cause." *Kirkland v. Lee*, 160 Ga. App. 446, 287 S.E.2d 365 (1981) (decided under former § 19-8-6).

It must be presumed that the legislature when reenacting Ga. L. 1979, p. 1182 had knowledge of requirement of preexisting provisions found at Ga. L. 1977, p. 201 and intended to delete requirement that a parent's significant failure to communicate with or to provide support for the parent's child further be "without justifi-

able cause" and that such a finding is no longer a prerequisite to adoption without the consent of the natural parent. *Kirkland v. Lee*, 160 Ga. App. 446, 287 S.E.2d 365 (1981) (decided under former § 19-8-6).

Since the language "without justifiable cause" was no longer in former § 19-8-6, it is not necessary that the trial judge find that the father's failure to support or communicate was without justifiable cause. *Curtis v. Jones*, 160 Ga. App. 904, 288 S.E.2d 615 (1982) (decided under former § 19-8-6).

"Justifiable cause" determined in context of child's best interest. — It is apparent that in enacting Ga. L. 1979, p. 1182, the legislature intended that in adoption proceedings any issue of natural parent's justification for parent's significant failure to support or communicate with the parent's child be subsumed into and resolved in the context of whether severance of the parental relationship would be in the best interest of the child. *Kirkland v. Lee*, 160 Ga. App. 446, 287 S.E.2d 365 (1981) (decided under former § 19-8-6).

When paragraph (b)(2) not necessarily violated. — While divorce decree wherein mother waived child support was ineffective to modify statutory duty imposed upon father by § 19-7-2, his good faith reliance upon it constitutes a reasonable excuse for failing to provide for care and support of the child; if an excuse is reasonable, although not legal, the absence of a legal excuse does not demand a finding that paragraph (b)(2) of former § 19-8-6 had been violated. *Crumb v. Gordon*, 157 Ga. App. 839, 278 S.E.2d 725 (1981) (decided under former § 19-8-6).

Intent of phrase "failed significantly ... to provide ... support" contained in subsection (b) of former § 19-8-6 was to require more, or significant, support before parental consent would be required as provided in former § 19-8-3. *Prescott v. Judy*, 157 Ga. App. 735, 278 S.E.2d 493 (1981) (decided under former § 19-8-6).

"Sporadic and de minimis" efforts insufficient. — In determining whether "significant" steps have been taken with regard to support and communication,

Significant Failure to Communicate or Support (Cont'd)

“sporadic and de minimis” efforts do not require the court to find that there have been significant steps. *In re J.S.J.*, 180 Ga. App. 873, 350 S.E.2d 843 (1986); *Dubose v. Richardson*, 193 Ga. App. 104, 387 S.E.2d 156 (1989) (decided under former § 19-8-6).

Order terminating a father’s parental rights and allowing adoption pursuant to O.C.G.A. § 19-8-10 was supported by sufficient evidence as the father made no child support payments for the one year immediately before the filing of the petition, and, while the father was incarcerated for a part of that period, the support payments were sporadic even before the incarceration; testimony showed that the adoptive parent and the child were close and that the adoptive parent was capable and willing to take parental responsibility of the child. *Ray v. Denton*, 278 Ga. App. 69, 628 S.E.2d 180 (2006).

Support payment after petition filed. — Payment of delinquent child support coming after filing of adoption petition is too late to rely upon it as evidence that the parent did not significantly fail to provide child support. *Kirkland v. Lee*, 160 Ga. App. 446, 287 S.E.2d 365 (1981) (decided under former § 19-8-6).

Denial of petition proper. — Trial court did not err in denying a couple’s petition to adopt a child and to terminate a father’s parental rights under O.C.G.A. § 19-8-10; although the father had not provided a stable or wholesome relationship with the child based on his drug violations and repeated incarcerations, he had paid some child support and had communicated with the child. *Thaggard v. Willard*, 285 Ga. App. 384, 646 S.E.2d 479 (2007).

Effect of imprisonment. — Parents are not relieved of natural and statutory child support obligations because they have voluntarily committed offenses resulting in their imprisonment and possible inability to earn funds with which to support their child. *Curtis v. Jones*, 160 Ga. App. 904, 288 S.E.2d 615 (1982) (decided under former § 19-8-6).

Trial court properly granted a step-

mother’s petition to adopt a biological mother’s child because under O.C.G.A. § 19-8-10(b) there was sufficient clear and convincing evidence that the mother failed to provide for the child’s support; although the mother had been incarcerated, the mother received social security disability payments but did not use those payments to pay child support. *Sellers v. Sellers*, 277 Ga. App. 814, 627 S.E.2d 882 (2006).

Justifiable cause in incarceration situation. — Parental rights could not be terminated to permit adoption without the father’s consent since the evidence sustained a finding that the failure of the father, who was incarcerated, to provide support for the child was not without justifiable cause. *Jones v. Sauls*, 213 Ga. App. 55, 443 S.E.2d 693 (1994).

Evidence failed to show failure to communicate while incarcerated. — Stepmother seeking adoption of an incarcerated mother’s child failed to carry her burden of proving by clear and convincing evidence that the mother failed to attempt to communicate with the child and that such failure was without justifiable cause under O.C.G.A. § 19-8-10(b)(1); the mother wrote to the child frequently, but the father confiscated the letters. *In re Marks*, 300 Ga. App. 239, 684 S.E.2d 364 (2009).

Effect of omission of language “wantonly and willfully.” — It was error to base denial of adoption petition on failure to prove “willful failure” of father to communicate and support since the 1977 amendment to former § 19-8-6 removed that requirement. *In re S.B.P.*, 164 Ga. App. 50, 296 S.E.2d 236 (1982) (decided under former § 19-8-6).

Evidence sufficient to show significant failure to communicate or support. — See *In re D.P.T.*, 176 Ga. App. 409, 336 S.E.2d 330 (1985); *In re C.D.B.*, 182 Ga. App. 263, 355 S.E.2d 759 (1987); *Curde v. Matson*, 190 Ga. App. 782, 380 S.E.2d 71 (1989); *Cafagno v. Hagan*, 213 Ga. App. 631, 445 S.E.2d 380 (1994); *Bateman v. Futch*, 232 Ga. App. 271, 501 S.E.2d 615 (1998) (decided under former § 19-8-6).

Adoption was properly granted based on a parent’s failure to have contact with

or support the child, under O.C.G.A. § 19-8-10(b), since the parent, despite pursuing litigation concerning the petition of the child's prospective adoptive parents to adopt the child, had almost no contact with the child, despite opportunities to do so, and willfully refused to provide for the child's support as long as the child was not in the parent's custody. *Hall v. Coleman*, 264 Ga. App. 650, 592 S.E.2d 120 (2003).

Evidence insufficient to show failure to communicate or support. — Trial court erred in granting a stepfather's adoption petition and in terminating a natural father's parental rights because there was not clear and convincing evidence that the father's failure to communicate with and care for the child was without justifiable cause under O.C.G.A. § 19-8-10(b), and the stepfather failed to present any evidence of the father's finan-

cial condition during the year prior to the filing of the petition; the mother confirmed that she refused to let the father visit the child, and the stepfather failed to present any evidence contradicting the father's evidence that the father was unable to earn sufficient income because of his back injuries. *Weber v. Livingston*, 309 Ga. App. 665, 710 S.E.2d 864 (2011).

Trial court erred in terminating a parent's rights and allowing the maternal aunt to adopt a two-year-old child because the parent had completed the parent's reunification plan and there was no deprivation or any factors in O.C.G.A. § 19-8-10(a) or (b); the trial court relied on improper factors such as the parent's non-citizen status, the parent's lack of a driver's license, and the verifiability of the parent's income. *Alizota v. Stanfield*, 329 Ga. App. 550, 765 S.E.2d 707 (2014).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Adoption, §§ 76, 81 et seq., 120. 41 Am. Jur. 2d, Illegitimate Children, §§ 30, 36.

C.J.S. — 2 C.J.S., Adoption of Persons, §§ 49, 57, 63, 67.

ALR. — Sum set apart in connection with self-insurance as deductible in computing income tax, 76 ALR 1067.

Right of natural parent, or other person whose consent is necessary to adoption of child, to withdraw consent previously given, 138 ALR 1038; 156 ALR 1011.

Sufficiency of parent's consent to adoption of child, 24 ALR2d 1127; 15 ALR5th 1.

What constitutes abandonment or desertion of child by its parent or parents within purview of adoption laws, 35 ALR2d 662; 78 ALR3d 712.

Consent of natural parents as essential to adoption where parents are divorced, 47 ALR2d 824.

Necessity of securing consent of parents of illegitimate child to its adoption, 51 ALR2d 497.

What constitutes undue influence in obtaining a parent's consent to adoption of child, 50 ALR3d 918.

Postadoption visitation by natural parent, 78 ALR4th 218.

Validity of birth parent's "blanket" consent to adoption which fails to identify adoptive parent, 15 ALR5th 1.

Natural parent's indigence as precluding finding that failure to support child waived requirement of consent to adoption — general principles, 82 ALR5th 443.

Natural parent's indigence resulting from unemployment or underemployment as precluding finding that failure to support child waived requirement of consent to adoption, 83 ALR5th 375.

Natural parent's indigence as precluding finding that failure to support child waived requirement of consent to adoption — factors other than employment status, 84 ALR5th 191.

19-8-11. Petitioning superior court to terminate parental rights; service of process.

(a)(1) In those cases where the department or a child-placing agency has either obtained:

(A) The voluntary written surrender of all parental rights from one of the parents or the guardian of a child; or

(B) An order of a court of competent jurisdiction terminating all of the rights of one of the parents or the guardian of a child,

the department or child-placing agency may in contemplation of the placement of such child for adoption petition the superior court of the county where the child resides to terminate the parental rights of the remaining parent pursuant to this Code section.

(2) In those cases where a person who is the resident of another state has obtained the voluntary written surrender of all parental rights from one of the parents or the guardian of a child, each such person to whom the child has been surrendered may in contemplation of the adoption of such child in such other state petition the superior court of the county where the child resides to terminate the parental rights of the remaining parent pursuant to this Code section.

(3) Parental rights may be terminated pursuant to paragraph (1) or (2) of this subsection where the court determines by clear and convincing evidence that the:

(A) Child has been abandoned by that parent;

(B) Parent of the child cannot be found after a diligent search has been made;

(C) Parent is insane or otherwise incapacitated from surrendering such rights; or

(D) Parent has failed to exercise proper parental care or control due to misconduct or inability, as set out in paragraph (3), (4), or (5) of subsection (a) of Code Section 15-11-310,

and the court shall set the matter down to be heard in chambers not less than 30 and not more than 60 days following the receipt by such remaining parent of the notice under subsection (b) of this Code section and shall enter an order terminating such parental rights if it so finds and if it is of the opinion that adoption is in the best interests of the child, after considering the physical, mental, emotional, and moral condition and needs of the child who is the subject of the proceeding, including the need for a secure and stable home.

(b) Whenever a petition is filed pursuant to subsection (a) of this Code section, the parent whose rights the petitioner is seeking to terminate shall be personally served with a conformed copy of the petition, and a copy of the court's order setting forth the date upon which the petition shall be considered or, if personal service cannot be perfected, by registered or certified mail or statutory overnight delivery, return receipt requested, at his last known address. If service cannot be

made by either of these methods, that parent shall be given notice by publication once a week for three weeks in the official organ of the county where the petition has been filed and of the county of his last known address. A parent who receives notification pursuant to this subsection may appear and show cause why such parent's rights to the child sought to be placed for adoption should not be terminated. Notice shall be deemed to have been received the date:

(1) Personal service is perfected;

(2) Of delivery shown on the return receipt of registered or certified mail or statutory overnight delivery; or

(3) Of the last publication. (Code 1981, § 19-8-11, enacted by Ga. L. 1990, p. 1572, § 5; Ga. L. 1996, p. 474, § 6; Ga. L. 1999, p. 252, § 8; Ga. L. 2000, p. 20, § 12; Ga. L. 2000, p. 1589, § 3; Ga. L. 2013, p. 294, § 4-26/HB 242.)

The 2013 amendment, effective January 1, 2014, substituted "paragraph (3), (4), or (5) of subsection (a) of Code Section 15-11-310" for "paragraph (2), (3), or (4) of subsection (b) of Code Section 15-11-94" in subparagraph (a)(3)(D). See editor's note for applicability.

Editor's notes. — Ga. L. 1999, p. 252, § 11, not codified by the General Assembly, provides that: "The provisions of this Act shall apply to petitions for adoption filed on or after July 1, 1999, except that each surrender of rights filed pursuant to a petition filed on or after July 1, 1999, shall be effective if such surrender of rights complies with the provisions of law in effect on the date of the execution of such surrender of rights."

Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

JUDICIAL DECISIONS

Waiver of notice requirements. — Adoption decree was not invalid because the father was not served with the petition for adoption at least 30 days prior to the hearing pursuant to O.C.G.A. § 19-8-11(a); the father waived the notice

requirement by refusing an offer made by counsel to reopen the evidence, permit additional discovery, and to continue the hearing for 30 days. *Rokowski v. Gilbert*, 275 Ga. App. 305, 620 S.E.2d 509 (2005).

19-8-12. Notice to biological father; procedure when identity or location of father not known; petition, hearing, and order; when rights of biological father terminated; legitimation of child by father; rights of mother.

(a) The General Assembly finds that:

(1) The state has a compelling interest in promptly providing stable and permanent homes for adoptive children, and in preventing the disruption of adoptive placements;

(2) Adoptive children have a right to permanence and stability in adoptive placements;

(3) Adoptive parents have a constitutionally protected liberty and privacy interest in retaining custody of children;

(4) A biological father who is not the legal father may have an interest in his biological child. This inchoate interest is lost by failure to develop a familial bond with the child and acquires constitutional protection only if the biological father who is not the legal father develops a familial bond with the child;

(5) The subjective intent of a biological father who is not a legal father, whether expressed or otherwise, unsupported by evidence of acts manifesting such intent, shall not preclude a determination that the biological father who is not a legal father has failed to develop a familial bond with the child; and

(6) A man who has engaged in a nonmarital sexual relationship with a woman is deemed to be on notice that a pregnancy and adoption proceeding regarding a child may occur and has a duty to protect his own rights and interests in that child. He is therefore entitled to notice of an adoption proceeding only as provided in this Code section.

(b) If there is a biological father who is not the legal father of a child and he has not executed a surrender as specified in paragraph (2) of subsection (e) of Code Section 19-8-4, 19-8-5, 19-8-6, or 19-8-7, he shall be notified of adoption proceedings regarding the child in the following circumstances:

(1) If his identity is known to the petitioner, department, or licensed child-placing agency or to the attorney for the petitioner, department, or licensed child-placing agency;

(2) If he is a registrant on the putative father registry who has acknowledged paternity of the child in accordance with subparagraph (d)(2)(A) of Code Section 19-11-9;

(3) If he is a registrant on the putative father registry who has indicated possible paternity of a child of the child's mother during a period beginning two years immediately prior to the child's date of birth in accordance with subparagraph (d)(2)(B) of Code Section 19-11-9; or

(4) If the court finds from the evidence, including but not limited to the affidavit of the mother specified in subsection (g) of Code Section

19-8-4, 19-8-5, 19-8-6, or 19-8-7 in the form provided in subsection (h) of Code Section 19-8-26, that such biological father who is not the legal father has performed any of the following acts:

- (A) Lived with the child;
- (B) Contributed to the child's support;
- (C) Made any attempt to legitimate the child; or
- (D) Provided support or medical care for the mother either during her pregnancy or during her hospitalization for the birth of the child.

(c) Notification provided for in subsection (b) of this Code section shall be given to a biological father who is not a legal father by the following methods:

(1) Registered or certified mail or statutory overnight delivery, return receipt requested, at his last known address, which notice shall be deemed received upon the date of delivery shown on the return receipt;

(2) Personal service, which notice shall be deemed received when personal service is perfected; or

(3) Publication once a week for three weeks in the official organ of the county where the petition has been filed and of the county of his last known address, which notice shall be deemed received upon the date of the last publication.

If feasible, the methods specified in paragraph (1) or (2) of this subsection shall be used before publication.

(d)(1) Where the rights of a parent or guardian of a child have been surrendered or terminated in accordance with subsection (a) of Code Section 19-8-4, the department or a child-placing agency may file, under the authority of this paragraph, a petition to terminate such biological father's rights to the child with the superior court of the county where the child resides.

(2) Where the rights of a parent or guardian of a child have been surrendered in accordance with subsection (a) of Code Section 19-8-5, 19-8-6, or 19-8-7 or a consent to adopt has been executed pursuant to paragraph (2) of subsection (a) of Code Section 19-8-6, the petitioner shall file, under the authority of this paragraph, with the superior court either a motion, if a petition for adoption of the child has previously been filed with the court, or a petition to terminate such biological father's rights to the child.

(3) Where a petition or motion is filed pursuant to paragraph (1) or (2) of this subsection, the court shall, within 30 days from such filing,

conduct a hearing in chambers to determine the facts in the matter. The court shall be authorized to consider the affidavit of the mother specified in subsection (g) of Code Section 19-8-4, 19-8-5, 19-8-6, or 19-8-7, as applicable, in making its determination pursuant to this paragraph. If the court finds from the evidence that such biological father has not performed any of the following acts:

- (A) Lived with the child;
- (B) Contributed to the child's support;
- (C) Made any attempt to legitimate the child; or
- (D) Provided support or medical care for the mother, either during her pregnancy or during her hospitalization for the birth of the child,

and the petitioner provides a certificate as of the date of the petition or the motion, as the case may be, from the putative father registry stating that there is no entry on the putative father registry either acknowledging paternity of the child or indicating possible paternity of a child of the child's mother for a period beginning no later than two years immediately prior to the child's date of birth, then it shall be rebuttably presumed that the biological father who is not the legal father is not entitled to notice of the proceedings. Absent evidence rebutting the presumption, then no further inquiry or notice shall be required by the court and the court shall enter an order terminating the rights of such biological father to the child.

(e) When notice is to be given pursuant to subsection (b) of this Code section, it shall advise such biological father who is not the legal father that he loses all rights to the child and will neither receive notice nor be entitled to object to the adoption of the child unless, within 30 days of receipt of such notice, he files:

(1) A petition to legitimate the child pursuant to Code Section 19-7-22 or an acknowledgment of legitimation pursuant to Code Section 19-7-21.1; and

(2) Notice of the filing of the petition to legitimate or acknowledgment of legitimation with the court in which the action under this Code section, if any, is pending and to the person who provided such notice to such biological father.

(f) A biological father who is not the legal father loses all rights to the child and the court shall enter an order terminating all such father's rights to the child and such father may not thereafter object to the adoption and is not entitled to receive further notice of the adoption if within 30 days from his receipt of the notice provided for in subsection (b) of this Code section he:

(1) Does not file a legitimation petition and give notice as required in subsection (e) of this Code section;

(2) Files a legitimation petition which is subsequently dismissed for failure to prosecute; or

(3) Files a legitimation petition and the action is subsequently concluded without a court order declaring a finding that he is the father of the child.

(g) If the child is legitimated by his or her biological father, the adoption shall not be permitted except as provided in Code Sections 19-8-4 through 19-8-7.

(h) If the child is legitimated by his or her biological father and in the subsequent adoption proceeding the petition for adoption is either withdrawn with prejudice or denied by the court, then a surrender of parental rights final release for adoption executed by the legal mother pursuant to the provisions of subsection (a) of Code Section 19-8-4, 19-8-5, or 19-8-7 shall be dissolved by operation of law and her parental rights shall be restored to her. The fact that the legal mother executed a surrender of parental rights final release for adoption, now dissolved, shall not be admissible evidence in any proceedings against the legal mother. (Code 1981, § 19-8-12, enacted by Ga. L. 1990, p. 1572, § 5; Ga. L. 1997, p. 1686, § 5; Ga. L. 2000, p. 1589, § 3; Ga. L. 2004, p. 631, § 19; Ga. L. 2007, p. 342, § 8/HB 497; Ga. L. 2008, p. 667, § 8/SB 88.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1997, in subsection (b), “subparagraph (d)(2)(A)” was substituted for “subparagraph (A) of paragraph (2) of subsection (d)” in paragraph (b)(2), and “subparagraph (d)(2)(B)” was substituted for “subparagraph (B) of paragraph (2) of subsection (d)” in paragraph (b)(3).

Editor’s notes. — Ga. L. 2007, p. 342, § 10/HB 497, not codified by the General Assembly, provides that subsection (h) shall apply to proceedings under this chapter on or after July 1, 2007.

Ga. L. 2008, p. 667, § 1/SB 88, not codified by the General Assembly, provides: “This Act shall be known and may be cited as the ‘Care of a Grandchild Act.’”

Ga. L. 2008, p. 667, § 2/SB 88, not codified by the General Assembly, provides: “The General Assembly finds that:

“(1) An increasing number of relatives in Georgia, including grandparents and great-grandparents, are providing care to children who cannot reside with their parents due to the parent’s incapacity or

inability to perform the regular and expected functions to provide such care and support;

“(2) Parents need a means to confer to grandparents or great-grandparents the authority to act on behalf of grandchildren without the time and expense of a court proceeding; and

“(3) Providing a statutory mechanism for granting such authority enhances family preservation and stability.”

Law reviews. — For article surveying developments in Georgia domestic relations law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 109 (1981). For article, “Continuing Confusion in the Georgia Adoption Process,” see 20 Ga. St. B.J. 62 (1983).

For note, “In re Baby Girl Eason: Expanding the Constitutional Rights of Unwed Fathers,” see 39 Mercer L. Rev. 997 (1988).

For comment, “The Putative Father’s Right to Notice of Adoption Proceedings: Has Georgia Finally Solved the Adoption

Equation?," see 47 Emory L.J. 1475 (1998).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1977, p. 201, § 1 and former § 19-8-7 are included in the annotations for this Code section.

Venue. — Since venue in an action to recognize a mother's voluntary surrender of parental rights was not challenged below, the issue was waived on appeal; also, proper venue was shown under O.C.G.A. § 19-8-12(d)(1) as the case was filed in the county where the child lived, and since the mother failed to include in the record the transcript of the trial on the petition, the appellate court assumed that the evidence showed proper venue. *Ueal v. AAA Ptnrs. in Adoption, Inc.*, 269 Ga. App. 258, 603 S.E.2d 672 (2004).

Notice to putative father not a jurisdictional issue. — Determination of whether the notice to the putative father required by former § 19-8-7 had been given affected whether a judgment terminating his rights to the child could be properly entered; it did not affect the question of whether the superior court had jurisdiction of the case. *H.C.S. v. Grebel*, 253 Ga. 404, 321 S.E.2d 321 (1984) (decided under former § 19-8-7).

Unknown parent. — Biological father of a child sought to be adopted by a stepparent petitioner was not "known" in the context of O.C.G.A. § 19-8-12 since the mother knew the identity of the father but exercised her right not to disclose his name and address. *Cowdell v. Doe*, 225 Ga. App. 97, 483 S.E.2d 347 (1997), overruled on other grounds, 274 Ga. 765, 560 S.E.2d 1 (2002).

Right to intervene in father's petition to legitimate child. — Agency and adoptive parents had interest, as legal custodians of child, in father's petition to legitimate the child, and when their rights were not represented, they had a right to intervene. *In re Ashmore*, 163 Ga. App. 194, 293 S.E.2d 457 (1982) (decided under former § 19-8-7).

Due process notice. — Grant of adoption to a mother's new husband pursuant

to O.C.G.A. § 19-8-6 was proper as it was found to be in the children's best interests; the fact that the father alleged that the father had made several support payments right around the time that the adoption petition was filed did not affect the determination that the father failed in his support duties as there was insubstantial evidence to support a finding as to those payments and there was also evidence that the father did not make payments for the three years prior thereto; the father's claim that his due process rights were violated by not receiving notice that his parental rights could be terminated, pursuant to O.C.G.A. § 19-8-12, lacked merit as the father was personally served with the adoption petition which indicated that his rights could be terminated without his consent and such a possibility was discussed in opening statements. *McCurry v. Harding*, 270 Ga. App. 416, 606 S.E.2d 639 (2004).

Petitions for legitimation separate civil actions. — Father's petition for legitimation should have been filed as a separate civil action because the language within O.C.G.A. § 19-7-22 suggested that legitimation petitions were separate civil actions; the absence of language explicitly providing for a similar avenue in the adoption context implies that the legislature intended legitimation petitions to be stand-alone actions. *Brewton v. Poss*, 316 Ga. App. 704, 728 S.E.2d 837 (2012).

Adoption petition failed to address statutory factors. — In a step-father's appeal, a trial court erred by denying the step-father's petition for adoption because the adoption petition did not address the issue of whether the biological father was a parent of the child for purposes of the adoption statutes, O.C.G.A. §§ 19-7-21.1(a)(2)(F) and 19-8-1(6). *Allifi v. Raider*, 323 Ga. App. 510, 746 S.E.2d 763 (2013).

Out of state paternity order substantially equivalent to Georgia legitimation order. — Trial court properly denied the applicants' motion to terminate

a father's parental rights and denied the applicants' adoption petition because a State of Alabama paternity order obtained by the father was substantially equivalent to a Georgia legitimation order such that the father had not lost his right to contest the adoption and the father properly domesticated the Alabama order with the trial court. *Park v. Bailey*, 329 Ga. App. 569, 765 S.E.2d 721 (2014).

Cited in *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978); *McCary v. Department of Human Resources*, 151 Ga. App. 181, 259 S.E.2d 181 (1979); *Nelson v. Taylor*, 244 Ga. 657, 261

S.E.2d 579 (1979); *Hinkins v. Francis*, 154 Ga. App. 716, 270 S.E.2d 33 (1980); *Thrasher v. Glynn County Dep't of Family & Children Servs.*, 162 Ga. App. 702, 293 S.E.2d 6 (1982); *In re S.B.P.*, 164 Ga. App. 50, 296 S.E.2d 236 (1982); *Sapp v. Solomon*, 252 Ga. 532, 314 S.E.2d 878 (1984); *Ramos v. Ramos*, 173 Ga. App. 30, 325 S.E.2d 415 (1984); *Northcraft v. Doe*, 192 Ga. App. 666, 385 S.E.2d 756 (1989); *Blount v. Knighton*, 298 Ga. App. 448, 680 S.E.2d 522 (2009); *In the Interest of V.B.L.*, 306 Ga. App. 709, 703 S.E.2d 127 (2010).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Adoption, §§ 72, 75.

C.J.S. — 2 C.J.S., Adoption of Persons, § 80.

ALR. — Necessity of notice to parents before adoption of child, 24 ALR 416; 76 ALR 1077.

Necessity of securing consent of parents of illegitimate child to its adoption, 51 ALR2d 497.

Right of putative father to custody of illegitimate child, 45 ALR3d 216.

Right of natural parent to withdraw valid consent to adoption of child, 74 ALR3d 421.

Mistake or want of understanding as ground for revocation of consent to adoption of agreement releasing infant to adoption placement agency, 74 ALR3d 489.

What constitutes "duress" in obtaining parent's consent to adoption of child or surrender of child to adoption agency, 74 ALR3d 527.

Rights of unwed father to obstruct adoption of his child by withholding consent, 61 ALR5th 151.

19-8-13. Petition; filing and contents; financial disclosures; attorney's affidavit.

(a) The petition for adoption, duly verified, together with one conformed copy thereof, must be filed with the clerk of the superior court having jurisdiction and shall conform to the following guidelines:

(1) The petition shall set forth:

(A) The name, age, marital status, and place of residence of each petitioner;

(B) The name by which the child is to be known should the adoption ultimately be completed;

(C) The date of birth and the sex of the child;

(D) The date and circumstances of the placement of the child with each petitioner;

(E) Whether the child is possessed of any property and, if so, a full and complete description thereof;

(F) Whether the child has one or both parents or his biological father who is not the legal father living; and

(G) Whether the child has a guardian.

(2) Where the adoption is pursuant to subsection (a) of Code Section 19-8-4 the following shall be provided or attached or its absence explained when the petition is filed:

(A) An affidavit from the department or a child-placing agency stating that all of the requirements of Code Sections 19-8-4 and 19-8-12 have been complied with;

(B) The written consent of the department or agency to the adoption;

(C) A copy of the appropriate form verifying the allegation of compliance with the requirements of Chapter 4 of Title 39, relating to the Interstate Compact on the Placement of Children; and

(D) A completed form containing background information regarding the child to be adopted, as required by the adoption unit of the department.

(3) Where the adoption is pursuant to subsection (a) of Code Section 19-8-5, the following shall be provided or attached or its absence explained when the petition is filed:

(A) The written voluntary surrender of each parent or guardian specified in subsection (e) of Code Section 19-8-5;

(B) The written acknowledgment of surrender specified in subsection (f) of Code Section 19-8-5;

(C) The affidavits specified in subsections (g) and (h) of Code Section 19-8-5;

(D) Allegations of compliance with Code Section 19-8-12;

(E) Allegations of compliance with Chapter 4 of Title 39, relating to the Interstate Compact on the Placement of Children;

(F) The accounting required by subsection (c) of this Code section;

(G) Copies of appropriate certificates or forms verifying allegations contained in the petition as to guardianship or custody of the child, the marriage of each petitioner, the divorce or death of each parent of the child, and compliance with Chapter 4 of Title 39, relating to the Interstate Compact on the Placement of Children;

(H) A completed form containing background information regarding the child to be adopted, as required by the adoption unit of the department; and

(I) A copy of the home study report.

(4) Where the adoption is pursuant to subsection (a) of Code Section 19-8-6, the following shall be provided or attached or its absence explained when the petition is filed:

(A) The written voluntary surrender of the parent or guardian specified in subsection (e) of Code Section 19-8-6;

(B) The written acknowledgment of surrender specified in subsection (f) of Code Section 19-8-6;

(C) The affidavits specified in subsections (g) and (h) of Code Section 19-8-6;

(D) The consent specified in subsection (j) of Code Section 19-8-6;

(E) Allegations of compliance with Code Section 19-8-12;

(F) Copies of appropriate certificates verifying allegations contained in the petition as to guardianship of the child sought to be adopted, the birth of the child sought to be adopted, the marriage of each petitioner, and the divorce or death of each parent of the child sought to be adopted; and

(G) A completed form containing background information regarding the child to be adopted, as required by the adoption unit of the department.

(5) Where the adoption is pursuant to subsection (a) of Code Section 19-8-7, the following shall be provided or attached or its absence explained when the petition is filed:

(A) The written voluntary surrender of each parent specified in subsection (e) of Code Section 19-8-7;

(B) The written acknowledgment of surrender specified in subsection (f) of Code Section 19-8-7;

(C) The affidavits specified in subsections (g) and (h) of Code Section 19-8-7;

(D) Allegations of compliance with Code Section 19-8-12;

(E) Copies of appropriate certificates or forms verifying allegations contained in the petition as to guardianship of the child sought to be adopted, the birth of the child sought to be adopted, the marriage of each petitioner, and the divorce or death of each parent of the child sought to be adopted; and

(F) A completed form containing background information regarding the child to be adopted, as required by the adoption unit of the department.

(6)(A) Where the adoption is pursuant to Code Section 19-8-8, the following shall be provided or attached or its absence explained when the petition is filed:

(i) A certified copy of the final decree of adoption from the foreign country along with a verified English translation. The translator shall provide a statement regarding his qualification to render the translation, his complete name, and his current address. Should the current address be a temporary one, his permanent address shall also be provided;

(ii) A verified copy of the visa granting the child entry to the United States;

(iii) A certified copy along with a verified translation of the child's amended birth certificate or registration showing each petitioner as parent; and

(iv) A copy of the home study which was completed for United States Immigration and Naturalization Service.

(B) It is not necessary to file copies of surrenders or termination on any parent or biological father who is not the legal father when the petition is filed pursuant to paragraph (1) of Code Section 19-8-8.

(7) Where Code Section 19-8-10 is applicable, parental rights need not be surrendered or terminated prior to the filing of the petition; but any petitioner shall allege facts demonstrating the applicability of Code Section 19-8-10 and shall allege compliance with subsection (c) of Code Section 19-8-10.

(8) If the petition is filed in a county other than that of the petitioners' residence, the reason therefor must also be set forth in the petition.

(b) At the time of filing the petition, the petitioner shall deposit with the clerk the deposit required by Code Section 9-15-4; the fees shall be those established by Code Sections 15-6-77 and 15-6-77.1.

(c) Each petitioner in any proceeding for the adoption of a minor pursuant to the provisions of Code Section 19-8-5 shall file with the petition, in a manner acceptable to the court, a report fully accounting for all disbursements of anything of value made or agreed to be made, directly or indirectly, by, on behalf of, or for the benefit of the petitioner in connection with the adoption, including, but not limited to, any expenses incurred in connection with:

(1) The birth of the minor;

(2) Placement of the minor with the petitioner;

(3) Medical or hospital care received by the mother or by the minor during the mother's prenatal care and confinement; and

(4) Services relating to the adoption or to the placement of the minor for adoption which were received by or on behalf of the petitioner, either natural parent of the minor, or any other person.

(d) Every attorney for a petitioner in any proceeding for the adoption of a minor pursuant to the provisions of Code Section 19-8-5 shall file, in a manner acceptable to the court, before the decree of adoption is entered, an affidavit detailing all sums paid or promised to that attorney, directly or indirectly, from whatever source, for all services of any nature rendered or to be rendered in connection with the adoption; provided, however, that if the attorney received or is to receive less than \$500.00, the affidavit need only state that fact.

(e) Any report made under this Code section must be signed and verified by the individual making the report.

(f) Whenever a petitioner is a blood relative of the child to be adopted and a grandparent other than the petitioner has visitation rights to the child granted pursuant to Code Section 19-7-3, the petitioner shall cause a copy of the petition for adoption to be served upon the grandparent with the visitation rights or upon such person's counsel of record.

(g) Notwithstanding the provisions of Code Sections 19-8-5 and 19-8-7 and this Code section which require obtaining and attaching a written voluntary surrender and acknowledgment thereof and affidavits of the legal mother and a representative of the petitioner, when the adoption is sought under subsection (a) of Code Section 19-8-5 or 19-8-7 following the termination of parental rights and the placement of the child by the juvenile court pursuant to Code Section 15-11-321, obtaining and attaching to the petition a certified copy of the order terminating parental rights of the parent shall take the place of obtaining and attaching those otherwise required surrenders, acknowledgments, and affidavits.

(h) A petition for adoption regarding a child or children who have a living biological father who is not the legal father and who has not surrendered his rights to the child or children shall include a certificate from the putative father registry disclosing the name, address, and social security number of any registrant acknowledging paternity of the child or children pursuant to subparagraph (d)(2)(A) of Code Section 19-11-9 or indicating the possibility of paternity of a child of the child's mother pursuant to subparagraph (d)(2)(B) of Code Section 19-11-9 for a period beginning no later than two years immediately prior to the child's date of birth. Such certificate shall indicate a search of the registry on or after the earliest of the following:

- (1) The date of the mother's surrender of parental rights;
- (2) The date of entry of the court order terminating the mother's parental rights;
- (3) The date of the mother's consent to adoption pursuant to Code Section 19-8-6; or
- (4) The date of the filing of the petition for adoption, in which case the certificate may be filed as an amendment to the petition for adoption.

Such certificate shall include a statement that the registry is current as of the earliest date listed in paragraphs (1) through (4) of this subsection, or as of a specified date that is later than the earliest such date. (Code 1981, § 19-8-13, enacted by Ga. L. 1990, p. 1572, § 5; Ga. L. 1991, p. 1640, §§ 4, 5; Ga. L. 1992, p. 6, § 19; Ga. L. 1997, p. 1686, § 6; Ga. L. 2000, p. 20, § 13; Ga. L. 2011, p. 573, § 4/SB 172; Ga. L. 2013, p. 294, § 4-27/HB 242.)

The 2013 amendment, effective January 1, 2014, in subsection (g), substituted "when the adoption" for "where the adoption" near the middle, and substituted "Code Section 15-11-321" for "paragraph (1) of subsection (a) of Code Section 15-11-103" near the end. See editor's notes for applicability.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1990, "acknowledgment" was substituted for "acknowledgement" in subparagraph (a)(5)(B).

Editor's notes. — Ga. L. 2011, p. 573, § 8/ SB 172, not codified by the General Assembly, provides that the amendment to this Code section shall apply to all placements of children for adoption and all petitions for adoption filed on or after July 1, 2011.

Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: "This Act shall become effective

on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions."

Law reviews. — For article surveying developments in Georgia domestic relations law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 109 (1981). For article, "Continuing Confusion in the Georgia Adoption Process," see 20 Ga. St. B.J. 62 (1983).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1941, p. 300, § 4, Ga. L. 1977, p. 201, and former § 19-8-8 are included in the annotations for this Code section.

Best interest of child. — In adoption proceedings, best interest of child is always a prime factor to be considered.

Davey v. Evans, 156 Ga. App. 698, 275 S.E.2d 769 (1980) (decided under Ga. L. 1977, p. 201).

Appointment of guardian. — There is no requirement that guardian must be appointed before adoption is legally permissible. Davey v. Evans, 156 Ga. App. 698, 275 S.E.2d 769 (1980) (decided under Ga. L. 1977, p. 201).

Identity of biological father in adoption petition. — When petitioners for an adoption learned that the man named by the child's biological mother in her affidavit as the father was excluded by DNA evidence, they amended the petition to state that the mother did not know the father's identity, and the mother so testified at trial. This cured any problem with the petition and the mother's affidavit. *Blount v. Knighton*, 298 Ga. App. 448, 680 S.E.2d 522 (2009).

Grant of name change required if requested. — Trial court erred in denying the mother's and adoptive father's request to change the child's surname from the deceased father's name to the adoptive father's name, pursuant to O.C.G.A. § 19-8-13(a)(1)(B). *Evans v. Sangster*, 330 Ga. App. 533, 768 S.E.2d 278 (2015).

Factual error in adoption petition in no way deprives court of subject matter jurisdiction. *Burrell v. Wood*, 237 Ga. 162, 227 S.E.2d 60 (1976) (decided prior to revision of chapter by Ga. L. 1977, p. 201).

Amendment of petition to cure omission of marriage certificate. — Although when appellees filed their petition for adoption, their marriage certificate was not attached, it was supplied by amendment which related back to the date the pleading was filed, thus curing omission from the petition. *Owens v. Worley*, 163 Ga. App. 488, 295 S.E.2d 199 (1982) (decided under former § 19-8-8).

Failure to attach marriage license to petition. — That a petition for adoption failed to contain the petitioners' marriage license as required by O.C.G.A. § 19-8-13(a)(3)(G) did not invalidate the adoption as the petitioners testified as to the date of their marriage and presented the license at trial. *Blount v. Knighton*, 298 Ga. App. 448, 680 S.E.2d 522 (2009).

Defects in an adoption petition regarding the name, age, marital status, and residence of the petitioners, the affidavit of the adoptive parents' legal repre-

sentative, and information pertaining to the circumstances of the adoption, were timely cured by amendment. *Mabou v. Eller*, 232 Ga. App. 635, 502 S.E.2d 760 (1998).

Petition lacking documentation required reversal. — Reversal of an order granting a petition was required because the petition failed to include the affidavit of the legal mother, allegation of compliance with O.C.G.A. § 19-8-12, birth certificate of the child, marriage certificate of the custodial parents, and background information regarding the child. *Spires v. Tarleton*, 225 Ga. App. 117, 483 S.E.2d 337 (1997).

Discretion of court regarding financial transactions. — Former provisions granted broad discretion to the trial court in determining whether there have been improper financial transactions associated with adoption. *Owens v. Worley*, 163 Ga. App. 488, 295 S.E.2d 199 (1982) (decided under former § 19-8-8); *Messer v. Marchman*, 205 Ga. App. 364, 422 S.E.2d 250 (1992); *Lee v. Stringer*, 212 Ga. App. 401, 441 S.E.2d 861 (1994), overruled on other grounds 224 Ga. App. 124, 479 S.E.2d 439 (1996).

Foster parents did not have right to adopt child without consent of department. — Foster parents did not have standing to pursue an adoption of a foster child that had been living happily with the child's grandmother for three years because the biological parents did not surrender their rights in favor of the foster parents under O.C.G.A. § 19-8-5, and the Foster Parent's Bill of Rights, O.C.G.A. § 49-5-281, did not grant adoption rights. Additionally, the Department of Human Services was required to consent to any adoption. *Owen v. Watts*, 303 Ga. App. 867, 695 S.E.2d 62, cert. denied, U.S. , 131 S. Ct. 156, 178 L. Ed. 2d 93 (2010).

Cited in *Prince v. Black*, 256 Ga. 79, 344 S.E.2d 411 (1986); *Smallwood v. Davis*, 292 Ga. App. 173, 664 S.E.2d 254 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Adoption, § 114.

Am. Jur. Pleading and Practice Forms. — 1B Am. Jur. Pleading and Practice Forms, Adoption, § 122.

C.J.S. — 2 C.J.S., Adoption of Persons, §§ 81, 82.

19-8-14. Timing of adoption hearing; required records; filing.

(a) It is the policy of this state that, in the best interest of the child, uncontested adoption petitions should be heard as soon as possible but not later than 120 days after the date of filing, unless the petitioner has failed to arrange for the court to receive the report required by the provisions of Code Section 19-8-16 or has otherwise failed to provide the court with all exhibits, surrenders, or certificates required by this chapter within that time period. It is the policy of this state that, in contested adoption petitions, the parties shall make every effort to have the petition considered by the court as soon as practical after the date of filing taking into account the circumstances of the petition and the best interest of the child.

(b) Upon the filing of the petition for adoption, accompanied by the filing fee unless such fee is waived, it shall be the responsibility of the clerk to accept the petition as filed.

(c) Upon the filing of the petition for adoption the court shall fix a date upon which the petition shall be considered, which date shall be not less than 45 days from the date of the filing of the petition.

(d) Notwithstanding the provisions of subsections (a) and (c) of this Code section, it shall be the petitioner's responsibility to request that the court hear the petition on a date that allows sufficient time for fulfillment of notice requirements of Code Section 19-8-10 and Code Section 19-8-12, where applicable.

(e) In the best interest of the child the court may hear the petition less than 45 days from the date of filing upon a showing by the petitioner that either no further notice is required or that any statutory requirement of notice to any person will be fulfilled at an earlier date, and provided that any report required by Code Section 19-8-16 has been completed or will be completed at an earlier date.

(f) The court in the child's best interest may grant such expedited hearings or continuances as may be necessary for completion of applicable notice requirements, investigations, a home study, and reports or for other good cause shown.

(g) Copies of the petition and all documents filed in connection therewith, including, but not limited to, the order fixing the date upon

which the petition shall be considered, and all exhibits, surrenders, or certificates required by this chapter, shall be forwarded by the clerk to the department within 15 days after the date of the filing of the petition for adoption.

(h) Copies of the petition, the order fixing the date upon which the petition shall be considered, and all exhibits, surrenders, or certificates required by this chapter shall be forwarded by the clerk to the child-placing agency or other agent appointed by the court pursuant to the provisions of Code Section 19-8-16 within 15 days after the filing of the petition for adoption, together with a request that a report and investigation be made as required by law.

(i) Copies of all motions, amendments, and other pleadings filed and of all orders entered in connection with the petition for adoption shall be forwarded by the clerk to the department within 15 days after such filing or entry. (Code 1981, § 19-8-14, enacted by Ga. L. 1990, p. 1572, § 5; Ga. L. 1991, p. 1640, § 6; Ga. L. 2003, p. 503, § 4; Ga. L. 2011, p. 573, § 5/SB 172.)

Cross references. — Adoption — Expediting uncontested agency adoption hearings, Ga. Unif. Sup. Ct. R. 47.
Editor’s notes. — Ga. L. 2011, p. 573, § 8/SB 172, not codified by the General

Assembly, provides that the amendment to this Code section shall apply to all placements of children for adoption and all petitions for adoption filed on or after July 1, 2011.

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1941, p. 300, §§ 5, 6 and former § 19-8-9 are included in the annotations for this Code section.

Cited in Ehrhart v. Brooks, 231 Ga. 272, 201 S.E.2d 464 (1973); Wilson v. James, 260 Ga. 234, 392 S.E.2d 5 (1990); McKinney v. Jennings, 246 Ga. App. 862, 542 S.E.2d 580 (2000).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Adoption, § 117.

C.J.S. — 2 C.J.S., Adoption of Persons, § 93.

19-8-15. When objections may be filed by relatives to petition for adoption.

If the child sought to be adopted has no legal father or legal mother living, it shall be the privilege of any person related by blood to the child to file objections to the petition for adoption. A grandparent with visitation rights to a child granted pursuant to Code Section 19-7-3 shall have the privilege to file objections to the petition of adoption if neither parent has any further rights to the child and if the petition for adoption has been filed by a blood relative of the child. The court, after hearing such objections, shall determine, in its discretion, whether or

not the same constitute a good reason for denying the petition and the court shall have the authority to grant or continue such visitation rights of the grandparent to the child in the adoption order in the event the adoption by the blood relative is approved by the court. (Code 1981, § 19-8-15, enacted by Ga. L. 1990, p. 1572, § 5.)

Law reviews. — For note on permissive intervention of grandparents in divorce proceedings, see 26 Ga. L. Rev. 787 (1992).

For comment on “Grandparents’ Visitation Rights in Georgia,” see 29 Emory L.J. 1083 (1980).

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1941, p. 300, § 9 and former § 19-8-10 are included in the annotations for this Code section.

One who objects to proceeding must establish blood relationship to child. McDonald v. Hester, 115 Ga. App. 740, 155 S.E.2d 720 (1967) (decided under Ga. L. 1941, p. 300, § 9 prior to revision of chapter by Ga. L. 1977, p. 201).

Standing to object when babies inadvertently switched in hospital. — Parents who adopted petitioner’s child, after the child had been inadvertently exchanged with another woman’s baby in the hospital shortly after delivery, were not “related by blood” to the other woman’s child and had no authority to object when petitioner sought to adopt the other woman’s child, whom she had loved and cared for since she left the hospital with that child. Pope v. Moore, 261 Ga. 253, 403 S.E.2d 205 (1991) (decided under former § 19-8-10 prior to 1990 revision of this chapter).

Relatives of child may not object to adoption as long as one natural parent is living and has consented, and may not intervene in action as they lack required interest in adoption. Lockey v. Bennett, 244 Ga. 339, 260 S.E.2d 56 (1979) (decided under Ga. L. 1941, p. 300, § 9); Brant v. Bazemore, 173 Ga. App. 294, 325 S.E.2d 905 (1985) (decided under former § 19-8-10).

Relatives had standing to object when “legal father” not established. — Maternal great aunt and uncle had standing to file objections to an adoption petition of aunt and uncle who had ob-

tained a written surrender of rights from the child’s putative biological father; the latter was not the “legal father” as defined by O.C.G.A. § 19-8-1. Echols v. Cochran, 214 Ga. App. 348, 447 S.E.2d 700 (1994).

Former husband lacked standing to object to adoption. — When former husband had no blood relationship to the child, the natural father had surrendered his parental rights to present husband, and his wife, the natural mother, consented to the adoption, the former husband had no standing to object to the adoption. Kelly v. Silverstein, 207 Ga. App. 381, 427 S.E.2d 851 (1993).

O.C.G.A. § 19-8-15 does not limit the court’s authority to award grandparent visitation pursuant to O.C.G.A. § 19-7-3. O.C.G.A. § 19-8-15 pertains to objections that certain relatives of the child sought to be adopted may make to the petition to adopt in those circumstances where both of the child’s parents are either deceased or no longer have parental rights. Evans v. Sangster, 330 Ga. App. 533, 768 S.E.2d 278 (2015).

Grandparent lacks standing to object to adoption while natural parent is in life, and it is error to allow a grandparent to file objections to a petition, even if the grandparent has an interest in seeing his blood line continue into the future. Hester v. Mathis, 147 Ga. App. 257, 248 S.E.2d 538 (1978) (decided under Ga. L. 1941, p. 300, § 9).

Grandparents may file objections to petitions for adoption only if there is no father or mother living; otherwise, they have no standing to object. Mead v. Owens, 149 Ga. App. 303, 254 S.E.2d 431 (1979) (decided under Ga. L. 1941, p. 300, § 9).

Grandparents were not statutorily authorized to intervene in adoption proceedings brought by a married couple who were not blood relatives of the child since the child's parents were living, and the grandparents did not intervene to seek visitation rights, but instead intervened to object to the adoption and to seek to adopt the child themselves. *Murphy v. McCarthy*, 201 Ga. App. 101, 410 S.E.2d 198 (1991).

Grandmother who was temporary legal custodian of child under juvenile court deprivation order did not have standing to intervene in adoption proceedings. *Edgar v. Shave*, 205 Ga. App. 337, 422 S.E.2d 234 (1992).

O.C.G.A. § 19-7-1(b.1) did not give

grandparents the right to intervene in adoption proceedings brought by third parties after the parents had voluntarily surrendered their parental rights and agreed to the adoption. *Baum v. Moore*, 230 Ga. App. 255, 496 S.E.2d 307 (1998).

Construction with other law. — Superior court properly dismissed a grandmother's adoption petition on collateral estoppel grounds based on the juvenile court's previous order granting temporary custody to the maternal grandfather and grant of visitation rights to the grandmother; as a result, the superior court was not authorized to readjudicate the issue of permanent custody involving the child at issue. *Smith v. Hutcheson*, 283 Ga. App. 117, 640 S.E.2d 690 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Adoption, § 148.

C.J.S. — 2 C.J.S., Adoption of Persons, § 121.

ALR. — Sum set apart in connection

with self-insurance as deductible in computing income tax, 76 ALR 1067.

Who, other than natural or adopting parents, or heirs of latter, may collaterally attack adoption decree, 92 ALR2d 813.

19-8-16. Investigation by child-placing agency or other agent.

(a) Prior to the date set by the court for a hearing on the petition for adoption, it shall be the duty of a child-placing agency appointed by the court or any other independent agent appointed by the court to verify the allegations in the petition for adoption, to make a complete and thorough investigation of the entire matter, including a criminal records check of each petitioner, and to report its findings and recommendations in writing to the court where the petition for adoption was filed. The department, child-placing agency, or other independent agent appointed by the court shall also provide the attorney for petitioner with a copy of the report to the court. If for any reason the child-placing agency or other agent finds itself unable to make or arrange for the proper investigation and report, it shall be the duty of the agency or agent to notify the court immediately, or at least within 20 days after receipt of the request for investigation service, that it is unable to make the report and investigation, so that the court may take such other steps as in its discretion are necessary to have the entire matter investigated.

(b) If the petition has been filed pursuant to subsection (a) of Code Section 19-8-6 or 19-8-7, the court is authorized but not required to appoint a child-placing agency or other independent agent to make an investigation in whatever form the court specifies.

(c) If the petition has been filed pursuant to Code Section 19-8-8, or if the department has conducted an investigation and has consented to the adoption, an investigation shall not be required.

(d) The court shall require the petitioner submit to a criminal history records check. The petitioner shall submit his or her fingerprints to the Georgia Crime Information Center with the appropriate fee. The center shall promptly transmit the fingerprints to the Federal Bureau of Investigation for a search of bureau records and shall obtain an appropriate report. The Georgia Crime Information Center shall also promptly conduct a search of its records and any records to which it has access. The center shall notify the court in writing of the presence or absence of any derogatory finding, including but not limited to any conviction data, regarding the fingerprint records check.

(e) The court may appoint the department to serve as its agent to conduct the investigation required by this Code section if an appropriate child-placing agency or independent agent is not available. If for any reason the department finds itself unable to make or arrange for the proper investigation and report, it shall be the duty of the commissioner of human services to notify the court immediately, or at least within 20 days after receipt of the request for investigation service, that it is unable to make the report and investigation, so that the court may take such other steps as in its discretion are necessary to have the entire matter investigated.

(f) The court shall require the petitioner to reimburse the child-placing agency or other independent agent, including the department, for the full cost of conducting the investigation and preparing the report. Such cost shall not exceed \$250.00 unless specifically authorized by the court. (Code 1981, § 19-8-16, enacted by Ga. L. 1990, p. 1572, § 5; Ga. L. 1991, p. 1640, § 7; Ga. L. 1992, p. 6, § 19; Ga. L. 1992, p. 2505, § 1; Ga. L. 2003, p. 503, § 5; Ga. L. 2007, p. 42, § 1/SB 61; Ga. L. 2009, p. 453, § 2-4/HB 228.)

Law reviews. — For article surveying mid-1981, see 33 Mercer L. Rev. 109 developments in Georgia domestic relations law from mid-1980 through (1981).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1941, p. 300, § 7 and former § 19-8-11 are included in the annotations for this Code section.

Many of the cases cited below were decided prior to the amendments by Ga. L. 1992, p. 2505, § 1, which substituted ref-

erences to "child-placing agency" for references to "department."

Failure to obtain investigative report from agency not reversible error. — While former § 19-8-11 required that the Department of Human Resources file an investigative report in adoption proceedings, failure to obtain this report

from the agency was not reversible error. *Chandler v. Cochran*, 247 Ga. 184, 275 S.E.2d 23 (1981) (decided under former § 19-8-11).

Father's failure to request access to investigation report upon which the trial court relied in granting adoption to the grandparents, or to subpoena the investigator for examination at the hearing, constituted waiver of the father's right to do so. *Cafagno v. Hagan*, 213 Ga. App. 631, 445 S.E.2d 380 (1994).

Failure to require investigation before entering judgment. — Trial court did not commit reversible error in entering judgment terminating a natural father's parental rights and granting an adoption petition by the mother's husband without first requiring an investigation by the Department of Human Resources as was provided for in former § 19-8-11. In *re C.D.B.*, 182 Ga. App. 263, 355 S.E.2d 759 (1987) (decided under former § 19-8-11).

Legislature intended that judge receive information obtained in investigation. — Statute relating to adoption

of children is perfectly clear that it was the intention of the legislature to provide the judge at an interlocutory adoption hearing with information obtained from the investigation by the Department of Human Resources for the judge's consideration in deciding the issue. *Cox v. Bohannon*, 86 Ga. App. 236, 71 S.E.2d 440 (1952) (decided under Ga. L. 1941, p. 300, § 7 prior to revision of chapter by Ga. L. 1977, p. 201).

Lack of report not reversible error. — Although the Department of Human Resources was statutorily required to prepare a report and recommendation concerning the adoption petition, there was no requirement that the report be entered into evidence, and therefore the lack of such a report in the record was not reversible error. *Baugh v. Robinson*, 179 Ga. App. 571, 346 S.E.2d 918 (1986) (decided under former § 19-8-11).

Cited in *Motes v. Love*, 202 Ga. App. 749, 415 S.E.2d 334 (1992).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Adoption, § 113.

C.J.S. — 2 C.J.S., Adoption of Persons, §§ 46, 48.

19-8-17. Report and recommendation of investigating agency; dismissal of petition; appointment of guardian ad litem.

(a) The report and findings of the investigating agency shall include, among other things, the following:

- (1) Verification of allegations contained in the petition;
- (2) Circumstances under which the child came to be placed for adoption;
- (3) Whether each proposed adoptive parent is financially, physically, and mentally able to have the permanent custody of the child; in considering financial ability any adoption supplement approved by the department shall be taken into account;
- (4) The physical and mental condition of the child, insofar as this can be determined by the aid of competent medical authority;
- (5) Whether or not the adoption is in the best interests of the child, including his general care;

(6) Suitability of the home to the child;

(7) If applicable, whether the identity and location of the biological father who is not the legal father are known or ascertainable and whether the requirements of Code Section 19-8-12 were complied with; and

(8) Any other information that might be disclosed by the investigation that would be of any value or interest to the court in deciding the case.

(b) If the report of the investigating agency or independent agent disapproves of the adoption of the child, motion may be made by the investigating agency or independent agent to the court to dismiss the petition and the court after hearing is authorized to do so. If the court denies the motion to dismiss, the court shall appoint a guardian ad litem who may appeal the ruling to the Georgia Court of Appeals or Supreme Court, as in other cases, as provided by law.

(c) If at any time it appears to the court that the interests of the child may conflict with those of any petitioner, the court may, in its discretion, appoint a guardian ad litem to represent the child and the cost thereof shall be a charge upon the funds of the county. (Code 1981, § 19-8-17, enacted by Ga. L. 1990, p. 1572, § 5; Ga. L. 1992, p. 2505, § 2.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1941, p. 300, § 8 and former § 19-8-12 are included in the annotations for this Code section.

Legislature intended that judge receive information obtained in investigation. — Ga. L. 1941, p. 300, § 8, relating to adoption of children was perfectly clear that it was the intention of the legislature to provide the judge at the interlocutory adoption hearing with information obtained from investigation for the judge's consideration in deciding the issues. *Cox v. Bohannon*, 86 Ga. App. 236, 71 S.E.2d 440 (1952) (decided under Ga. L. 1941, p. 300, § 8, prior to revision of chapter by Ga. L. 1977, p. 201).

Judge must give consideration to recommendations of investigating agency. — It appears that, while the legislature invested the trial judge with utmost discretion in determining the child's best interests to the judge's own satisfaction, it included a mandatory provision that the judge should give consid-

eration to recommendations in so doing. *Cox v. Bohannon*, 86 Ga. App. 236, 71 S.E.2d 440 (1952) (decided under Ga. L. 1941, p. 300, § 8 prior to revision of chapter by Ga. L. 1977, p. 201).

Goal is to duplicate relationship that most persons have with their natural parents during their entire lives. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910, 98 S. Ct. 3103, 57 L. Ed. 2d 1141 (1978) (decided under Ga. L. 1941, p. 300, § 8).

Difficulties inherent in interracial adoption justify consideration of race as a relevant factor in adoption. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910, 98 S. Ct. 3103, 57 L. Ed. 2d 1141 (1978) (decided under Ga. L. 1941, p. 300, § 8).

Lack of report not reversible error. — Although the Department of Human Resources is statutorily required to prepare a report and recommendation concerning the adoption petition, there is no

requirement that the report be entered into evidence, and therefore the lack of such a report in the record is not reversible error. *Baugh v. Robinson*, 179 Ga. App. 571, 346 S.E.2d 918 (1986) (decided under former § 19-8-12).

Cited in *Chandler v. Cochran*, 247 Ga. 184, 275 S.E.2d 23 (1981); *Hayes v. Watkins*, 163 Ga. App. 589, 295 S.E.2d 556 (1982); *Motes v. Love*, 202 Ga. App. 749, 415 S.E.2d 334 (1992).

OPINIONS OF THE ATTORNEY GENERAL

Editor's notes. — In light of the similarity of the statutory provisions, opinions under Ga. L. 1941, p. 300, § 8 are included in the annotations for this Code section.

Word "verify" as used in Ga. L. 1941, p. 300, § 8, means to prove to be true, to confirm, substantiate, check, or test accuracy of various allegations of petition, and means more than a mere certificate by the welfare department that the petitioner, insofar as the petitioner knows, has pled

the truth. 1948-49 Op. Att'y Gen. p. 613 (decided under Ga. L. 1941, p. 300, § 8 prior to revision of chapter by Ga. L. 1977, p. 201).

There is no requirement that names of natural parents be disclosed and in absence of such an affirmative requirement, such information need not be disclosed in the report. 1948-49 Op. Att'y Gen. p. 278 (decided under Ga. L. 1941, p. 300, § 8 prior to revision of chapter by Ga. L. 1977, p. 201).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Adoption, §§ 113, 129, 131.

C.J.S. — 2 C.J.S., Adoption of Persons, §§ 46, 48.

ALR. — Religion as factor in adoption proceedings, 48 ALR3d 383.

Liability of guardian ad litem for infant party to civil suit for negligence in connection with suit, 14 ALR5th 929.

19-8-18. Hearing and decree of adoption; district attorney to be directed to review inducement of violations; disposition of child on denial of petition.

(a)(1) Upon the date appointed by the court for a hearing of the petition for adoption or as soon thereafter as the matter may be reached for a hearing, the court shall proceed to a full hearing on the petition and the examination of the parties at interest in chambers, under oath, with the right of continuing the hearing and examinations from time to time as the nature of the case may require. The court at such times shall give consideration to the investigation report to the court provided for in Code Section 19-8-16 and the recommendations contained therein.

(2) The court shall examine the petition for adoption and the affidavit specified in subsection (g) of Code Section 19-8-5, 19-8-6, or 19-8-7, as appropriate, to determine whether Code Section 19-8-12 is applicable. If the court determines that Code Section 19-8-12 is applicable to the petition, it shall:

(A) Determine that an appropriate order has previously been entered;

(B) Enter an order consistent with Code Section 19-8-12; or

(C) Continue the hearing until Code Section 19-8-12 is complied with.

(3) If the adoption petition is filed pursuant to subsection (a) of Code Section 19-8-5, the court shall examine the financial disclosures required under subsections (c) and (d) of Code Section 19-8-13 and make such further examination of each petitioner and his attorney as the court deems appropriate in order to make a determination as to whether there is cause to believe that Code Section 19-8-24 has been violated with regard to the "inducement" of the placement of the child for adoption. Should the court determine that further inquiry is in order, the court shall direct the district attorney for the county to review the matter further and to take such appropriate action as the district attorney in his discretion deems appropriate.

(b) If the court is satisfied that each living parent or guardian of the child has surrendered or had terminated all his rights to the child in the manner provided by law prior to the filing of the petition for adoption or that each petitioner has satisfied his burden of proof under Code Section 19-8-10, that such petitioner is capable of assuming responsibility for the care, supervision, training, and education of the child, that the child is suitable for adoption in a private family home, and that the adoption requested is for the best interest of the child, it shall enter a decree of adoption, terminating all the rights of each parent and guardian to the child, granting the permanent custody of the child to each petitioner, naming the child as prayed for in the petition, and declaring the child to be the adopted child of each petitioner. In all cases wherein Code Section 19-8-10 is relied upon by any petitioner as a basis for the termination of parental rights, the court shall include in the decree of adoption appropriate findings of fact and conclusions of law relating to the applicability of Code Section 19-8-10.

(c) If the court determines that any petitioner has not complied with this chapter, it may dismiss the petition for adoption without prejudice or it may continue the case. Should the court find that any notice required to be given by any petitioner under this chapter has not been given or has not been properly given or that the petition has not been properly filed, the court is authorized to enter an order providing for corrective action and an additional hearing.

(d) If the court is not satisfied that the adoption is in the best interests of the child, it shall deny the petition. If the petition is denied because of such reason or for any other reason under law, the court shall commit the child to the custody of the department or to a child-placing

agency, if the petition was filed pursuant to Code Section 19-8-4 or 19-8-5. If the petition was filed pursuant to Code Section 19-8-6, 19-8-7, or 19-8-8, the child shall remain in the custody of each petitioner if that petitioner is fit to have custody or the court may place the child with the department for the purpose of determining whether or not a petition should be initiated under Chapter 11 of Title 15.

(e) A decree of adoption issued pursuant to subsection (b) of this Code section shall not be subject to any judicial challenge filed more than six months after the date of entry of such decree.

(f) Any decree of adoption issued prior to the effective date of this action shall not be subject to any judicial challenge more than six months after July 1, 1995. (Code 1981, § 19-8-18, enacted by Ga. L. 1990, p. 1572, § 5; Ga. L. 1995, p. 791, § 1/HB 474.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1995, “July 1, 1995” was substituted for “the effective date of this Act” in subsection (f).

Law reviews. — For note on the 1995 amendment of this Code section, see 12 Ga. St. U.L. Rev. 166 (1995).

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1941, p. 300, § 3 and former § 19-8-13 are included in the annotations for this section.

Purpose of hearing upon petition of adoption is to ascertain disposition in the child’s best interest. *Hester v. Mathis*, 147 Ga. App. 257, 248 S.E.2d 538 (1978) (decided under Ga. L. 1941, p. 300, § 3).

Petition for adoption properly granted. — Trial court did not abuse the court’s discretion in granting the petition for adoption filed by a child’s paternal grandmother and paternal step grandfather because the court properly found that the adoption was in the best interest of the child; the trial court recognized the importance of continuity, stability, and security that would come from allowing the paternal grandmother and paternal step grandfather to adopt the child and found that they applied themselves so as to promote or foster a positive relationship with all the child’s blood relatives. *Barr v. Gregor*, 316 Ga. App. 269, 728 S.E.2d 868 (2012).

Res judicata. — Superior court erred in granting a mother’s motion to dismiss a former partner’s petition to adopt the

mother’s child because a judgment denying the mother’s motion to set aside the adoption decree was res judicata as to the validity of the adoption decree, and the superior court that dismissed the partner’s petition for custody was not entitled to revisit the validity of the decree; although a superior court ultimately denied the mother’s motion to set aside as untimely, the application of the time bar set out in O.C.G.A. § 19-8-18(e) presupposed that the adoption was one authorized by, and entered in accordance with, O.C.G.A. § 19-8-18(b). *Bates v. Bates*, 317 Ga. App. 339, 730 S.E.2d 482 (2012).

Adoption laws are to be strictly construed in favor of natural parents. *Johnson v. Strickland*, 88 Ga. App. 281, 76 S.E.2d 533 (1953) (decided under Ga. L. 1941, p. 300, § 3 prior to revision of chapter by Ga. L. 1977, p. 201).

While it may be true that in some respects adoption statute may be liberally construed, as applied to severance forever of paternal relation, it must be construed strictly against applicant and favorably to parent. *Wheeler v. Little*, 113 Ga. App. 106, 147 S.E.2d 352 (1966) (decided under Ga. L. 1941, p. 300, § 3 prior to revision of chapter by Ga. L. 1977, p. 201).

Unmarried individuals may adopt. — Trial court abused the court's discretion by denying a foster parent's petition to adopt the foster child on the ground that placing the child with the foster parent, who was not married to the individual with whom the foster parent lived, violated the state's public policy because all of the evidence showed that the adoption would be in the child's best interest, and the trial court failed to apply the law as written and determine whether it was in the child's best interest to allow the adoption; all of the witnesses, including the guardian ad litem the trial court appointed to represent the child's interests and the Department of Family and Children's Services adoption specialist, testified that the adoption was in the child's best interest and that to remove the child from the only family the child had ever known would be devastating to the child, and O.C.G.A. § 19-8-3 clearly did not prohibit the adoption because the General Assembly did not prohibit unmarried couples from adopting. *In re Goudeau*, 305 Ga. App. 718, 700 S.E.2d 688 (2010).

In all adoption proceedings, judge exercises wide discretion which will not be set aside by appellate courts unless abused. *McCall v. VanPopering*, 124 Ga. App. 149, 183 S.E.2d 411 (1971) (decided under Ga. L. 1941, p. 300, § 3 prior to revision of chapter by Ga. L. 1977, p. 201).

In matters of adoption, superior court has very broad discretion which will not be controlled by appellate courts except in plain cases of abuse. If there is any evidence to support judgment entered in adoption proceeding, it must be affirmed. *Nix v. Sanders*, 136 Ga. App. 859, 223 S.E.2d 21 (1975) (decided under Ga. L. 1941, p. 300, § 3 prior to revision of chapter by Ga. L. 1977, p. 201).

Wide discretion is vested in the trial judge, who acts as both judge and jury, in adoption proceedings, and the judge's discretion will not be controlled unless manifestly abused. *Ritchie v. Dillon*, 103 Ga. App. 7, 118 S.E.2d 115 (1961) (decided under Ga. L. 1941, p. 300, § 3 prior to revision of chapter by Ga. L. 1977, p. 201).

Judge must consider recommendations of Department of Human Resources. — It appears that, while legisla-

ture invested trial judge with utmost discretion in determining child's best interests to the judge's own satisfaction, it included mandatory provision that judge should give consideration to recommendations of Department of Human Resources in so doing. *Cox v. Bohannon*, 86 Ga. App. 236, 71 S.E.2d 440 (1952) (decided under Ga. L. 1941, p. 300, § 7 prior to revision of chapter by Ga. L. 1977, p. 201).

Recommendations of investigating agency to be "given consideration". — Court properly granted a married couple's petition to adopt a child despite testimony from a representative of the Department of Family and Children Services (DFACS) that the child's interests would be best served by remaining in the care of relatives since the child had been there for a while. Although O.C.G.A. § 19-8-18(a)(1) required the trial court to "give consideration" to the DFACS investigative report, the law did not require the court to follow or adopt any conclusions in the report. *Blount v. Knighton*, 298 Ga. App. 448, 680 S.E.2d 522 (2009).

Only questions before court are: (1) do parents consent; (2) are adopting parents worthy and able to care for child; and (3) is adoption in best interests of child? Court is not required to declare adoption unless all three facts unequivocally appear. *Allen v. Morgan*, 75 Ga. App. 738, 44 S.E.2d 500 (1947) (decided under Ga. L. 1941, p. 300, § 7 prior to revision of chapter by Ga. L. 1977, p. 201).

Judge must determine whether parents have consented. — At full hearing, judge has jurisdiction and it is the judge's duty to inquire into whether both parents have consented to adoption, and whether, if one parent has not consented, the necessity for such consent has been rendered unnecessary under law providing for such cases. *Murray v. Woodford*, 86 Ga. App. 273, 71 S.E.2d 275 (1952) (decided under Ga. L. 1941, p. 300, § 7 prior to revision of chapter by Ga. L. 1977, p. 201).

Challenge to consent order time barred. — Challenge by the adoptive father and the biological mother to a consent order providing, inter alia, visitation to the biological father and the paternal grandmother, filed more than a year after

the consent order was entered was time barred. *Rimmer v. Tinch*, 324 Ga. App. 65, 749 S.E.2d 236 (2013).

Consideration of investigative report of Department of Human Resources. — if existent, is mandatory in adoption proceedings. *Chandler v. Cochran*, 247 Ga. 184, 275 S.E.2d 23 (1981) (decided under former § 19-8-13).

Acceptance of recommendations. — While the trial court is required to “give consideration” to the investigative report, the court is not required to follow or adopt any conclusions in the report. *Bragg v. State*, 226 Ga. App. 588, 487 S.E.2d 137 (1997).

When the trial court considered the investigative report’s recommendations and scanned the report, although the court did not read the report in detail, there was no violation of paragraph (a)(1) of former § 19-8-13. *Ridgley v. Helms*, 168 Ga. App. 435, 309 S.E.2d 375 (1983) (decided under former § 19-8-13); *Cafagno v. Hagan*, 213 Ga. App. 631, 445 S.E.2d 380 (1994).

Challenge to adoption decree untimely. — Because any challenge to the adoption decree had to be brought within six months and the mother brought a challenge approximately 10 months after the decree was entered, the trial court erred in granting the mother’s motion to set aside the adoption. *Oni v. Oni*, 323 Ga. App. 467, 746 S.E.2d 641 (2013).

Denial of adoption petition affirmed. — Fact that the child’s father surrendered his rights to the child over to the paternal grandparents pursuant to O.C.G.A. § 19-8-7(a) was not determinative of the adoption petition filed by the paternal grandparents; since there was evidence to support the trial court’s findings that the paternal grandparents would have denied the maternal grandparents contact with the child if the adoption petition were granted, and that the granting of the petition was not in the child’s best interests, the denial of the petition was affirmed. *Madison v. Barnett*, 268 Ga. App. 348, 601 S.E.2d 704 (2004).

Decree met statutory requirements. — Trial court’s decree terminating a father’s parental rights and allowing the adoption of the child by the adoptive par-

ent complied with the statutory requirements because the order provided specific findings of fact that at the time of filing the petition, there had been no payments on the monthly child support for the one-year period immediately prior, and that there had been no child support payments from the date of the father’s release from prison through a specific date; the trial court’s decree further stated that the court’s conclusions of law were based on the court’s findings of fact and the verified petition, which specifically referenced O.C.G.A. § 19-8-10 in seeking adoption due, in part, to the father’s failure to pay child support as required by a divorce decree and contempt order. *Ray v. Denton*, 278 Ga. App. 69, 628 S.E.2d 180 (2006).

Lack of notification to natural parent. — Trial court erred by granting a stepparent’s petition to adopt an eight-year-old child and by terminating the parental rights of one of the child’s natural parents as the trial court failed to make any finding as to whether the natural parent’s lack of communication with the child was without justifiable cause as required by O.C.G.A. § 19-8-18(b). Further, the trial court erred by basing the court’s adoption decision, in part, on O.C.G.A. § 19-8-10(a)(4) as the stepparent’s petition did not assert any claim pursuant to § 19-8-10(a) and, instead, relied exclusively on § 19-8-10(b). The natural parent was not served with a petition making allegations under subsection (a) and, therefore, received no notification that the natural parent had to prepare to show cause why the natural parent’s parental rights should not be terminated. *Smallwood v. Davis*, 292 Ga. App. 173, 664 S.E.2d 254 (2008).

Findings of fact and conclusions of law. — Since a trial court failed to make any specific findings of fact in support of the court’s recitation under O.C.G.A. § 19-8-10 that a child’s father had failed without justifiable cause to communicate with the child for a period of one year immediately prior to the filing of the adoption petition, the order did not comply with the requirements of O.C.G.A. § 19-8-18, and the court had to remand the matter to the trial court to make the appropriate findings of fact and conclu-

sions of law. *Sauls v. Atchison*, 316 Ga. App. 792, 730 S.E.2d 459 (2012).

Trial court erred by terminating a biological father's parental rights and ordering adoption because the court failed to set forth specific findings of fact to support the conclusion that the requisites of O.C.G.A. § 19-8-10(b) as to abandonment of the child had been met. *Ray v. Hann*, 323 Ga. App. 45, 746 S.E.2d 600 (2013).

Best interests of child not shown. — Although a grandmother's testimony as to her care and support of her granddaughter supported a trial court's grant of the grandmother's adoption petition pursuant to O.C.G.A. § 19-8-18(b), there was no showing that such adoption was in the child's best interest. *Owen v. Watts*, 296 Ga. App. 449, 674 S.E.2d 665 (2009).

Construction with other law. — Superior court properly dismissed a grandmother's adoption petition on collateral estoppel grounds based on the juvenile court's previous order granting temporary custody to the maternal grandfather and grant of visitation rights to the grandmother; as a result, the superior court was not authorized to readjudicate the issue of permanent custody involving the child at issue. *Smith v. Hutcheson*, 283 Ga. App. 117, 640 S.E.2d 690 (2006).

When the trial court denied a couple's petition to adopt a child and to terminate the parental rights of the child's legal father, the court was not required to enter findings in accordance with O.C.G.A. § 19-8-18(b), which applied when an adoption petition was granted and parental rights terminated; the court entered findings and conclusions sufficient to satisfy O.C.G.A. § 19-8-10(b) when the court found that the father had paid child support and had communicated with the child and that the adoption was not in the child's best interest. *Thaggard v. Willard*, 285 Ga. App. 384, 646 S.E.2d 479 (2007).

Trial court erred in denying an aunt and uncle's petition to adopt their nephew under O.C.G.A. § 19-8-8, and should have applied O.C.G.A. § 19-8-7 as: (1) the former was not intended to be a general rule regarding the adoption of foreign children; (2) the aunt and uncle satisfied the jurisdictional and venue requirements of

O.C.G.A. § 19-8-2 by filing the adoption petition in the superior court of their county of residence; and (3) as the child's aunt and uncle, they were relatives eligible to adopt under O.C.G.A. § 19-8-7(a); hence, the matter was remanded for consideration of the relevant factors in making the determinations required under O.C.G.A. § 19-8-18(b). *In re Adoption of D.J.F.M.*, 284 Ga. App. 420, 643 S.E.2d 879 (2007).

Limiting language of O.C.G.A. § 19-7-3(b), forbidding original actions for grandparent visitation if the parents are together and living with the child, includes adoptive parents because in the absence of language limiting the term "parent" to only "natural parents" or "biological parents," there is no legislative intent to withhold from adoptive parents the same constitutionally protected status enjoyed by biological parents to raise their children without state interference; in construing § 19-7-3(b), the definition of parent in the adoption statute, O.C.G.A. § 19-8-1(6) and (8), which gives full legal status to adoptive parents, cannot be ignored, and the clear intent of the adoption statute is to give adoptive parents full legal rights. *Bailey v. Kunz*, 307 Ga. App. 710, 706 S.E.2d 98 (2011), *aff'd*, 290 Ga. 361, 720 S.E.2d 634 (2012).

Public policy of the state is to consider best interest of the child. — Public policy of the state as enunciated by the General Assembly is to consider the best interest of the child when determining whether he or she should be adopted, O.C.G.A. § 19-8-18(b); in stating that marriage is encouraged, O.C.G.A. § 19-3-6 forbids most efforts to restrain or discourage marriage by contract, condition, limitation, or otherwise, and § 19-3-6 has nothing to do with the standards the courts must apply in determining whether to allow a child to be adopted. *In re Goudeau*, 305 Ga. App. 718, 700 S.E.2d 688 (2010).

Cited in *Howard v. Bridger*, 189 Ga. App. 292, 375 S.E.2d 270 (1988); *Stroud v. McSwain*, 192 Ga. App. 171, 384 S.E.2d 206 (1989); *Matherly v. Kinney*, 227 Ga. App. 302, 489 S.E.2d 89 (1997); *In re Stroh*, 240 Ga. App. 835, 523 S.E.2d 887 (1999).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Adoption, §§ 117, 128 et seq.

Am. Jur. Pleading and Practice Forms. — 1B Am. Jur. Pleading and Practice Forms, Adoption, §§ 182, 209.

C.J.S. — 2 C.J.S., Adoption of Persons, §§ 93 et seq., 118.

ALR. — Right of natural parent to withdraw valid consent to adoption of child, 74 ALR3d 421.

Mistake or want of understanding as

ground for revocation of consent to adoption or of agreement releasing infant to adoption placement agency, 74 ALR3d 489.

What constitutes “duress” in obtaining parent’s consent to adoption of child or surrender of child to adoption agency, 74 ALR3d 527.

Postadoption visitation by natural parent, 78 ALR4th 218.

19-8-19. Effect of decree of adoption.

(a) A decree of adoption, whether issued by a court of this state or by a court of any other jurisdiction, shall have the following effect as to matters within the jurisdiction of or before a court in this state:

(1) Except with respect to a spouse of the petitioner and relatives of the spouse, a decree of adoption terminates all legal relationships between the adopted individual and his relatives, including his parent, so that the adopted individual thereafter is a stranger to his former relatives for all purposes, including inheritance and the interpretation or construction of documents, statutes, and instruments, whether executed before or after the adoption is decreed, which do not expressly include the individual by name or by some designation not based on a parent and child or blood relationship; and

(2) A decree of adoption creates the relationship of parent and child between each petitioner and the adopted individual, as if the adopted individual were a child of biological issue of that petitioner. The adopted individual shall enjoy every right and privilege of a biological child of that petitioner; shall be deemed a biological child of that petitioner, to inherit under the laws of descent and distribution in the absence of a will, and to take under the provisions of any instrument of testamentary gift, bequest, devise, or legacy, whether executed before or after the adoption is decreed, unless expressly excluded therefrom; shall take by inheritance from relatives of that petitioner; and shall also take as a “child” of that petitioner under a class gift made by the will of a third person.

(b) Notwithstanding the provisions of subsection (a) of this Code section, if a parent of a child dies without the relationship of parent and child having been previously terminated by court order or unrevoked surrender of parental rights to the child, the child’s right of inheritance from or through the deceased parent shall not be affected by the adoption. (Code 1981, § 19-8-19, enacted by Ga. L. 1990, p. 1572, § 5.)

Law reviews. — For article discussing problems in construction of instrument conveying gift to a group or class, see 6 Ga. St. B.J. 169 (1969). For article discussing inheritance by and from adopted child, see 10 Ga. L. Rev. 447 (1976). For article surveying legislative and judicial developments in Georgia's will, trusts, and estate laws, see 31 Mercer L. Rev. 281 (1979). For survey article on wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982). For annual survey of law of wills, trusts, and administration of estates, see 38 Mercer L. Rev. 417 (1986). For annual survey article discussing wills, trusts and administration of estates, see 51 Mercer L. Rev. 487 (1999). For annual survey on domestic relations law, see 64 Mercer L. Rev. 121 (2012).

For note discussing rights of inheritance after adoption in Georgia, see 24 Ga. B.J. 139 (1961). For note advocating consistency of inheritance and wrongful death rights with adopted child's new legal status, see 23 Mercer L. Rev. 1003

(1972). For note, "In re Baby Girl Eason: Expanding the Constitutional Rights of Unwed Fathers," see 39 Mercer L. Rev. 997 (1988). For note, "Surrogate Mother Agreements in Georgia: Conflict and Accord with Statutory and Case Law," see 4 Ga. St. U.L. Rev. 153 (1988). For note, "Status or Contract? A Comparative Analysis of Inheritance Rights under Equitable Adoption and Domestic Partnership Doctrines," 39 Ga. L. Rev. 675 (2005).

For comment on *Thornton v. Anderson*, 207 Ga. 714, 64 S.E.2d 186 (1951), see 3 Mercer L. Rev. 223 (1951). For comment on *Thornton v. Anderson*, 207 Ga. 714, 64 S.E.2d 186 (1950), holding adoption of child serves as natural birth to revoke will, see 14 Ga. B.J. 86 (1951). For comment on "Grandparents' Visitation Rights in Georgia," see 29 Emory L.J. 1083 (1980). For comment on equitable adoption, equitable legitimation, and inheritance in extralegal family arrangements, see 48 Emory L.J. 943 (1999).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1941, p. 300, § 11 and former § 19-8-14 are included in the annotations for this Code section.

Effect of adoption prior to Act severing adopted child's rights. — After the natural father died in 1982 and his daughter had been adopted by another person prior to the 1977 enactment which severed an adopted child's right of inheritance from the child's natural parents and severed the adopted child's former right to bring a wrongful death action for the homicide of the child's natural parent, the decedent's daughter was not an heir of her natural father and had no vested right to bring an action in tort for his death. *Eig v. Savage*, 177 Ga. App. 514, 339 S.E.2d 752 (1986) (decided under former § 19-8-14).

Res judicata. — Superior court erred in granting a mother's motion to dismiss a former partner's petition to adopt the mother's child because a judgment denying the mother's motion to set aside the adoption decree was res judicata as to the validity of the adoption decree; the supe-

rior court was competent to entertain the motion to set aside and to consider whether the court properly had jurisdiction when the court entered the adoption decree, and the court's denial of the motion to set aside was conclusive of the question of standing in the partner's case. *Bates v. Bates*, 317 Ga. App. 339, 730 S.E.2d 482 (2012).

Section 19-7-3 constitutes exception to rule. — Legislature's intent in enacting 1980 amendment to O.C.G.A. § 19-7-3 was to give grandparents standing to seek visitation in a situation in which their own child had lost his or her parental rights through death or termination; therefore, that section constitutes specific exception to provision of former § 19-8-14 that adopted child shall become a legal stranger to his former relatives for all purposes. *Smith v. Finstad*, 247 Ga. 603, 277 S.E.2d 736 (1981) (decided under former § 19-8-14).

When § 19-7-3 not an exception. — O.C.G.A. § 19-7-3, which provides visitation rights for grandparents in certain situations, is not an exception to former

§ 19-8-14 when both the natural mother and father have released the child for adoption. *Mitchell v. Erdmier*, 253 Ga. 335, 320 S.E.2d 163 (1984) (decided under former § 19-8-14).

“Grandparents’ Bill of Rights” in O.C.G.A. § 19-7-3 is not an exception to former § 19-8-14. The only provision which grants grandparents visitation rights after an adoption is the limited one of the death of one parent, the remarriage of the surviving parent, followed by the adoption of the child by the stepparent. In other adoptions, the severance of relationships provision of former § 19-8-14 controls, and no rights of visitation by former grandparents existed. *Heard v. Coleman*, 181 Ga. App. 899, 354 S.E.2d 164 (1987) (decided under former § 19-8-14).

No biological parent preference over adoptive parent. — In a custody dispute between a biological parent and an adoptive parent, preference cannot be given to the biological parent. The test is the best interest of the child. *Ivey v. Ivey*, 264 Ga. 435, 445 S.E.2d 258 (1994).

Adopting parent on equal footing as biological. — Trial court did not err in awarding primary physical custody of the couple’s biological child to the wife as the court’s determination that splitting the siblings would cause emotional harm to both children was sufficient to overcome the statutory presumption in favor of the husband with respect to custody of the older child, who was the biological child of the husband and adopted by the wife. *Hastings v. Hastings*, 291 Ga. 782, 732 S.E.2d 272 (2012).

Grandparents’ visitation precluded after child adopted by stepfather. — Paternal grandparents were not entitled to visitation rights after the child’s natural father’s parental rights had been terminated and the child had been adopted by the child’s stepfather. *Campbell v. Holcomb*, 193 Ga. App. 474, 388 S.E.2d 65 (1989) (decided under former § 19-8-14).

Limiting language of O.C.G.A. § 19-7-3(b), forbidding original actions for grandparent visitation if the parents are together and living with the child, includes adoptive parents because in the absence of language limiting the term “parent” to only “natural parents” or “bio-

logical parents”, there is no legislative intent to withhold from adoptive parents the same constitutionally protected status enjoyed by biological parents to raise their children without state interference; in construing § 19-7-3(b), the definition of parent in the adoption statute, O.C.G.A. § 19-8-1(6) and (8), which gives full legal status to adoptive parents, cannot be ignored, and the clear intent of the adoption statute is to give adoptive parents full legal rights. *Bailey v. Kunz*, 307 Ga. App. 710, 706 S.E.2d 98 (2011), *aff’d*, 290 Ga. 361, 720 S.E.2d 634 (2012).

Grandparents’ visitation rights precluded when child adopted by stepfather. — Term “parents” in O.C.G.A. § 19-7-3(b) did not exclude a child’s adoptive parent; therefore, because a child was living with the child’s mother and adoptive father, who were not separated, the child’s natural grandparents had no right to file an original action for visitation with the child under the statute. Upon their son’s termination of his parental rights to the child, the grandparents became strangers to the child, pursuant to O.C.G.A. § 19-8-19. *Kunz v. Bailey*, 290 Ga. 361, 720 S.E.2d 634 (2012).

Effect of termination of grandparent’s legal relationship. — Child’s biological grandmother lacked standing to bring an action for injuries arising from illegitimacy since the child was adopted and the grandmother’s legal relationship was terminated. *Vance v. T.R.C.*, 229 Ga. App. 608, 494 S.E.2d 714 (1997).

Since the intervention of grandparents into a custody proceeding and an order granting them temporary custody had already occurred, the later adult adoption of the child’s father did not extinguish the legal status that the grandparents held; the trial court’s subsequent order dismissing the intervention of the grandparents, and setting aside the award of temporary custody to the grandparents was reversed. *Walls v. Walls*, 278 Ga. 206, 599 S.E.2d 173 (2004).

Child support arrearages not eradicated by adoption. — Arrearages in child support payments which accrued prior to adoption are not eradicated by the adoption decree. *Sample v. Poteralski*, 169 Ga. App. 448, 313 S.E.2d 145 (1984) (decided under former § 19-8-14).

Status of parent and child exists after parental rights terminated. However, “child” no longer exists between the natural parent and “child” but exists between the child and the adopting parent. *Menard v. Fairchild*, 254 Ga. 275, 328 S.E.2d 721 (1985) (decided under former § 19-8-14).

Right of adopted child to take under will. — In construing rights of adopted child to take under a will, it is not a question of right of adopted child to inherit, but simply a question of the testator’s intent with respect to those who are to share in the estate. *Thomas v. Trust Co. Bank*, 247 Ga. 693, 279 S.E.2d 440 (1981) (decided under former § 19-8-14).

Incest. — In a prosecution for incest, although the state did not introduce documentary evidence of adoption, un rebutted testimony of the adoption by the defendant, his wife, and the victim was sufficient to establish the relationship. *Edmonson v. State*, 219 Ga. App. 323, 464 S.E.2d 839 (1995), overruled on other grounds, *Collins v. State*, 229 Ga. App. 658, 495 S.E.2d 59 (1997).

Because adopted individuals “enjoy every right and privilege of a biological child,” they are statutorily protected from incest. *Edmonson v. State*, 219 Ga. App. 323, 464 S.E.2d 839 (1995), overruled on other grounds, *Collins v. State*, 229 Ga. App. 658, 495 S.E.2d 59 (1997).

Incest not applicable between adopted siblings. — Trial court erred when the court denied the defendant’s motion to quash the count of an indictment charging the defendant with incest because the defendant did not commit incest since the defendant’s adoptive sister was not a whole blood or half blood sibling; the incest statute does not prohibit sexual intercourse between a brother and an adoptive sister not related by blood. *Smith v. State*, 311 Ga. App. 757, 717 S.E.2d 280 (2011).

Cited in *Sachs v. Walzer*, 242 Ga. 742, 251 S.E.2d 302 (1978); *Mead v. Owens*, 149 Ga. App. 303, 254 S.E.2d 431 (1979); *O’Quinn v. Bunkley*, 185 Ga. App. 673, 365 S.E.2d 460 (1988); *Garcia v. Garcia*, 284 Ga. 152, 663 S.E.2d 709 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Adoption, § 129 et seq.

Am. Jur. Pleading and Practice Forms. — 1B Am. Jur. Pleading and Practice Forms, Adoption, § 209.

C.J.S. — 2 C.J.S., Adoption of Persons, § 133 et seq.

ALR. — Adoption of child as satisfying condition of devise or bequest when or if beneficiary has a child, 30 ALR 1412.

Right to disinherit adopted child, 97 ALR 1015.

Adoption as affecting duty of support or assistance otherwise owed by natural parent to child, or by child to natural parent, 114 ALR 494.

Adoption as affecting right of inheritance by, through, or from natural parent or other natural kin, 123 ALR 1038.

Underformed or imperfectly performed agreement to adopt child as giving child the status of an adopted child for purposes of succession or estate tax, 141 ALR 1302; 97 ALR3d 347.

Right of parent to recover for injury to

or death of minor child as affected by award of custody of child to another, 147 ALR 482.

Relationship created by adoption as within statute prohibiting marriage between parties in specified relationships, or statute regarding incest, 151 ALR 1146.

Descent and distribution of property of adopted child, 170 ALR 742.

Annulment or vacation of adoption decree by adopting parent or natural parent consenting to adoption, 2 ALR2d 887.

Adoption of child as revoking will, 24 ALR2d 1085.

Adopted child as within class named in deed or inter vivos trust instrument, 37 ALR2d 237.

Adoption as affecting right of inheritance through or from natural parent or other natural kin, 37 ALR2d 333.

Right of adopted child to inherit from kindred of adoptive parent, 43 ALR2d 1183.

Applicability of res judicata to decrees or judgments in adoption proceedings, 52 ALR2d 406.

What law, in point of time, governs inheritance from or through adopted person, 52 ALR2d 1228.

Change of child's name in adoption proceeding, 53 ALR2d 927.

Conflict of laws as to adoption as affecting descent and distribution of decedent's estate, 87 ALR2d 1240.

Right of adopted child to inherit from intestate natural grandparent, 60 ALR3d 631.

Right of natural parent to withdraw valid consent to adoption of child, 74 ALR3d 421.

Mistake or want of understanding as ground for revocation of consent to adoption or of agreement releasing infant to adoption placement agency, 74 ALR3d 489.

What constitutes "duress" in obtaining parent's consent to adoption of child or

surrender of child to adoption agency, 74 ALR3d 527.

Validity, construction, and application of statute imposing upon stepparent obligation to support child, 75 ALR3d 1129.

Adoption as precluding testamentary gift under natural relative's will, 71 ALR4th 374.

Liability of public or private agency or its employees to prospective adoptive parents in contract or tort for failure to complete arrangement for adoption, 8 ALR5th 860.

Adopted child as within class named in testamentary gift, 36 ALR5th 395.

Adopted child as within class named in deed or inter vivos trust instrument, 37 ALR5th 237.

Modern status of law as to equitable adoption or adoption by estoppel, 122 ALR5th 205.

19-8-20. Forwarding of decree, report, and subsequent orders to department; issuance of adoption certificate; use as evidence.

(a) Upon the entry of the decree of adoption, the clerk of the court granting the same shall forward a copy of the decree, together with the original of the investigation report and background information filed with the court, to the department. If there is any subsequent order or revocation of the adoption a copy of same in like manner shall be forwarded by the clerk to the department.

(b) At any time after the entry of the decree of adoption, upon the request of an adopted person who has reached 18 years of age or upon the request of any adopting parent, the clerk of the court granting the decree shall issue to that requesting adopted person or adopting parent a certificate of adoption, under the seal of the court, upon payment to the clerk of the fee prescribed in paragraph (4) of subsection (g) of Code Section 15-6-77, which adoption certificate shall be received as evidence in any court or proceeding as primary evidence of the facts contained in the certificate.

(c) The adoption certificate shall be in substantially the following form:

This is to certify that _____ (names of each adopting parent) have obtained a decree of adoption for _____ (full name of adopted child) in the Superior Court of _____ County, Georgia, on the _____ day of _____, as shown by the court's records.

Given under the hand and seal of said court, this the _____ day
of _____, _____.

Clerk

(Code 1981, § 19-8-20, enacted by Ga. L. 1990, p. 1572, § 5; Ga. L. 1991, p. 1324, § 4; Ga. L. 1991, p. 1640, § 8.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1941, p. 300, § 14 are included in the annotations for this Code section.

Order need not state that investigative report was considered by court. — When transcript of evidence reflects that trial court gave consideration to investigative report by Department of Human Resources as required by Ga. L.

1941, p. 300, § 14, before making the court's decision, the fact that such court did not explicitly state in the order that the report was considered was not ground for reversing the judgment. *Wellfort v. Bowick*, 147 Ga. App. 565, 249 S.E.2d 363 (1978) (decided under Ga. L. 1941, p. 300, § 14).

Cited in *Ellison v. Thompson*, 240 Ga. 594, 242 S.E.2d 95 (1978).

RESEARCH REFERENCES

C.J.S. — 2 C.J.S., Adoption of Persons, § 6.

ALR. — Necessity of notice to parents

before adoption of child, 24 ALR 416; 76 ALR 1077.

19-8-21. Adoption of adult persons; applicability of Code Sections 19-8-19 and 19-8-20.

(a) Adult persons may be adopted on giving written consent to the adoption. In such cases, adoption shall be by a petition duly verified and filed, together with two conformed copies, in the superior court in the county in which either any petitioner or the adult to be adopted resides, setting forth the name, age, and residence of each petitioner and of the adult to be adopted, the name by which the adult is to be known, and his written consent to the adoption. The court may assign the petition for hearing at any time. After examining each petitioner and the adult sought to be adopted, the court, if satisfied that there is no reason why the adoption should not be granted, shall enter a decree of adoption and, if requested, shall change the name of the adopted adult. Thereafter, the relation between each petitioner and the adopted adult shall be, as to their legal rights and liabilities, the relation of parent and child.

(b) Code Section 19-8-19, relating to the effect of a decree of adoption, and Code Section 19-8-20, relating to notice of adoption, shall also apply to the adoption of adults. (Code 1981, § 19-8-21, enacted by Ga. L. 1990, p. 1572, § 5.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1941, p. 300, § 16 are included in the annotations for this Code section.

Effect of section's discretionary terms. — While couched in discretionary terms, Ga. L. 1941, p. 300, § 16 did not permit the trial judge to deny the adult adoption without a hearing. The legislature did not intend to grant to trial courts discretionary power to decide an adult's *ex parte* adoption case on pleadings and without giving the petitioner an opportunity to be heard. *In re Chambers*, 147 Ga. App. 536, 249 S.E.2d 343 (1978) (decided under Ga. L. 1941, p. 300, § 16).

Adoptees have same rights as natural born children. — Under the 1967 amendment to former Code 1933, § 74-420, which was in effect when a testator died in 1970, an adult who was adopted by a life tenant was entitled to inherit a remainder interest to the same extent as would a natural-born child. The law granted adoptees the same rights as natural born children, and the will did not expressly exclude adoptees. *Elrod v. Cowart*, 284 Ga. 869, 672 S.E.2d 616 (2009).

Cited in *Lee v. Green*, 217 Ga. 860, 126 S.E.2d 417 (1962); *Faulk v. Faulk*, 240 Ga. 373, 240 S.E.2d 848 (1977).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Adoption, § 26 et seq.

C.J.S. — 2 C.J.S., Adoption of Persons, §§ 22, 23.

ALR. — Adoption of adult, 21 ALR3d 1012; 42 ALR4th 776.

19-8-22. Recognition and effect of foreign decrees.

(a) A decree of a court terminating the relationship of parent and child or establishing the relationship of parent and child by adoption, issued pursuant to due process of law by a court of any other jurisdiction within or outside the United States, or the clear and irrevocable release or consent to adoption by the guardian of a child where the appointment of the guardian has been certified by the appropriate and legally authorized court or agency of the government of the foreign country shall be recognized in this state; and the rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though any such decree were issued by a court of this state and any such consent or release shall be deemed to satisfy the requirements of Code Sections 19-8-4, 19-8-5, 19-8-6, 19-8-7, and 19-8-12.

(b) Any adoption proceeding in this state in which a final order of adoption was entered by the court prior to April 1, 1986, and to which subsection (a) of this Code section would have been applicable if said subsection, as amended, had been effective at the time such proceeding was filed or concluded shall be governed by the provisions of subsection (a) of this Code section, as amended.

(c) Any adoption proceeding pending in a court of competent jurisdiction in this state in which no final order of adoption has been entered

as of April 1, 1986, to which the provisions of subsection (a) of this Code section are applicable shall be governed by the provisions of subsection (a) of this Code section, as amended. (Code 1981, § 19-8-22, enacted by Ga. L. 1990, p. 1572, § 5.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under Ga. L. 1941, p. 300, § 11, prior to revision of the chapter by Ga. L. 1977, p. 201, are included in the annotations for this Code section.

Status acquired by adoption is determined by state creating adoption. — Status acquired by adoption, like that acquired by marriage, is a personal one,

and the adoption's validity is conclusively determined by law of state creating the adoption, and if validly created there it will be recognized and given effect here though procedure by which it was created under foreign law is different from that required here. *Watson v. Watson*, 208 Ga. 512, 67 S.E.2d 704 (1951) (decided under Ga. L. 1941, p. 300, § 11 prior to revision of chapter by Ga. L. 1977, p. 201).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Adoption, §§ 36-39.

C.J.S. — 2 C.J.S., Adoption of Persons, § 139.

ALR. — Conflict of laws as to adoption as affecting descent and distribution of decedent's estate, 87 ALR2d 1240.

19-8-23. Where records of adoption kept; examination by parties and attorneys; use of information by agency and department.

(a) The original petition, all amendments and exhibits thereto, all motions, documents, affidavits, records, and testimony filed in connection therewith, and all decrees or orders of any kind whatsoever, except the original investigation report and background information referred to in Code Section 19-8-20, shall be recorded in a book kept for that purpose and properly indexed; and the book shall be part of the records of the court in each county which has jurisdiction over matters of adoption in that county. All of the records, including the docket book, of the court granting the adoption, of the department, and of the child-placing agency that relate in any manner to the adoption shall be kept sealed and locked. The records may be examined by the parties at interest in the adoption and their attorneys when, after written petition has been presented to the court having jurisdiction and after the department and the appropriate child-placing agency have received at least 30 days' prior written notice of the filing of such petition, the matter has come on before the court in chambers and, good cause having been shown to the court, the court has entered an order permitting such examination. Notwithstanding the foregoing, if the adoptee who is the subject of the records sought to be examined is less than 18 years of age at the time the petition is filed and the petitioner

is someone other than one of the adoptive parents of the adoptee, then the department shall provide written notice of such proceedings to the adoptive parents by certified mail or statutory overnight delivery, return receipt requested, at the last address the department has for such adoptive parents and the court shall continue any hearing on the petition until not less than 60 days after the date the notice was sent. Each such adoptive parent shall have the right to appear in person or through counsel and show cause why such records should not be examined. Adoptive parents may provide the department with their current address for purposes of receiving notice under this subsection by mailing that address to:

Office of Adoptions
Department of Human Services
Atlanta, Georgia

(b) The department or the child-placing agency may, in its sole discretion, make use of any information contained in the records of the respective department or agency relating to the adoptive parents in connection with a subsequent adoption matter involving the same adoptive parents or to provide notice when required by subsection (a) of this Code section.

(c) The department or the child-placing agency may, in its sole discretion, make use of any information contained in its records on a child when an adoption disrupts after finalization and when such records are required for the permanent placement of such child, or when the information is required by federal law.

(d)(1) Upon the request of a party at interest in the adoption, a child, legal guardian, or health care agent of an adopted person or a provider of medical services to such a party, child, legal guardian, or health care agent when certain information would assist in the provision of medical care, a medical emergency, or medical diagnosis or treatment, the department or child-placing agency shall access its own records on finalized adoptions for the purpose of adding subsequently obtained medical information or releasing nonidentifying medical and health history information contained in its records pertaining to an adopted person or the biological parents or relatives of the biological parents of the adopted person. For purposes of this paragraph, the term "health care agent" has the meaning provided by Code Section 31-32-2.

(2) Upon receipt by the State Adoption Unit of the Division of Family and Children Services of the department or by a child-placing agency of documented medical information relevant to an adoptee, the office or child-placing agency shall use reasonable efforts to contact the adoptive parents of the adoptee if the adoptee is under 18

years of age or the adoptee if he or she is 18 years of age or older and provide such documented medical information to the adoptive parents or the adoptee. The office or child-placing agency shall be entitled to reimbursement of reasonable costs for postage and photocopying incurred in the delivery of such documented medical information to the adoptive parents or adoptee.

(e) Records relating in any manner to adoption shall not be open to the general public for inspection.

(f)(1) Notwithstanding Code Section 19-8-1, for purposes of this subsection, the term:

(A) "Biological parent" means the biological mother or biological father who surrendered that person's rights or had such rights terminated by court order giving rise to the adoption of the child.

(B) "Commissioner" means the commissioner of human services or that person's designee.

(C) "Department" means the Department of Human Services or, when the Department of Human Services so designates, the county department of family and children services which placed for adoption the person seeking, or on whose behalf is sought, information under this subsection.

(D) "Placement agency" means the child-placing agency, as defined in paragraph (3) of Code Section 19-8-1, which placed for adoption the person seeking or on whose behalf is sought information under this subsection.

(2) The department or a placement agency, upon the written request of an adopted person who has reached 18 years of age or upon the written request of an adoptive parent on behalf of that parent's adopted child, shall release to such adopted person or to the adoptive parent on the child's behalf nonidentifying information regarding such adopted person's biological parents and information regarding such adopted person's birth. Such information may include the date and place of birth of the adopted person and the genetic, social, and health history of the biological parents. No information released pursuant to this paragraph shall include the name or address of either biological parent or the name or address of any relative by birth or marriage of either biological parent.

(3)(A) The department or a placement agency upon written request of an adopted person who has reached 21 years of age shall release to such adopted person the name of such person's biological parent if:

(i) The biological parent whose name is to be released has submitted unrevoked written permission to the department or

the placement agency for the release of that parent's name to the adopted person;

(ii) The identity of the biological parent submitting permission for the release of that parent's name has been verified by the department or the placement agency; and

(iii) The department or the placement agency has records pertaining to the finalized adoption and to the identity of the biological parent whose name is to be released.

(B) If the adopted person is deceased and leaves a child, such child, upon reaching 21 years of age, may seek the name and other identifying information concerning his or her grandparents in the same manner as the deceased adopted person and subject to the same procedures contained in this Code section.

(4)(A) If a biological parent has not filed written unrevoked permission for the release of that parent's name to the adopted child, the department or the placement agency, within six months of receipt of the written request of the adopted person who has reached 21 years of age, shall make diligent effort to notify each biological parent identified in the original adoption proceedings or in other records of the department or the placement agency relative to the adopted person. For purposes of this subparagraph, "notify" means a personal and confidential contact with each biological parent of the adopted person. The contact shall be by an employee or agent of the placement agency which processed the pertinent adoption or by other agents or employees of the department. The contact shall be evidenced by the person who notified each parent certifying to the department that each parent was given the following information:

(i) The nature of the information requested by the adopted person;

(ii) The date of the request of the adopted person;

(iii) The right of each biological parent to file an affidavit with the placement agency or the department stating that such parent's identity should not be disclosed;

(iv) The right of each biological parent to file a consent to disclosure with the placement agency or the department; and

(v) The effect of a failure of each biological parent to file either a consent to disclosure or an affidavit stating that the information in the sealed adoption file should not be disclosed.

(B) If a biological parent files an unrevoked consent to the disclosure of that parent's identity, such parent's name shall be

released to the adopted person who has requested such information as authorized by this paragraph.

(C) If, within 60 days of being notified by the department or the placement agency pursuant to subparagraph (A) of this paragraph, a biological parent has filed with the department or placement agency an affidavit objecting to such release, information regarding that biological parent shall not be released.

(D)(i) If six months after receipt of the adopted person's written request the placement agency or the department has either been unable to notify a biological parent identified in the original adoption record or has been able to notify a biological parent identified in the original adoption record but has not obtained a consent to disclosure from the notified biological parent, then the identity of a biological parent may only be disclosed as provided in division (ii) or (iii) of this subparagraph.

(ii) The adopted person who has reached 21 years of age may petition the Superior Court of Fulton County to seek the release of the identity of each of that person's biological parents from the department or placement agency. The court shall grant the petition if the court finds that the department or placement agency has made diligent efforts to locate each biological parent pursuant to this subparagraph either without success or upon locating a biological parent has not obtained a consent to disclosure from the notified biological parent and that failure to release the identity of each biological parent would have an adverse impact upon the physical, mental, or emotional health of the adopted person.

(iii) If it is verified that a biological parent of the adopted person is deceased, the department or placement agency shall be authorized to disclose the name and place of burial of the deceased biological parent, if known, to the adopted person seeking such information without the necessity of obtaining a court order.

(5)(A) Upon written request of an adopted person who has reached 21 years of age or a person who has reached 21 years of age and who is the sibling of an adopted person, the department or a placement agency shall attempt to identify and notify the siblings of the requesting party, if such siblings are at least 18 years of age. Upon locating the requesting party's sibling, the department or the placement agency shall notify the sibling of the inquiry. Upon the written consent of a sibling so notified, the department or the placement agency shall forward the requesting party's name and address to the sibling and, upon further written consent of the

sibling, shall divulge to the requesting party the present name and address of the sibling. If a sibling cannot be identified or located, the department or placement agency shall notify the requesting party of such circumstances but shall not disclose any names or other information which would tend to identify the sibling. If a sibling is deceased, the department or placement agency shall be authorized to disclose the name and place of burial of the deceased sibling, if known, to the requesting party without the necessity of obtaining a court order.

(B)(i) If six months after receipt of the written request from an adopted person who has reached 21 years of age or a person who has reached 21 years of age and who is the sibling of an adopted person, the placement agency or the department has either been unable to notify one or more of the siblings of the requesting party or has been able to notify a sibling of the requesting party but has not obtained a consent to disclosure from the notified sibling, then the identity of the siblings may only be disclosed as provided in division (ii) of this subparagraph.

(ii) The adopted person who has reached 21 years of age or a person who has reached 21 years of age and who is the sibling of an adopted person may petition the Superior Court of Fulton County to seek the release of the last known name and address of each of the siblings of the petitioning sibling, that are at least 18 years of age, from the department or placement agency. The court shall grant the petition if the court finds that the department or placement agency has made diligent efforts to locate such siblings pursuant to subparagraph (A) of this paragraph either without success or upon locating one or more of the siblings has not obtained a consent to disclosure from all the notified siblings and that failure to release the identity and last known address of said siblings would have an adverse impact upon the physical, mental, or emotional health of the petitioning sibling.

(C) If the adopted person is deceased and leaves a child, such child, upon reaching 21 years of age, may obtain the name and other identifying information concerning the siblings of his or her deceased parent in the same manner that the deceased adopted person would be entitled to obtain such information pursuant to the procedures contained in this Code section.

(6)(A) Upon written request of a biological parent of an adopted person who has reached 21 years of age, the department or a placement agency shall attempt to identify and notify the adopted person. Upon locating the adopted person, the department or the placement agency shall notify the adopted person of the inquiry.

Upon the written consent of the adopted person so notified, the department or the placement agency shall forward the biological parent's name and address to the adopted person and, upon further written consent of the adopted person, shall divulge to the requesting biological parent the present name and address of the adopted person. If the adopted person is deceased, the department or placement agency shall be authorized to disclose the name and place of burial of the deceased adopted person, if known, to the requesting biological parent without the necessity of obtaining a court order.

(B)(i) If six months after receipt of the written request from a biological parent of an adopted person who has reached 21 years of age the placement agency or the department has either been unable to notify the adopted person or has been able to notify the adopted person but has not obtained a consent to disclosure from the notified adopted person, then the identity of the adopted person may only be disclosed as provided in division (ii) of this subparagraph.

(ii) The biological parent of an adopted person who has reached 21 years of age may petition the Superior Court of Fulton County to seek the release of the last known name and address of the adopted person from the department or placement agency. The court shall grant the petition if the court finds that the department or placement agency has made diligent efforts to locate such adopted person pursuant to subparagraph (A) of this paragraph either without success or upon locating the adopted person has not obtained a consent to disclosure from the adopted person and that failure to release the identity and last known address of said adopted person would have an adverse impact upon the physical, mental, or emotional health of the petitioning biological parent.

(C) If the biological parent is deceased, a parent or sibling of the deceased biological parent, or both, may obtain the name and other identifying information concerning the adopted person in the same manner that the deceased biological parent would be entitled to obtain such information pursuant to the procedures contained in this Code section.

(7) If an adoptive parent or the sibling of an adopted person notifies the department or placement agency of the death of an adopted person, the department or placement agency shall add information regarding the date and circumstances of the death to its records so as to enable it to share such information with a biological parent or sibling of the adopted person if they make an inquiry pursuant to the provisions of this Code section.

(8) If a biological parent or parent or sibling of a biological parent notifies the department or placement agency of the death of a biological parent or a sibling of an adopted person, the department or placement agency shall add information regarding the date and circumstances of the death to its records so as to enable it to share such information with an adopted person or sibling of the adopted person if he or she makes an inquiry pursuant to the provisions of this Code section.

(9) The Office of Adoptions within the department shall maintain a registry for the recording of requests by adopted persons for the name of any biological parent, for the recording of the written consent or the written objections of any biological parent to the release of that parent's identity to an adopted person upon the adopted person's request, and for nonidentifying information regarding any biological parent which may be released pursuant to paragraph (2) of this subsection. The department and any placement agency which receives such requests, consents, or objections shall file a copy thereof with that office.

(10) The department or placement agency may charge a reasonable fee to be determined by the department for the cost of conducting any search pursuant to this subsection.

(11) Nothing in this subsection shall be construed to require the department or placement agency to disclose to any party at interest, including but not limited to an adopted person who has reached 21 years of age, any information which is not kept by the department or the placement agency in its normal course of operations relating to adoption.

(12) Any department employee or employee of any placement agency who releases information or makes authorized contacts in good faith and in compliance with this subsection shall be immune from civil or criminal liability for such release of information or authorized contacts.

(13) Information authorized to be released pursuant to this subsection may be released under the conditions specified in this subsection notwithstanding any other provisions of law to the contrary.

(14) A placement agency which demonstrates to the department by clear and convincing evidence that the requirement that such agency search for or notify any biological parent, sibling, or adopted person under subparagraph (A) of paragraph (4) of this subsection or subparagraph (A) of paragraph (5) of this subsection or subparagraph (A) of paragraph (6) of this subsection will impose an undue hardship upon that agency shall be relieved from that responsibility, and the

department shall assume that responsibility upon such finding by the department of undue hardship. The department's determination under this subsection shall be a contested case within the meaning of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(15) Whenever this subsection authorizes both the department and a placement agency to perform any function or requires the placement agency to perform any function which the department is also required to perform, the department or agency may designate an agent to perform that function and in so performing it the agent shall have the same authority, powers, duties, and immunities as an employee of the department or placement agency has with respect to performing that function. (Code 1981, § 19-8-23, enacted by Ga. L. 1990, p. 1572, § 5; Ga. L. 1991, p. 1640, §§ 9, 10; Ga. L. 1997, p. 1686, § 7; Ga. L. 1999, p. 252, § 9; Ga. L. 2000, p. 1589, § 3; Ga. L. 2003, p. 503, §§ 6, 7, 8; Ga. L. 2004, p. 631, § 19; Ga. L. 2009, p. 453, §§ 2-2, 2-4/HB 228; Ga. L. 2011, p. 573, § 6/SB 172.)

Cross references. — Access to date of birth or maiden name in genealogical papers, § 50-18-100. Inspection of public records generally, § 50-18-70 et seq.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1990, "identity" was substituted for "identify" in division (f)(4)(A)(iii).

Editor's notes. — Ga. L. 1999, p. 252, § 11, not codified by the General Assembly, provides that: "The provisions of this Act shall apply to petitions for adoption filed on or after July 1, 1999, except that each surrender of rights filed pursuant to a petition filed on or after July 1, 1999,

shall be effective if such surrender of rights complies with the provisions of law in effect on the date of the execution of such surrender of rights."

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that subsection (a) is applicable with respect to notices delivered on or after July 1, 2000.

Ga. L. 2011, p. 573, § 8/SB 172, not codified by the General Assembly, provides that the amendment to this Code section shall apply to all placements of children for adoption and all petitions for adoption filed on or after July 1, 2011.

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code Section 19-8-18 are included in the annotations for this Code section.

Cited in *Smith v. Finstad*, 247 Ga. 603, 277 S.E.2d 736 (1981); *In re Ashmore*, 163 Ga. App. 194, 293 S.E.2d 457 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Adoption, § 113 et seq.

ALR. — Restricting access to judicial records of concluded adoption proceedings, 83 ALR3d 800.

Restricting access to judicial records of concluded adoption proceedings, 103 ALR5th 255.

19-8-24. Unlawful advertisements; unlawful inducements; penalties.

(a) It shall be unlawful for any person, organization, corporation, hospital, or association of any kind whatsoever which has not been established as a child-placing agency by the department to:

(1) Advertise, whether in a periodical, by television, by radio, or by any other public medium or by any private means, including letters, circulars, handbills, and oral statements, that the person, organization, corporation, hospital, or association will adopt children or will arrange for or cause children to be adopted or placed for adoption; or

(2) Directly or indirectly hold out inducements to parents to part with their children.

As used in this subsection, "inducements" shall include any financial assistance, either direct or indirect, from whatever source, except payment or reimbursement of the medical expenses directly related to the mother's pregnancy and hospitalization for the birth of the child and medical care for the child.

(b) It shall be unlawful for any person to sell, offer to sell, or conspire with another to sell or offer to sell a child for money or anything of value, except as otherwise provided in this chapter.

(c) Any person who violates subsection (a) or (b) of this Code section shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine not to exceed \$10,000.00 or imprisonment for not more than ten years, or both, in the discretion of the court.

(d)(1) Paragraph (1) of subsection (a) of this Code section shall not apply to communication by private means, including only written letters or oral statements, by an individual seeking to:

(A) Adopt a child or children; or

(B) Place that individual's child or children for adoption,

whether the communication occurs before or after the birth of such child or children.

(2) Paragraph (1) of subsection (a) of this Code section shall not apply to any communication described in paragraph (1) of this subsection which contains any attorney's name, address, telephone number, or any combination of such information and which requests any attorney named in such communication to be contacted to facilitate the carrying out of the purpose, as described in subparagraph (A) or (B) of paragraph (1) of this subsection, of the individual making such personal communication. (Code 1981, § 19-8-24, en-

acted by Ga. L. 1990, p. 1572, § 5; Ga. L. 1991, p. 94, § 19; Ga. L. 1991, p. 1640, § 11; Ga. L. 2004, p. 449, § 1.)

Cross references. — False, misleading, advertising, § 10-1-420 et seq.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1991, “subparagraph (A) or (B)” was substituted for “subsection (A) or (B)” in present paragraph (d)(2).

Law reviews. — For article, “Who is Georgia’s Mother? Gestational Surrogacy: A Formulation for Georgia’s Legislature,” see 38 Ga. L. Rev. 395 (2003).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 19-8-24 was sufficiently clear to apprise the defendant that offering an automobile to a mother in exchange for physical custody or control of her child was proscribed. *Douglas v. State*, 263 Ga. 748, 438 S.E.2d 361 (1994).

Unlawful inducement not found. — Surrendering parents were not induced to

give up their child for adoption simply because they were offered shelter by the father’s aunt, or because the adopting parents had provided care for the child at the surrendering parents’ request. *Hicks v. Stargel*, 226 Ga. App. 639, 487 S.E.2d 428 (1997).

OPINIONS OF THE ATTORNEY GENERAL

Editor’s notes. — In light of the similarity of the statutory provisions, opinions under Ga. L. 1941, p. 300, § 17 and former § 19-8-19 are included in the annotations for this Code section.

Course of conduct of orally spreading information may constitute advertising. — General definition of advertisement would seem to dictate that when an individual, as a course of action, spreads information by word of mouth to various people with whom the individual comes into contact announcing that the individual occasionally knows unmarried mothers and would welcome inquiries from persons desiring to adopt their illegitimate children, such oral statements would be an advertisement and violative of Ga. L. 1941, p. 300, § 17. 1967 Op. Att’y Gen. No. 67-31 (decided under Ga. L. 1941, p. 300, § 17).

“Networking” letters are unlawful advertisements. — Although a potential adoptive couple may send personal communications expressing an interest in adoption, “networking” letters which involve an attorney in the placement of children are unlawful advertisements within the meaning of subsection (a) of O.C.G.A. § 19-8-24. Attorneys may provide necessary legal services in connection with adoptions; however, attorneys may not provide placement services unless licensed as a child-placing agency. 1990 Op. Att’y Gen. No. 90-42.

Payment of lost wages to an expectant mother of a child to be placed for adoption was clearly barred by subsection (b) of former § 19-8-19. 1986 Op. Att’y Gen. No. U86-21 (decided under former § 19-8-19).

RESEARCH REFERENCES

ALR. — What constitutes undue influence in obtaining a parent’s consent to adoption of child, 50 ALR3d 918.

Criminal liability of one arranging for

adoption of child through other than licensed child placement agency (“baby broker acts”), 3 ALR4th 468.

Validity of agreement to pay expenses

attendant on birth of child on condition that natural parents consent to adoption of child, 43 ALR4th 935.

19-8-25. Effect of prior consent or surrender.

(a) A written consent or surrender, executed on or before June 30, 1990, shall, for purposes of an adoption proceeding commenced on or after July 1, 1990, be deemed to satisfy the surrender requirements of this chapter and it shall not be necessary to have any parent or guardian execute the documents required by Code Section 19-8-4, 19-8-5, 19-8-6, or 19-8-7; however, all other applicable provisions of this chapter must be complied with.

(b) It is the legislative intent of this subsection to clarify and not to change the applicability of certain previously existing provisions of this chapter to adoption proceedings pending on July 1, 1990. Any decree of adoption issued in an adoption proceeding in which the adoption petition was filed in a superior court of this state prior to July 1, 1990, shall be valid if the adoption conformed to the requirements of this chapter either as they existed on June 30, 1990, or on July 1, 1990, and each such adoption decree is hereby ratified and confirmed. (Code 1981, § 19-8-25, enacted by Ga. L. 1990, p. 1572, § 5; Ga. L. 1991, p. 1640, § 12.)

19-8-26. How surrender of parental rights executed; how and when surrender may be withdrawn; forms.

(a) The surrender of rights by a parent or guardian pursuant to paragraph (1) of subsection (e) of Code Section 19-8-4 shall conform substantially to the following form:

SURRENDER OF RIGHTS

FINAL RELEASE FOR ADOPTION

NOTICE TO PARENT OR GUARDIAN:

This is an important legal document and by signing it you are surrendering all of your right, title, and claim to the child identified herein, so as to facilitate the child's placement for adoption. You are to receive a copy of this document and as explained below have the right to withdraw your surrender within ten days from the date you sign it.

I, the undersigned, being solicitous that my (male) (female) child, born (insert name of child) on (insert birthdate of child), should receive the benefits and advantages of a good home, to the end that

(she) (he) may be fitted for the requirements of life, consent to this surrender.

I, the undersigned, (insert relationship to child) of the aforesaid child, do hereby surrender the child to (insert name of child-placing agency or Department of Human Services, as applicable) and promise not to interfere in the management of the child in any respect whatever; and, in consideration of the benefits guaranteed by (insert name of child-placing agency or Department of Human Services, as applicable) in thus providing for the child, I do relinquish all right, title, and claim to the child herein named, it being my wish, intent, and purpose to relinquish absolutely all parental control over the child.

Furthermore, I hereby agree that the (insert name of child-placing agency or Department of Human Services, as applicable) may seek for the child a legal adoption by such person or persons as may be chosen by the (insert name of child-placing agency or Department of Human Services, as applicable) or its authorized agents, without further notice to me. I do, furthermore, expressly waive any other notice or service in any of the legal proceedings for the adoption of the child.

Furthermore, I understand that under Georgia law the Department of Human Services or the child-placing agency is required to conduct an investigation and render a report to the court in connection with the legal proceeding for the legal adoption of the child and I hereby agree to cooperate fully with such department or agency in the conduct of its investigation.

Furthermore, I hereby certify that I have received a copy of this document and that I understand I may only withdraw this surrender by giving written notice, delivered in person or mailed by registered mail or statutory overnight delivery, to (insert name and address of child-placing agency or Department of Human Services, as applicable) within ten days from the date hereof; that the ten days shall be counted consecutively beginning with the day immediately following the date hereof; however, if the tenth day falls on a Saturday, Sunday, or legal holiday then the last day on which the surrender may be withdrawn shall be the next day that is not a Saturday, Sunday, or legal holiday; and I understand that it may NOT be withdrawn thereafter.

Furthermore, I hereby certify that I have not been subjected to any duress or undue pressure in the execution of this surrender document and do so freely and voluntarily.

Witness my hand and seal this _____ day of _____, ____.

(SEAL)
(Parent or guardian)

Unofficial witness

Notary public

(b) Reserved.

(c) The surrender of rights by a parent or guardian pursuant to paragraph (1) of subsection (e) of Code Section 19-8-5 shall conform substantially to the following form:

SURRENDER OF RIGHTS
FINAL RELEASE FOR ADOPTION
NOTICE TO PARENT OR GUARDIAN:

This is an important legal document and by signing it you are surrendering all of your right, title, and claim to the child identified herein so as to facilitate the child’s placement for adoption. You are to receive a copy of this document and as explained below have the right to withdraw your surrender within ten days from the date you sign it.

I, the undersigned, being solicitous that my (male) (female) child, born (insert name of child), on (insert birthdate of child), should receive the benefits and advantages of a good home, to the end that (she) (he) may be fitted for the requirements of life, consent to this surrender.

I, the undersigned, (insert relationship to child) of the aforesaid child, do hereby surrender the child to (insert name, surname not required, of each person to whom surrender is made), PROVIDED that each such person is named as petitioner in a petition for adoption of the child filed in accordance with Article 1 of Chapter 8 of Title 19 of the Official Code of Georgia Annotated within 60 days from the date hereof. Furthermore, I promise not to interfere in the management of the child in any respect whatever; and, in consideration of the benefits guaranteed by (insert name, surname not required, of each person to whom surrender is made) in thus providing for the child, I do relinquish all right, title, and claim to the child herein named, it being my wish, intent, and purpose to relinquish absolutely all parental control over the child.

It is also my wish, intent, and purpose that if each such person is not named as petitioner in a petition for adoption as provided for above within the 60 day period, other than for excusable neglect, or, if said petition for adoption is filed within 60 days but the adoption action is dismissed with prejudice or otherwise concluded without an

order declaring the child to be the adopted child of each such person, then I do hereby surrender the child as follows:

(Mark one of the following as chosen)

— I wish the child returned to me, and I expressly acknowledge that this provision applies only to the limited circumstance that the child is not adopted by the person or persons designated herein and further that this provision does not impair the validity, absolute finality, or totality of this surrender under any circumstance other than the failure of the designated person or persons to adopt the child and that no other provision of this surrender impairs the validity, absolute finality, or totality of this surrender once the revocation period has elapsed; or

— I surrender the child to (insert name of designated licensed child-placing agency), a licensed child-placing agency, for placement for adoption; or

— I surrender the child to the Department of Human Services, as provided by subsection (k) of Code Section 19-8-5, for placement for adoption; and (insert name of designated licensed child-placing agency) or the Department of Human Services may petition the superior court for custody of the child in accordance with the terms of this surrender.

Furthermore, I hereby agree that the child is to be adopted either by each person named above or by any other such person as may be chosen by the (insert name of designated licensed child-placing agency) or the Department of Human Services and I do expressly waive any other notice or service in any of the legal proceedings for the adoption of the child.

Furthermore, I understand that under Georgia law an evaluator is required to conduct and provide to the court a home study and make recommendations to the court regarding the qualification of each person named above to adopt a child concerning the circumstances of placement of my child for adoption. I hereby agree to cooperate fully with such investigations.

Furthermore, I understand that under Georgia law, an agent appointed by the court is required to conduct an investigation and render a report to the court in connection with the legal proceeding for the legal adoption of the child, and I hereby agree to cooperate fully with such agent in the conduct of this investigation.

Furthermore, I hereby certify that I have received a copy of this document and that I understand I may only withdraw this surrender by giving written notice, delivered in person or mailed by registered mail or statutory overnight delivery, to (insert name and address of

agent of each person to whom surrender is made) within ten days from the date hereof; that the ten days shall be counted consecutively beginning with the day immediately following the date hereof; provided, however, that if the tenth day falls on a Saturday, Sunday, or legal holiday, then the last day on which the surrender may be withdrawn shall be the next day that is not a Saturday, Sunday, or legal holiday; and I understand that it may NOT be withdrawn thereafter.

Furthermore, I hereby certify that I have not been subjected to any duress or undue pressure in the execution of this surrender document and do so freely and voluntarily.

Witness my hand and seal this _____ day of _____, _____.

(SEAL)
(Parent or guardian)

Unofficial witness

Sworn to and subscribed
before me this _____
day of _____, _____.

Notary public (SEAL)
My commission expires _____.

(d) The surrender of rights by a biological father who is not the legal father of the child pursuant to paragraph (2) of subsection (e) of Code Section 19-8-4, 19-8-5, 19-8-6, or 19-8-7 shall conform substantially to the following form:

SURRENDER OF RIGHTS
FINAL RELEASE FOR ADOPTION
NOTICE TO ALLEGED BIOLOGICAL FATHER:

This is an important legal document and by signing it you are surrendering all of your right, title, and claim to the child identified herein, so as to facilitate the child’s placement for adoption. You are to receive a copy of this document and as explained below have the right to withdraw your surrender within ten days from the date you sign it.

I, the undersigned, alleged biological father of a (male) (female) child, born (insert name of child) to (insert name of mother) on (insert birthdate of child), being solicitous that said child should receive the benefits and advantages of a good home, to the end that (she) (he) may be fitted for the requirements of life, consent to this surrender.

I, the undersigned, do hereby surrender the child. I promise not to interfere in the management of the child in any respect whatever; and, in consideration of the benefits provided to the child through adoption, I do relinquish all right, title, and claim to the child herein named, it being my wish, intent, and purpose to relinquish absolutely all control over the child.

Furthermore, I hereby agree that the child is to be adopted and I do expressly waive any other notice or service in any of the legal proceedings for the adoption of the child.

Furthermore, I understand that under Georgia law an agent appointed by the court is required to conduct an investigation and render a report to the court in connection with the legal proceeding for the legal adoption of the child and I hereby agree to cooperate fully with the agent appointed by the court in the conduct of this investigation.

Furthermore, I hereby certify that I have received a copy of this document and that I understand I may only withdraw this surrender by giving written notice, delivered in person or mailed by registered mail or statutory overnight delivery, to (insert name and address of child-placing agency representative, Department of Human Services representative, person to whom surrender is made, or petitioner's representative, as appropriate) within ten days from the date hereof; that the ten days shall be counted consecutively beginning with the day immediately following the date hereof; however, if the tenth day falls on a Saturday, Sunday, or legal holiday then the last day on which the surrender may be withdrawn shall be the next day that is not a Saturday, Sunday, or legal holiday; and I understand that it may NOT be withdrawn thereafter.

Furthermore, I hereby certify that I have not been subjected to any duress or undue pressure in the execution of this surrender document and do so freely and voluntarily.

Witness my hand and seal this _____ day of _____, ____.

(SEAL)
(Alleged biological father)

Unofficial witness

Sworn to and subscribed

before me this _____

day of _____, _____.

Notary public (SEAL)

My commission expires _____.

(e) The surrender of rights by a parent or guardian pursuant to paragraph (1) of subsection (e) of Code Section 19-8-6 or 19-8-7 shall conform substantially to the following form:

SURRENDER OF RIGHTS

FINAL RELEASE FOR ADOPTION

NOTICE TO PARENT OR GUARDIAN:

This is an important legal document and by signing it you are surrendering all of your right, title, and claim to the child identified herein, so as to facilitate the child's placement for adoption. You are to receive a copy of this document and as explained below have the right to withdraw your surrender within ten days from the date you sign it.

I, the undersigned, being solicitous that my (male) (female) child, born (insert name of child), on (insert birthdate of child), should receive the benefits and advantages of a good home, to the end that (she) (he) may be fitted for the requirements of life, consent to this surrender.

I, the undersigned, (insert relationship to child) of the aforesaid child, do hereby surrender the child to (insert name of each person to whom surrender is made) and promise not to interfere in the management of the child in any respect whatever; and, in consideration of the benefits guaranteed by (insert name of each person to whom surrender is made) in thus providing for the child, I do relinquish all right, title, and claim to the child herein named, it being my wish, intent, and purpose to relinquish absolutely all parental control over the child.

Furthermore, I hereby agree that (insert name of each person to whom surrender is made) may initiate legal proceedings for the legal adoption of the child without further notice to me. I do, furthermore, expressly waive any other notice or service in any of the legal proceedings for the adoption of the child.

Furthermore, I understand that under Georgia law the Department of Human Services may be required to conduct an investigation and render a report to the court in connection with the legal proceeding for the legal adoption of the child and I hereby agree to cooperate fully with the department in the conduct of its investigation.

Furthermore, I hereby certify that I have received a copy of this document and that I understand I may only withdraw this surrender

by giving written notice, delivered in person or mailed by registered mail or statutory overnight delivery, to (insert name and address of each person to whom surrender is made) within ten days from the date hereof; that the ten days shall be counted consecutively beginning with the day immediately following the date hereof; however, if the tenth day falls on a Saturday, Sunday, or legal holiday then the last day on which the surrender may be withdrawn shall be the next day that is not a Saturday, Sunday, or legal holiday; and I understand it may NOT be withdrawn thereafter.

Furthermore, I hereby certify that I have not been subjected to any duress or undue pressure in the execution of this surrender document and do so freely and voluntarily.

Witness my hand and seal this _____ day of _____, ____.

_____ (SEAL)
(Parent or guardian)

Unofficial witness

Notary public

(f) The pre-birth surrender of rights by a biological father who is not the legal father of the child pursuant to paragraph (3) of subsection (e) of Code Section 19-8-4, 19-8-5, or 19-8-7 shall conform substantially to the following form:

PRE-BIRTH SURRENDER OF RIGHTS
FINAL RELEASE FOR ADOPTION
NOTICE TO ALLEGED BIOLOGICAL FATHER

This is an important legal document and by signing it you are surrendering any and all of your right, title, and claim to the child identified herein, so as to facilitate the child's placement for adoption. You have the right to wait to execute a Surrender of Rights Final Release for Adoption after the child is born, but by signing this document you are electing to surrender your rights prior to the birth of this child. You are to receive a copy of this document and as explained below have the right to withdraw your pre-birth surrender within ten days from the date you sign it.

I, the undersigned, understand that I have been named by _____, the mother of the child expected to be born in _____(city) _____(county) _____(state) on or about the _____day of _____(month), _____(year), as the bio-

logical father or possible biological father of her child. I further understand that the mother wishes to place this child for adoption.

To the best of my knowledge and belief, the child has not been born as of the date I am signing this pre-birth surrender; however, if in fact the child has been born, this surrender shall have the same effect as if it were a surrender executed following the birth of the child.

I understand that by signing this document I am not admitting that I am the biological father of this child, but if I am, I hereby agree that adoption is in this child's best interest. I consent to adoption of this child by any person chosen by the child's mother or by any public or private child-placing agency without further notice to me. I expressly waive any other notice or service in any of the legal proceedings for the adoption of the child.

I understand that I have the option to wait until after the child is born to execute a surrender of my rights (with a corresponding ten-day right of withdrawal) and, further, that by executing this document I am electing instead to surrender my rights before the child's birth.

I further understand that execution of this document does not fully and finally terminate my responsibilities until a final order of adoption is entered. I understand that if the child is not adopted, legal proceedings can be brought to establish paternity, and I may become liable for financial obligations related to the birth and support of this child.

Furthermore, I hereby certify that I have received a copy of this document and that I understand that I may only withdraw this pre-birth surrender by giving written notice, delivered in person or by statutory overnight delivery or registered mail, return receipt requested, to _____ within ten days from the date hereof; that the ten days shall be counted consecutively beginning with the day immediately following the date hereof; that, however, if the tenth day falls on a Saturday, Sunday, or legal holiday, then the last day on which the surrender may be withdrawn shall be the next day that is not a Saturday, Sunday, or legal holiday; and that it may NOT be withdrawn thereafter.

If prior to my signing this pre-birth surrender I have registered on Georgia's putative father registry then if I do not withdraw this surrender within the time permitted, I waive the notice I would be entitled to receive pursuant to the provisions of Code Section 19-8-12 of the Official Code of Georgia Annotated because of my registration on the putative father registry.

Furthermore, I hereby certify that I have not been subjected to any duress or undue pressure in the execution of this document and do so freely and voluntarily.

Witness my hand and seal this _____ day of _____, _____.

(SEAL)
Alleged biological father

Unofficial Witness

Sworn to and subscribed
before me on this _____ day of
_____, _____.

Notary Public

Seal

My commission expires: _____.

(g) The acknowledgment of surrender of rights pursuant to subsection (f) of Code Section 19-8-4, 19-8-5, 19-8-6, or 19-8-7 shall conform substantially to the following form:

ACKNOWLEDGMENT OF SURRENDER
OF RIGHTS

By execution of this paragraph, the undersigned expressly acknowledges:

(A) That I have read the accompanying SURRENDER OF RIGHTS/FINAL RELEASE FOR ADOPTION relating to said minor child born (insert name of child), a (male) (female) on (insert birthdate of child);

(B) That I understand that this is a full, final, and complete surrender, release, and termination of all of my rights to the child;

(C) That I have the unconditional right to revoke the surrender by giving written notice, delivered in person or mailed by registered mail or statutory overnight delivery, to (insert name and address of each person or entity to whom surrender is made) not later than ten days from the date of the surrender and that after such ten-day period I shall have no right to revoke the surrender;

(D) That the ten days shall be counted consecutively beginning with the day immediately following the date the surrender is executed; however, if the tenth day falls on a Saturday, Sunday, or legal holiday then the last day on which the surrender may be withdrawn shall be the next day that is not a Saturday, Sunday, or legal holiday;

(E) That I have read the accompanying surrender and received a copy thereof;

(F) That any and all questions regarding the effect of said surrender and its provisions have been satisfactorily explained to me;

(G) That I have been afforded an opportunity to consult with counsel of my choice prior to execution of the surrender; and

(H) That the surrender of my rights has been knowingly, intentionally, freely, and voluntarily made by me.

Witness my hand and seal this _____ day of _____, _____.

(Parent, guardian, or biological father)

Unofficial witness

Notary public

(h) The affidavit of a legal mother required by subsection (g) of Code Section 19-8-4, 19-8-5, 19-8-6, or 19-8-7 shall meet the following requirements:

(1) The affidavit shall set forth:

- (A) Her name;
- (B) Her relationship to the child;
- (C) Her age;
- (D) Her marital status;

(E) The identity and last known address of any spouse or former spouse;

(F) The identity, last known address, and relationship to the mother of the biological father of her child, provided that the mother shall have the right not to disclose the name and address of the biological father of her child should she so desire;

(G) Whether or not the biological father of the child has lived with the child, contributed to its support, provided for the mother's support or medical care during her pregnancy or during her hospitalization for the birth of the child, or made an attempt to legitimate the child; and

(H) All financial assistance received by or promised her either directly or indirectly, from whatever source, in connection with her pregnancy, the birth of the child, or the placement or arranging for the placement of the child for adoption (including the date, amount or value, description, payor, and payee), provided that financial

assistance provided directly by the mother's husband, mother, father, sister, brother, aunt, uncle, grandfather, or grandmother need not be detailed and instead the mother need only state the nature of the assistance received; and

(2) The affidavit shall conform substantially to the following form:

MOTHER'S AFFIDAVIT

NOTICE TO MOTHER:

This is an important legal document which deals with your child's right to have its father's rights properly determined. If you decline to disclose the name and address of the biological father of your child, understand that you may be required to appear in court to explain your refusal and that your name may be used in connection with the publication of notice to the biological father. Understand that you are providing this affidavit under oath and that the information provided will be held in strict confidence and will be used only in connection with the adoption of your child.

STATE OF GEORGIA

COUNTY OF _____

Personally appeared before me, the undersigned officer duly authorized to administer oaths, _____, who, after having been sworn, deposes and says as follows:

That my name is _____.

That I am the mother of a (male) (female) child born (insert name of child) in the State of _____, County of _____ on (insert birthdate of child).

That I am _____ years of age, having been born in the State of _____, County of _____ on _____.

That my social security account number is _____.

That my marital status at the time of the conception of my child was (check the status and complete the appropriate information):

() Single, never having been married.

() Separated but not legally divorced; the name of my spouse is _____; his last known address is _____; we were married in the State of _____, County of _____ on _____; we have been separated since _____; we last had sexual relations on _____.

() Divorced; the name of my previous spouse is _____; we were married in the State of _____, County of _____ on _____; his last known address is _____; divorce granted in the State of _____, County of _____ on _____.

() Legally married; the name of my spouse (was) (is) _____; we were married in the State of _____, County of _____ on _____; and his last known address is _____.

() Married through common-law marriage relationship prior to January 1, 1997; the name of my spouse (was) (is) _____; his last known address is _____; our relationship began in the State of _____, County of _____ on _____.

() Widowed; the name of my deceased spouse was _____; we were married in the State of _____, County of _____ on _____; and he died on _____ in the County of _____, State of _____.

That my name and marital status at the time of the birth of my child was (check the status and complete the appropriate information):

Name

() Single, never having been married.

() Separated, but not legally divorced; the name of my spouse (was) (is) _____; his last known address is _____; we were married in the State of _____, County of _____ on _____; we have been separated since _____; we last had sexual relations on _____.

() Divorced; the name of my former spouse is _____; we were married in the State of _____, County of _____ on _____; his last known address is _____; divorce granted in the State of _____, County of _____.

() Legally Married; the name of my spouse (was) (is) _____; we were married in the State of _____, County of _____ on _____ on _____; and his last known address is _____.

() Married through common-law relationship prior to January 1, 1997; the name of my spouse (was) (is) _____; his last known address is _____; our relationship began in the State of _____, County of _____ on _____.

() Widowed; the name of my deceased spouse was _____; we were married in the State of _____, County of _____ on _____; and he died on _____ in the County of _____, State of _____.

That the name of the biological father of my child is (complete appropriate response):

Known to me and is (_____);

Known to me but I expressly decline to identify him because _____; or

Unknown to me because

That the last known address of the biological father of my child is (complete appropriate response):

Known to me and is _____;

Known to me but I expressly decline to provide his address because _____; or

Unknown to me because

That, to the best of my knowledge, I (am) (am not) of American Indian heritage. If so:

(A) The name of my American Indian tribe is _____ and the percentage of my American Indian blood is _____ percent.

(B) My relatives with American Indian blood are:

(C) I (am) (am not) a member of an American Indian tribe. If so, the name of the tribe is _____.

(D) I (am) (am not) registered with an American Indian tribal registry. If so, the American Indian tribal registry is: _____ and my registration or identification number is: _____.

(E) A member of my family (is) (is not) a member of an American Indian tribe. If so, the name of each such family member is: _____ and the name of the corresponding American Indian tribe is: _____.

(F) A member of my family (is) (is not) registered with an American Indian tribal registry. If so, the name of each such family member is: _____ and the name of the corresponding American Indian tribal registry is: _____ and their corresponding registration or identification numbers are: _____.

That to the best of my knowledge, the biological father (is) (is not) of American Indian heritage. If so:

(A) The name of his American Indian tribe is _____ and the percentage of his American Indian blood is _____ percent.

(B) His relatives with American Indian blood are:

_____.

(C) He (is) (is not) a member of an American Indian tribe. If so, the name of the tribe is:_____.

(D) He (is) (is not) registered with an American Indian tribal registry. If so, the American Indian tribal registry is: _____ and his registration or identification number is: _____.

That the date of birth of the biological father (was _____, _____) or (is not known to me).

That the biological father (is) (is not) on active duty in a branch of the United States armed forces. If so:

(A) The branch of his service is (Army) (Navy) (Marine) (Air Force) (Coast Guard).

(B) His rank is _____.

(C) His duty station is _____.

If applicable, please provide any additional available information regarding his military service.

That the biological father of my child, whether or not identified herein (strike each inappropriate phrase):

(Was) (Was not) married to me at the time this child was conceived;

(Was) (Was not) married to me at any time during my pregnancy with this child;

(Was) (Was not) married to me at the time that this child was born;

(Did) (Did not) marry me after the child was born and recognize the child as his own;

(Has) (Has not) been determined to be the child's father by a final paternity order of a court;

(Has) (Has not) legitimated the child by a final court order;

(Has) (Has not) lived with the child;

(Has) (Has not) contributed to its support;

(Has) (Has not) provided for my support during my pregnancy or hospitalization for the birth of the child;

(Has) (Has not) provided for my medical care during my pregnancy or hospitalization for the birth of the child; and

(Has) (Has not) made any attempt to legitimate the child.

That I have received or been promised the following financial assistance, either directly or indirectly, from whatever source, in connection with my pregnancy, the birth of my child, and its placement for adoption: _____.

That I recognize that if I knowingly and willfully make a false statement in this affidavit, I will be guilty of the crime of false swearing.

(Biological mother's signature)

Sworn to and subscribed
before me this _____
day of _____, _____.

Notary public (SEAL)
My Commission Expires _____.

(i) The affidavit of an adoptive mother required by subsection (a) of Code Section 19-8-9 for the surrender of her rights shall meet the following requirements:

(1) The affidavit shall set forth:

- (A) Her name;
- (B) Her relationship to the child;
- (C) Her age;
- (D) Her marital status;

(E) The name and last known address of any spouse at the time the child was adopted and whether any such spouse also adopted the child or was the biological father of the child;

(F) The circumstances surrounding her adoption of her child, including the date the adoption was finalized, the state and county where finalized, and the name and address of the adoption agency, if any; and

(G) All financial assistance received by or promised her either directly or indirectly, from whatever source, in connection with the placement or arranging for the placement of her child for adoption (including the date, amount or value, description, payor, and payee), provided that financial assistance provided directly by the adoptive mother’s husband, mother, father, sister, brother, aunt, uncle, grandfather, or grandmother need not be detailed and instead the adoptive mother need only state the nature of the assistance received.

(2) The affidavit shall be in substantially the following form:

ADOPTIVE MOTHER’S AFFIDAVIT

NOTICE TO MOTHER:

This is an important legal document which deals with your child’s right to have its legal father’s rights properly terminated. Understand that you are providing this affidavit under oath and that the information provided will be held in strict confidence and will be used only in connection with the adoption of your child.

STATE OF GEORGIA
COUNTY OF _____

Personally appeared before me, the undersigned officer duly authorized to administer oaths, _____, who, after having been sworn, deposes and says as follows:

That my name is _____.

That I am the adoptive mother of a (male) (female) child born (insert name of child) in the State of _____, County of _____ on (insert birthdate of child).

That I am _____ years of age, having been born in the State of _____, County of _____ on _____.

That my marital status is (check the status and complete the appropriate information):

☐ Single, never having been married.

☐ Separated but not legally divorced; the name of my spouse is _____; his last known address is _____; we were married in the State of _____, County of _____ on _____; we have been separated since _____; my spouse (did) (did not) also adopt said child; my spouse (is) (is not) the biological father of said child.

☐ Divorced; the name of my previous spouse is _____; we were married in the State of _____, County of _____ on _____; his last known address is _____; divorce granted in the State of _____, County of _____ on _____; my previous spouse (did) (did not) also adopt said child; my previous spouse (is) (is not) the biological father of said child.

☐ Legally married; the name of my spouse is _____; we were married in the State of _____, County of _____ on _____; his last known address is _____; my spouse (did) (did not) also adopt said child; my spouse (is) (is not) the biological father of said child.

☐ Married through common-law marriage relationship; the name of my spouse is _____; his address is _____; the date and place our relationship began is (date, county, state); my spouse (did) (did not) also adopt said child; my spouse (is) (is not) the biological father of said child.

☐ Widowed; the name of my deceased spouse is _____; we were married in the State of _____, County of _____ on _____; he died on _____ in the County of _____, State of _____; he (did) (did not) also adopt said child; and he (was) (was not) the biological father of said child.

That I adopted my child in the State of _____, County of _____;

That the final order of adoption was entered on _____;

That there (was) (was not) an adoption agency involved in the placement of my child with me for adoption; and if so its name was _____, and its address is _____.

That I have received or been promised the following financial assistance, either directly or indirectly, from whatever source, in connection with my child's placement for adoption: _____.

That I recognize that if I knowingly and willfully make a false statement in this affidavit, I will be guilty of the crime of false swearing.

(Adoptive mother)

Sworn to and subscribed
before me this _____
day of _____, _____.

Notary public

(j) The affidavit of an agency or department representative required by subsection (h) of Code Section 19-8-4 shall conform substantially to the following form:

AFFIDAVIT OF AGENCY OR
DEPARTMENT REPRESENTATIVE

Personally appeared before me, the undersigned officer duly authorized to administer oaths, _____, who, after having been sworn, deposes and says as follows:

That I am (position) of (department or agency).

That prior to the execution of the accompanying SURRENDER OF RIGHTS/FINAL RELEASE FOR ADOPTION by _____, releasing and surrendering all of (his) (her) rights in a (male) (female) minor child born (insert name of child) on (insert birthdate of child), I reviewed with and explained to said individual all of the provisions of the surrender, and particularly the provisions which provide that the surrender is a full surrender of all rights to the child.

That based on my review and explanation to said individual, it is my opinion that said individual knowingly, intentionally, freely,

and voluntarily executed the SURRENDER OF RIGHTS/FINAL RELEASE FOR ADOPTION.

(Agency representative)

Sworn to and subscribed
before me this _____
day of _____, _____.

Notary public

(k) The affidavit of a petitioner's representative required by subsection (h) of Code Section 19-8-5, 19-8-6, or 19-8-7 shall conform substantially to the following form:

AFFIDAVIT OF PETITIONER'S REPRESENTATIVE

Personally appeared before me, the undersigned officer duly authorized to administer oaths, _____, who, after having been sworn, deposes and says as follows:

That my name is _____.

That my address is _____.

That prior to the execution of the accompanying SURRENDER OF RIGHTS/FINAL RELEASE FOR ADOPTION by _____, releasing and surrendering all of (his) (her) rights in a (male) (female) minor child born (insert name of child) on (insert birthdate of child), I reviewed with and explained to said individual all of the provisions of the surrender, and particularly the provisions which provide that the surrender is a full surrender of all rights to the child.

That based on my review and explanation to said individual, it is my opinion that said individual knowingly, intentionally, freely, and voluntarily executed the SURRENDER OF RIGHTS/FINAL RELEASE FOR ADOPTION.

(Petitioner's representative)

Sworn to and subscribed
before me this _____
day of _____, _____.

Notary public

(l) The parental consent to a stepparent adoption required by subsection (j) of Code Section 19-8-6 shall conform substantially to the following form:

PARENTAL CONSENT TO STEPPARENT ADOPTION

I, the undersigned, hereby consent that my spouse (insert name of spouse) adopt my (son) (daughter), (insert name of child), whose date of birth is _____, and in so doing I in no way relinquish or surrender my parental rights to the child.

I further acknowledge service of a copy of the petition for adoption of the child as filed on behalf of my spouse, and I hereby consent to the granting of the prayers of the petition. I also waive all other and further service and notice of any kind and nature in connection with the proceedings.

This _____ day of _____, _____.

(Parent)

Unofficial witness

Notary public

(Code 1981, § 19-8-26, enacted by Ga. L. 1990, p. 1572, § 5; Ga. L. 1999, p. 81, § 19; Ga. L. 1999, p. 252, § 10; Ga. L. 2000, p. 136, § 19; Ga. L. 2000, p. 1589, § 4; Ga. L. 2004, p. 631, § 19; Ga. L. 2007, p. 342, § 9/HB 497; Ga. L. 2008, p. 324, § 19/SB 455; Ga. L. 2009, p. 8, § 19/SB 46; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2009, p. 800, § 4/HB 388; Ga. L. 2011, p. 573, § 7/SB 172.)

Cross references. — Juvenile court orders terminating parental rights, § 15-11-81 et seq.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1990, a comma was deleted following “19-8-7” near the beginning of subsection (g) and semicolons were substituted for a comma following “executed” and for a period following “legal holiday” in (D) of the form set out in subsection (g).

Pursuant to Code Section 28-9-5, in 1991, a semicolon was substituted for the period at the end of (D) of the form in subsection (g).

Pursuant to Code Section 28-9-5, in 1999, “biological” was substituted for “Biological” in the signature line in the form in subsection (d) and “mother’s” was substituted for “Mother’s” in the signature line in the form in subsection (h).

Pursuant to Code Section 28-9-5, in 2007, “signature” was substituted for “Sig-

nature” in the signature line in the form in paragraph (h)(2).

Editor’s notes. — Ga. L. 1999, p. 252, § 11, not codified by the General Assembly, provides that: “The provisions of this Act shall apply to petitions for adoption filed on or after July 1, 1999, except that each surrender of rights filed pursuant to a petition filed on or after July 1, 1999, shall be effective if such surrender of rights complies with the provisions of law in effect on the date of the execution of such surrender of rights.”

Ga. L. 2007, p. 342, § 10/HB 497, not codified by the General Assembly, provides that subsection (f) shall apply to proceedings under this chapter on or after July 1, 2007.

Ga. L. 2009, p. 800, § 1HB/388, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Option of Adoption Act.’”

Ga. L. 2011, p. 573, § 8/SB 172, not codified by the General Assembly, provides that the amendment to this Code section shall apply to all placements of children for adoption and all petitions for adoption filed on or after July 1, 2011.

Law reviews. — For article, "Continuing Confusion in the Georgia Adoption Process," see 20 Ga. St. B.J. 62 (1983).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 74-404 and former § 19-8-4 are included in the annotations for this Code section.

Requirement of procedural strict compliance. — Procedure for surrender of parental rights requires strict compliance. *Johnson v. Smith*, 251 Ga. 1, 302 S.E.2d 542 (1983) (decided under former § 19-8-4).

Absence from the record of the form required under O.C.G.A. § 19-8-26(a) and the affidavit required under O.C.G.A. § 19-8-26(j) invalidated a surrender document as a matter of law. *In re Stroh*, 240 Ga. App. 835, 523 S.E.2d 887 (1999).

One policy of former § 19-8-4 was to ensure that the parent giving up parental rights had knowledge of the surrender, had the surrender explained to her, had an opportunity to talk with a lawyer, and had freely agreed to the surrender. *Bozeman v. Williams*, 248 Ga. 606, 285 S.E.2d 9 (1981) (decided under former § 19-8-4).

False statements in affidavit. — "Mother's Affidavit" containing knowingly false statements purporting to address the material issues of the natural father's lack of parental involvement does not substantially comply with the requirements of O.C.G.A. §§ 19-8-6(g) and 19-8-26(h) so as to sustain a judgment terminating the father's parental rights based thereon. *Coleman v. Grimes*, 250 Ga. App. 880, 553 S.E.2d 185 (2001).

Surrender of rights freely and voluntarily given. — Finding that mother's surrender of her parental rights was freely and voluntarily given was not erroneous since, prior to signing the surrender and acknowledgment thereof, she had discussed her decision with members of her family and was fully aware of the legal consequences of her actions. *Howard v.*

Bridger, 189 Ga. App. 292, 375 S.E.2d 270 (1988) (decided under former § 19-8-4).

Different forms required for surrenders to third person and relatives. — Different form is required when the child is being surrendered to third persons than is necessary when the surrender is to relatives. *Tyson v. Department of Human Resources*, 165 Ga. App. 414, 301 S.E.2d 485 (1983) (decided under former § 19-8-4).

Written surrender of the natural mother's parental rights which conformed substantially to the form provided for in paragraph (c)(1) of former § 19-8-4 concerning adoption by a relative but declared invalid because prospective adoptive parent was not a relative of the natural mother could not be treated as a surrender of the mother's right to a third person under paragraph (c)(2) of former § 19-8-4 and resulted in the natural mother retaining her rights to the child. *Tyson v. Department of Human Resources*, 165 Ga. App. 414, 301 S.E.2d 485 (1983) (decided under former § 19-8-4).

Use of wrong form. — It was error for the trial court to dismiss an adoption petition solely on the technical ground that the wrong form had been used, when one of the adoption petitioners was a relative and the other was not, and they chose to use the "non-relative" form because the class of persons encompassed by it is broader than the class encompassed by the "relative" form. *Dover v. Dover*, 193 Ga. App. 433, 388 S.E.2d 35 (1989) (decided under former § 19-8-4).

Although a mother failed to provide an affidavit as required by O.C.G.A. § 19-8-26(h) in an adoption petition by the mother's new husband over her three minor children, such was deemed immaterial and therefore harmless because the statutory requisites had been met because the mother alleged that the father did not

live with the children, that he failed to pay the court-ordered support for them for more than a year, and the mother asserted that the father provided no financial assistance. *McCurry v. Harding*, 270 Ga. App. 416, 606 S.E.2d 639 (2004).

Omission of language from form. — Surrender of parental rights form that did not contain language surrendering child to the Department of Human Resources if the adoptive parents failed to file a petition for adoption within 60 days did not render the surrender invalid when, under the facts of the case, the language would have been mere surplusage. *Lee v. Stringer*, 212 Ga. App. 401, 441 S.E.2d 861 (1994), overruled on other grounds 224 Ga. App. 124, 479 S.E.2d 439 (1996).

Acknowledgment of surrender of parental rights must be in writing and signed by parent. *Nelson v. Taylor*, 244 Ga. 657, 261 S.E.2d 579 (1979) (decided under former Code 1933, § 74-404).

Effect of revocation of parental consent within ten days. — When parental consent was freely and voluntarily revoked by them within ten days as prescribed by law, they were entitled to custody of child and rendered temporary custody order to prospective adopting parents and all subsequent adoption proceedings nugatory. *Edwards v. Johnson*, 244 Ga. 467, 260 S.E.2d 875 (1979) (decided under former Code 1933, § 74-404).

Failed adoption does not become surrender of parental rights. — When an intended adoption fails due to a lack of compliance with the adoption statutes, an alleged surrender of parental rights will not then be upheld under O.C.G.A. § 19-7-1(b)(1) as such a procedure would tend to vitiate the policies underlying the adoption statutes. *Johnson v. Smith*, 251 Ga. 1, 302 S.E.2d 542 (1983) (decided under former § 19-8-4).

Assignment of adoption rights not authorized. — There is nothing in the adoption statute which authorizes an assignment of adoption rights from one third party to another. *Tyson v. Department of Human Resources*, 165 Ga. App.

414, 301 S.E.2d 485 (1983) (decided under former § 19-8-4).

Natural mother's surrender of right automatically revocable within ten days. — When a natural mother has signed a surrender of parental rights, she would have an automatic right to withdraw the surrender by written notice within ten days after signing. *Johnson v. Smith*, 251 Ga. 1, 302 S.E.2d 542 (1983) (decided under former § 19-8-4).

Revocation prior to adoption for good and sufficient cause. — After ten days, although consent of the living parent or parents of a child to adoption may not be withdrawn as a matter of right, it does not preclude such revocation prior to final adoption for good and sufficient cause. *Ridgley v. Helms*, 168 Ga. App. 435, 309 S.E.2d 375 (1983) (decided under former § 19-8-4).

Affirmation of surrender. — Absence from the record of affidavits required under O.C.G.A. § 19-8-26 did not invalidate a surrender since the mother never contested the validity thereof but, instead, reaffirmed at the final hearing her intention to release the child to the parties seeking to adopt and her consent to their adoption of the child. *In re Stroh*, 240 Ga. App. 835, 523 S.E.2d 887 (1999).

Surrender not voided. — Even though revocation of consent may be allowed more than 10 days after consent is given, when the mother had acted freely and voluntarily and the trial court found her competent, the court did not err in finding that she failed to establish good and sufficient cause to void the surrender. *Schumacher v. Sexton*, 216 Ga. App. 628, 455 S.E.2d 348 (1995).

Cited in *Hinkins v. Francis*, 154 Ga. App. 716, 270 S.E.2d 33 (1980); *Davey v. Evans*, 156 Ga. App. 698, 275 S.E.2d 769 (1980); *In re Ashmore*, 163 Ga. App. 194, 293 S.E.2d 457 (1982); *Owens v. Worley*, 163 Ga. App. 488, 295 S.E.2d 199 (1982); *Hayes v. Watkins*, 163 Ga. App. 589, 295 S.E.2d 556 (1982); *In re C.C.B.*, 164 Ga. App. 3, 296 S.E.2d 198 (1982); *Boatman v. Chapman*, 174 Ga. App. 77, 329 S.E.2d 185 (1985); *In the Interest of V.B.L.*, 306 Ga. App. 709, 703 S.E.2d 127 (2010).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Adoption, § 94.

C.J.S. — 2 C.J.S., Adoption of Persons, §§ 57, 70 et seq.

ALR. — Right of natural parent, or other person whose consent is necessary to adoption of child, to withdraw consent previously given, 138 ALR 1038; 156 ALR 1011.

Sufficiency of parent's consent to adoption of child, 24 ALR2d 1127; 15 ALR5th 1.

What constitutes undue influence in obtaining a parent's consent to adoption of child, 50 ALR3d 918.

Right of natural parent to withdraw valid consent to adoption of child, 74 ALR3d 421.

Mistake or want of understanding as

ground for revocation of consent to adoption or of agreement releasing infant to adoption placement agency, 74 ALR3d 489.

What constitutes "duress" in obtaining parent's consent to adoption of child or surrender of child to adoption agency, 74 ALR3d 527.

Validity of agreement to pay expenses attendant on birth of child on condition that natural parents consent to adoption of child, 43 ALR4th 935.

Postadoption visitation by natural parent, 78 ALR4th 218.

Validity of birth parent's "blanket" consent to adoption which fails to identify adoptive parent, 15 ALR5th 1.

19-8-27. Postadoption contact agreements; definitions; procedure; jurisdiction; warnings; enforcement or termination; modification; costs and expenses of mediation, alternative dispute resolution, and litigation.

(a) As used in this Code section, the term "birth relative" means:

(1) A parent, biological father who is not the legal father, grandparent, brother, sister, half-brother, or half-sister who is related by blood or marriage to a child who is being adopted or who has been adopted; or

(2) A grandparent, brother, sister, half-brother, or half-sister who is related by adoption to a child who is being adopted or who has been adopted.

(b)(1) An adopting parent or parents and birth relatives or an adopting parent or parents, birth relatives, and a child who is 14 years of age or older who is being adopted or who has been adopted may voluntarily enter into a written postadoption contact agreement to permit continuing contact between such birth relatives and such child. A child who is 14 years of age or older shall be considered a party to a postadoption contact agreement.

(2) A postadoption contact agreement may provide for privileges regarding a child who is being adopted or who has been adopted, including, but not limited to, visitation with such child, contact with such child, sharing of information about such child, or sharing of information about birth relatives.

(3) In order to be an enforceable postadoption contact agreement, such agreement shall be in writing and signed by all of the parties to

such agreement acknowledging their consent to its terms and conditions.

(4) Enforcement, modification, or termination of a postadoption contact agreement shall be under the continuing jurisdiction of the court that granted the petition of adoption; provided, however, that the parties to a postadoption contact agreement may expressly waive the right to enforce, modify, or terminate such agreement under this Code section.

(5) Any party to the postadoption contact agreement may, at any time, file the original postadoption contact agreement with the court that has or had jurisdiction over the adoption if such agreement provides for the court to enforce such agreement or such agreement is silent as to the issue of enforcement.

(c) A postadoption contact agreement shall contain the following warnings in at least 14 point boldface type:

(1) After the entry of a decree for adoption, an adoption cannot be set aside due to the failure of an adopting parent, a birth parent, a birth relative, or the child to follow the terms of this agreement or a later change to this agreement; and

(2) A disagreement between the parties or litigation brought to enforce, terminate, or modify this agreement shall not affect the validity of the adoption and shall not serve as a basis for orders affecting the custody of the child.

(d)(1) As used in this subsection, the term "parties" means the individuals who signed the postadoption contact agreement currently in effect, including the child if he or she is 14 years of age or older at the time of the action regarding such agreement, but such term shall exclude any third-party beneficiary to such agreement.

(2) A postadoption contact agreement may always be modified or terminated if the parties have voluntarily signed a written modified postadoption contact agreement or termination of a postadoption contact agreement. A modified postadoption contact agreement may be filed with the court if such agreement provides for the court to enforce such agreement or such agreement is silent as to the issue of enforcement.

(e) With respect to postadoption contact agreements that provide for court enforcement or termination or are silent as to such matters, any party, as defined in paragraph (1) of subsection (d) of this Code section, may file a petition to enforce or terminate such agreement with the court that granted the petition of adoption, and the court shall enforce the terms of such agreement or terminate such agreement if such court

finds by a preponderance of the evidence that the enforcement or termination is necessary to serve the best interests of the child.

(f) With respect to postadoption contact agreements that provide for court modification or are silent as to modification, only the adopting parent or parents may file a petition seeking modification. Such petition shall be filed with the court that granted the petition of adoption, and the court shall modify such agreement if such court finds by a preponderance of the evidence that the modification is necessary to serve the best interests of the child and there has been a material change of circumstances since the current postadoption contact agreement was executed.

(g) A court may require the party seeking modification, termination, or enforcement of a postadoption contact agreement to participate in mediation or other appropriate alternative dispute resolution.

(h) All reasonable costs and expenses of mediation, alternative dispute resolution, and litigation shall be borne by the party, other than the child, filing the action to enforce, modify, or terminate a postadoption contact agreement when no party has been found by the court as failing to comply with an existing postadoption contact agreement. Otherwise, a party, other than the child, found by the court as failing to comply without good cause with an existing postadoption contact agreement shall bear all the costs and expenses of mediation, alternative dispute resolution, and litigation of the other party.

(i) A court shall not set aside a decree of adoption, rescind a surrender, or modify an order to terminate parental rights or any other prior court order because of the failure of an adoptive parent, a birth relative, or the child to comply with any or all of the original terms of, or subsequent modifications to, a postadoption contact agreement. (Code 1981, § 19-8-27, enacted by Ga. L. 2013, p. 1097, § 1/HB 21.)

Effective date. — This Code section became effective July 1, 2013.

ARTICLE 2

OPTION OF ADOPTION

Editor's notes. — Ga. L. 2009, p. 800, § 1/HB 388, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Option of Adoption Act.'"

19-8-40. Definitions.

As used in this article, the term:

(1) “Embryo” or “human embryo” means an individual fertilized ovum of the human species from the single-cell stage to eight-week development.

(2) “Embryo relinquishment” or “legal transfer of rights to an embryo” means the relinquishment of rights and responsibilities by the person or persons who hold the legal rights and responsibilities for an embryo and the acceptance of such rights and responsibilities by a recipient intended parent.

(3) “Embryo transfer” means the medical procedure of physically placing an embryo into the uterus of a female.

(4) “Legal embryo custodian” means the person or persons who hold the legal rights and responsibilities for a human embryo and who relinquishes said embryo to another person or persons.

(5) “Recipient intended parent” means a person or persons who receive a relinquished embryo and who accepts full legal rights and responsibilities for such embryo and any child that may be born as a result of embryo transfer. (Code 1981, § 19-8-40, enacted by Ga. L. 2009, p. 800, § 2/HB 388.)

Law reviews. — For annual survey of law on domestic relations, see 62 Mercer L. Rev. 105 (2010).

19-8-41. Release of responsibility by legal embryo custodian; procedures; presumption of parentage.

(a) A legal embryo custodian may relinquish all rights and responsibilities for an embryo to a recipient intended parent prior to embryo transfer. A written contract shall be entered into between each legal embryo custodian and each recipient intended parent prior to embryo transfer for the legal transfer of rights to an embryo and to any child that may result from the embryo transfer. The contract shall be signed by each legal embryo custodian for such embryo and by each recipient intended parent in the presence of a notary public and a witness. Initials or other designations may be used if the parties desire anonymity. The contract may include a written waiver by the legal embryo custodian of notice and service in any legal adoption or other parentage proceeding which may follow.

(b) If the embryo was created using donor gametes, the sperm or oocyte donors who irrevocably relinquished their rights in connection with in vitro fertilization shall not be entitled to any notice of the embryo relinquishment, nor shall their consent to the embryo relinquishment be required.

(c) Upon embryo relinquishment by each legal embryo custodian pursuant to subsection (a) of this Code section, the legal transfer of

rights to an embryo shall be considered complete, and the embryo transfer shall be authorized.

(d) A child born to a recipient intended parent as the result of embryo relinquishment pursuant to subsection (a) of this Code section shall be presumed to be the legal child of the recipient intended parent; provided that each legal embryo custodian and each recipient intended parent has entered into a written contract. (Code 1981, § 19-8-41, enacted by Ga. L. 2009, p. 800, § 2/HB 388.)

19-8-42. Petition for expedited order of adoption or parentage; notice; waiver of technical requirements.

(a) Prior to the birth of a child or following the birth of a child, a recipient intended parent may petition the superior court for an expedited order of adoption or parentage. In such cases, the written contract between each legal embryo custodian and each recipient intended parent shall be acceptable in lieu of a surrender of rights.

(b) All petitions under this article shall be filed in the county in which any petitioner or any respondent resides.

(c) The court shall give effect to any written waiver of notice and service in the legal proceeding for adoption or parentage.

(d) In the interest of justice, to promote the stability of embryo transfers, and to promote the interests of children who may be born following such embryo transfers, the court in its discretion may waive such technical requirements as the court deems just and proper. (Code 1981, § 19-8-42, enacted by Ga. L. 2009, p. 800, § 2/HB 388.)

19-8-43. Finality of orders of adoption or parentage.

Upon a filing of a petition for adoption or parentage and the court finding that such petition meets the criteria required by this article, an expedited order of adoption or parentage shall be issued and shall be a final order. Such order shall terminate any future parental rights and responsibilities of any past or present legal embryo custodian or gamete donor in a child which results from the embryo transfer and shall vest such rights and responsibilities in the recipient intended parent. (Code 1981, § 19-8-43, enacted by Ga. L. 2009, p. 800, § 2/HB 388.)

CHAPTER 9

CHILD CUSTODY PROCEEDINGS

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- Sec.
- 19-9-1. Parenting plans; requirements for plan.
- 19-9-1.1. Parental agreement to binding arbitration on issue of child custody and related matters.
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- 19-9-44. Child custody determinations of foreign country.
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- 19-9-47. Notice and proof of service on persons outside the state.
- 19-9-48. Personal jurisdiction not obtained in other matters; service of process.
- 19-9-49. Communication between court of this state and other states; “record” defined.
- 19-9-50. Testimony by deposition; electronic deposition; evidence transmitted by technological means not to be excluded.
- 19-9-51. Hearings and studies in another state; costs.
- 19-9-52 through 19-9-60. [Repealed].

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- 19-9-61. Jurisdiction requirements for initial child custody determinations; physical presence alone insufficient.

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- 19-9-62. Prerequisites for termination of exclusive, continuing jurisdiction.
- 19-9-63. Prerequisites for modifying custody determination from foreign court.
- 19-9-64. Temporary emergency jurisdiction; continuing effect; communicating with other courts.
- 19-9-65. Notice required; intervention.
- 19-9-66. Procedure where proceedings pending in another state.
- 19-9-67. Finding of inconvenient forum; conditions.
- 19-9-68. Wrongfully obtained jurisdiction; actions to prevent repetition of unjustifiable conduct; expenses.
- 19-9-69. Information required as part of pleading or affidavit; continuing duty; sealing of information; children residing in family violence shelters.
- 19-9-70. Requiring appearance for in state and out of state residents; other court orders.

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- 19-9-81. Definitions.
- 19-9-82. Orders made under the Hague Convention.
- 19-9-83. Recognition of foreign custody decrees; remedies.
- 19-9-84. Authority to enter temporary orders if lacking jurisdiction; remedy from court with jurisdiction; victims of family violence.
- 19-9-85. Registering foreign custody determinations; requirements of registering court; contesting registration; confirmation of registered order.
- 19-9-86. Granting relief and enforcing registered custody determinations.
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- 19-9-88. Verification and petition for enforcement requirements; sealing; appearance; expenses.

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- 19-9-89. Service of petitions and orders.
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- 19-9-91. Verified application for warrant seeking physical custody; requirement for serious physical harm; warrant requirements; enforceability; conditions.
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- 19-9-101. Promotion of uniformity between states.
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- 19-9-120. Short title.
- 19-9-121. Definitions.
- 19-9-122. Delegation of authority; hardships; exception.
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- 19-9-127. Violations; execution of power of attorney; power of attorney to be signed and acknowledged.
- 19-9-128. Revocation of power of attorney; termination of power of

Sec.

attorney; resignation of agent
grandparent.

19-9-129. Power of attorney form.

Law reviews. — For annual survey of law of domestic relations, see 38 Mercer L. Rev. 179 (1986). For article, "Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System," see 8 Ga. St. U.L. Rev. 539 (1992). For annual survey of domestic relations, see 43 Mercer L. Rev. 243 (1991). For

article, "Custody Disputes: The Case for Independent Lawyer-Mediators," see 10 Ga. St. U.L. Rev. 487 (1994). For annual survey article on domestic relations, see 50 Mercer L. Rev. 217 (1998).

For comment on the interstate child support enforcement system, see 46 Mercer L. Rev. 921 (1995).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Denial of Child Visitation Rights, 2 POF2d 791.

Change in Circumstances Justifying Modification of Child Custody Order, 6 POF2d 499.

Change in Circumstances Justifying Modification of Child Visitation Rights, 15 POF2d 499.

Child Custody Determination on Termination of Marriage, 34 POF2d 407.

Proving Child Sexual Abuse in Custody or Visitation Dispute, 33 POF3d 303.

Custody and Visitation of Children by Gay and Lesbian Parents, 64 POF3d 403.

Grandparent Visitation and Custody Awards, 69 POF3d 281.

Am. Jur. Trials. — Child Custody Litigation, 22 Am. Jur. Trials 347.

Relocation of Children by the Custodial Parent, 65 Am. Jur. Trials 127.

ALR. — Propriety of awarding joint custody of children, 17 ALR4th 1013.

Propriety of awarding custody of child to parent residing or intending to reside in foreign country, 20 ALR4th 677.

Kidnapping or related offense by taking or removing of child by or under authority of parent or one in loco parentis, 20 ALR4th 823.

Standing of foster parent to seek termination of rights of foster child's natural parents, 21 ALR4th 535.

Right of parent to regain custody of child after temporary conditional relinquishment of custody, 35 ALR4th 61.

Attorneys' fee awards in parent-nonparent child custody cases, 45 ALR4th 212.

Right to jury trial in state court divorce proceedings, 56 ALR4th 955.

Parent's transsexuality as factor in award of custody of children, visitation rights, or termination of parental rights, 59 ALR4th 1170.

Tort liability of public authority for failure to remove parentally abused or neglected children from parents' custody, 60 ALR4th 942.

Withholding visitation rights for failure to make alimony or support payments, 65 ALR4th 1155.

Child custody: separating children by custody awards to different parents — post-1975 cases, 67 ALR4th 354.

State court's authority, in marital or child custody proceeding, to allocate federal income tax dependency exemption for child to noncustodial parent under § 152(e) of the Internal Revenue Code (26 USCS § 152(e)), 77 ALR4th 786.

Construction and effect of statutes mandating consideration of, or creating presumptions regarding, domestic violence in awarding custody of children, 51 ALR5th 241.

ARTICLE 1

GENERAL PROVISIONS

Cross references. — Procedure for appeals from judgments or orders awarding or refusing to change child custody or holding or declining to hold persons in contempt of such child custody judgments or orders, § 5-6-35. Kidnapping of child under age 16 against will of child's parents or other person having lawful cus-

tody, § 16-5-40. Offense of interference with custody, § 16-5-45.

Law reviews. — For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982).

For note on 1995 amendments and enactments of sections in this article, see 12 Ga. St. U.L. Rev. 96 (1995).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, decisions under former Civil Code 1910, § 2931 and former Code 1933, § 50-121, as it read prior to 1981 recodification are included in the annotations for this article.

For additional cases dealing with custody of children, see annotations under Code section § 9-14-2, dealing with habeas corpus on account of detention of child, and Code sections §§ 19-7-1 and 19-7-4 dealing with parental powers and loss of parental custody.

Court where custodial parent resides has exclusive jurisdiction to change custody. — General rule is that court where parent with legal custody resides has exclusive right to award change of custody. This is true whether legal custodian lives in another state or in another county, and irrespective of physical presence of child. *Matthews v. Matthews*, 238 Ga. 201, 232 S.E.2d 76 (1977) (decided under former Code 1933, § 50-121).

Acknowledged or established rights of parties. — In exercising discretion, judge shall not disregard or impair acknowledged or established rights of any party; to do so would constitute an abuse of discretion. *Hill v. Rivers*, 200 Ga. 354, 37 S.E.2d 386 (1946) (decided under former Code 1933, § 50-121).

When court's discretion should favor party with legal interest. — Court's discretion should be exercised in favor of party having legal right unless evidence shows that interest and welfare of child justify judge in awarding child's

custody to another. *Harper v. Ballensinger*, 121 Ga. App. 390, 174 S.E.2d 182, rev'd in part on other grounds, 226 Ga. 828, 177 S.E.2d 693 (1970) (decided under former Code 1933, § 50-121).

While judge in awarding custody of child is vested with wide discretion, such discretion should be governed by rules of law, and when rivalry between parents for custody of child is not involved, discretion should be exercised in favor of the party having legal right, unless evidence shows that interest and welfare of the child justify the judge in awarding the child's custody to another. *Harter v. Davis*, 199 Ga. 503, 34 S.E.2d 657 (1945) (decided under former Code 1933, § 50-121).

Between parents, best interests of child controls. — In all cases between parents for custody of minor children, law imposes upon trial judge duty to exercise sound discretion and to let welfare of child control judges award. The judge is empowered to award such custody to a nonresident for one month each year, and to resident parent for other 11 months; and whether judge requires bond of nonresident for return of child is a matter solely in the judges discretion. *Pruitt v. Butterfield*, 189 Ga. 593, 6 S.E.2d 786 (1940) (decided under former Code 1933, § 50-121).

Standing of child's sister to seek change of custody. — When there is none having legal right to custody save the father, it would be a travesty to hold that none other, even a sister of the child, has standing to seek change of custody if it appears that welfare of child requires it. *Harper v. Ballensinger*, 121 Ga. App. 390,

174 S.E.2d 182, rev'd in part on other grounds, 226 Ga. 828, 177 S.E.2d 693 (1970) (decided under former Code 1933, § 50-121).

When trial court's disposition will not be disturbed. — If evidence material to inquiry into change of circumstances is in conflict, disposition made by trial court will not be controlled by appellate courts. *Bosson v. Bosson*, 223 Ga. 793, 158 S.E.2d 231 (1967) (decided under former Code 1933, § 50-121).

Material and proper showing of party's unfitness. — It is usually material and proper for one party to show that other is unfit to have custody of child. *Beck v. Beck*, 134 Ga. 137, 67 S.E. 543 (1910); *Crapps v. Smith*, 9 Ga. App. 400, 71 S.E. 501 (1911) (decided under former Civil Code 1910, § 2931).

"Changed circumstances." — Change of circumstances that would render prior judgment inconclusive is not necessarily limited to change in moral or financial condition of parent to whom initial award was made, but includes any new and material change in circumstances of either parent or of children, which might substantially affect the health, happiness, or welfare of the children. *Handley v. Handley*, 204 Ga. 57, 48 S.E.2d 827 (1948); *Robinson v. Ashmore*, 232 Ga. 498, 207 S.E.2d 484 (1974) (decided under former Code 1933, § 50-121).

Change in capacity, ability, or fitness of either parent. — Capacity, ability, or fitness of party to whom child was awarded in previous proceeding may thereafter become entirely different. Status of both such parties and child may have changed. Change of circumstances may render a change necessary in order to promote the health, happiness, or welfare of the child. *Handley v. Handley*, 204 Ga. 57, 48 S.E.2d 827 (1948) (decided under former Code 1933, § 50-121).

Parent may lose right to custody if found by clear and convincing evidence to be unfit. *White v. Bryan*, 236 Ga. 349, 223 S.E.2d 710 (1976) (decided under former Code 1933, § 50-121).

Mother's extramarital affairs as ground for giving custody to grandparents. — When husband was overseas

with armed forces and wife had been engaging in illicit relations with another man while the children were left without adult supervision, the judge was authorized to find that it was in the best interests of three and five-year-old children to be left in the custody of the paternal grandmother. *Harter v. Davis*, 199 Ga. 503, 34 S.E.2d 657 (1945) (decided under former Code 1933, § 50-121).

Prisoner on parole is unfit for custody at that time. — While commission of crime might not absolutely forfeit father's right to custody of infant for all time, being a prisoner on parole makes him a person unfit to care for his child. *Yancey v. Watson*, 217 Ga. 215, 121 S.E.2d 772 (1961) (decided under former Code 1933, § 50-121).

Evidence of past homosexual conduct not basis for denying custody. — When there was no evidence that mother was presently engaged in homosexual relationship but merely some evidence of past conduct, custody should not have been denied on basis of unfitness. *Gay v. Gay*, 149 Ga. App. 173, 253 S.E.2d 846 (1979) (decided under former Code 1933, § 50-121).

Out-of-state custody awards entitled to full faith and credit. — Judgment of court of competent jurisdiction of sister state, awarding custody of minor child, which is regular on judgment's face and unimpeached for fraud, is entitled to full faith and credit in proceedings for custody of child in this state. *Bowen v. Bowen*, 223 Ga. 800, 158 S.E.2d 233 (1967), overruled on other grounds, *Crumbley v. Stewart*, 238 Ga. 169, 231 S.E.2d 772 (1977) (decided under former Code 1933, § 50-121).

Same considerations apply to modification of custody awards of other states. — Judgment of court of competent jurisdiction of sister state may be modified only when it appears that there has been such change in conditions since original decree as would authorize modification of similar judgment rendered by courts of this state. *Bowen v. Bowen*, 223 Ga. 800, 158 S.E.2d 233 (1967), overruled on other grounds, *Crumbley v. Stewart*, 238 Ga. 169, 231 S.E.2d 772 (1977) (decided under former Code 1933, § 50-121).

RESEARCH REFERENCES

ALR. — Propriety of provision of custody or visitation order designed to insulate child from parent's extramarital sexual relationships, 40 ALR4th 812.

Parent's or relative's rights of visitation of adult against latter's wishes, 40 ALR4th 846.

19-9-1. Parenting plans; requirements for plan.

(a) Except when a parent seeks emergency relief for family violence pursuant to Code Section 19-13-3 or 19-13-4, in all cases in which the custody of any child is at issue between the parents, each parent shall prepare a parenting plan or the parties may jointly submit a parenting plan. It shall be in the judge's discretion as to when a party shall be required to submit a parenting plan to the judge. A parenting plan shall be required for permanent custody and modification actions and in the judge's discretion may be required for temporary hearings. The final decree in any legal action involving the custody of a child, including modification actions, shall incorporate a permanent parenting plan.

(b)(1) Unless otherwise ordered by the judge, a parenting plan shall include the following:

(A) A recognition that a close and continuing parent-child relationship and continuity in the child's life will be in the child's best interest;

(B) A recognition that the child's needs will change and grow as the child matures and demonstrate that the parents will make an effort to parent that takes this issue into account so that future modifications to the parenting plan are minimized;

(C) A recognition that a parent with physical custody will make day-to-day decisions and emergency decisions while the child is residing with such parent; and

(D) That both parents will have access to all of the child's records and information, including, but not limited to, education, health, health insurance, extracurricular activities, and religious communications.

(2) Unless otherwise ordered by the judge, or agreed upon by the parties, a parenting plan shall include, but not be limited to:

(A) Where and when a child will be in each parent's physical care, designating where the child will spend each day of the year;

(B) How holidays, birthdays, vacations, school breaks, and other special occasions will be spent with each parent including the time of day that each event will begin and end;

(C) Transportation arrangements including how the child will be exchanged between the parents, the location of the exchange, how the transportation costs will be paid, and any other matter relating to the child spending time with each parent;

(D) Whether supervision will be needed for any parenting time and, if so, the particulars of the supervision;

(E) An allocation of decision-making authority to one or both of the parents with regard to the child's education, health, extracurricular activities, and religious upbringing, and if the parents agree the matters should be jointly decided, how to resolve a situation in which the parents disagree on resolution;

(F) What, if any, limitations will exist while one parent has physical custody of the child in terms of the other parent contacting the child and the other parent's right to access education, health, extracurricular activity, and religious information regarding the child; and

(G) If a military parent is a party in the case:

(i) How to manage the child's transition into temporary physical custody to a nondeploying parent if a military parent is deployed;

(ii) The manner in which the child will maintain continuing contact with a deployed parent;

(iii) How a deployed parent's parenting time may be delegated to his or her extended family;

(iv) How the parenting plan will be resumed once the deployed parent returns from deployment; and

(v) How divisions (i) through (iv) of this subparagraph serve the best interest of the child.

(c) If the parties cannot reach agreement on a permanent parenting plan, each party shall file and serve a proposed parenting plan on or before the date set by the judge. Failure to comply with filing a parenting plan may result in the judge adopting the plan of the opposing party if the judge finds such plan to be in the best interests of the child. (Orig. Code 1863, § 1685; Code 1868, § 1728; Code 1873, § 1733; Code 1882, § 1733; Civil Code 1895, § 2452; Civil Code 1910, § 2971; Code 1933, § 30-127; Ga. L. 1957, p. 412, § 1; Ga. L. 1962, p. 713, § 1; Ga. L. 1976, p. 1050, § 1; Ga. L. 1978, p. 258, § 2; Ga. L. 1983, p. 632, § 1; Ga. L. 1984, p. 22, § 19; Ga. L. 1986, p. 1000, § 1; Ga. L. 1986, p. 1036, § 1; Ga. L. 1988, p. 1368, § 1; Ga. L. 1992, p. 1656, § 1; Ga. L. 1995, p. 863, § 5; Ga. L. 1999, p. 329, § 3; Ga. L. 2000, p. 1292,

§ 1; Ga. L. 2007, p. 554, § 5/HB 369; Ga. L. 2011, p. 274, § 2/SB 112; Ga. L. 2013, p. 553, § 2/SB 1.)

The 2013 amendment, effective July 1, 2013, inserted “health insurance,” near the end of subparagraph (b)(1)(D).

Cross references. — Parenting plan, Uniform Rules for the Superior Courts of Georgia, Rule 24.10.

Editor’s notes. — Ga. L. 2007, p. 554, § 1/HB 369, not codified by the General Assembly, provides: “The General Assembly of Georgia declares that it is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage or relationship.”

Ga. L. 2007, p. 554, § 8/HB 369, not codified by the General Assembly, provides that the amendment to this Code section shall apply to all child custody proceedings and modifications of child custody filed on or after January 1, 2008.

Ga. L. 2011, p. 274, § 1/SB 112, not codified by the General Assembly, provides that: “This Act shall be known and

may be cited as the ‘Military Parents Rights Act.’”

Law reviews. — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969). For article, “The Child as a Party in Interest in Custody Proceedings,” see 10 Ga. St. B.J. 577 (1974). For article surveying Georgia cases dealing with domestic relations from June 1977 through May 1978, see 30 Mercer L. Rev. 59 (1978). For annual survey on law of domestic relations, see 42 Mercer L. Rev. 201 (1990). For article, “Domestic Relations Law,” see 53 Mercer L. Rev. 265 (2001). For survey article on domestic relations cases for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 223 (2003). For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004). For survey article on domestic relations law, see 59 Mercer L. Rev. 139 (2007).

For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 243 (1992).

For comment on *Bodrey v. Cape*, 120 Ga. App. 859, 172 S.E.2d 643 (1969), see 7 Ga. St. B.J. 256 (1970).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

TRIAL JUDGE’S DISCRETION GENERALLY

AWARD OF CUSTODY

1. IN GENERAL

2. TEMPORARY AWARDS

3. FINALITY OF AWARD

PARENTAL FITNESS

AWARD OF CUSTODY TO THIRD PARTY

SELECTION BY CHILD

CHANGE OF CUSTODY

1. IN GENERAL

2. APPLICATION

VISITATION RIGHTS

General Consideration

Statute deals with custody of minor children as between parents. *Rogers v. Smith*, 222 Ga. 841, 152 S.E.2d 859 (1967).

Superior courts of this state have subject matter jurisdiction over issues of child custody. *Foltz v. Foltz*, 238 Ga. 193, 232 S.E.2d 66 (1977).

Statute contemplated that judge, and not jury, shall dispose of children of marriage. *Johnson v. Johnson*, 131 Ga. 606, 62 S.E. 1044 (1908); *Alf v. Alf*, 226 Ga. 880, 178 S.E.2d 187 (1970).

When divorce is sought, court rather than jury has duty of disposing of custody of parties' minor children in their best interests. *Weaver v. Weaver*, 238 Ga. 101, 230 S.E.2d 886 (1976).

Power granted by section is one incident to divorce proceeding. — Trial judge can exercise power regarding custody of children only when divorces are granted, or can only make disposition of minor children of marriage during period divorce proceeding is pending. When case is terminated without divorce being granted to either party, court cannot exercise this power. *Brinson v. Jenkins*, 207 Ga. 218, 60 S.E.2d 440 (1950).

Court could make final disposition of children only when divorce was granted. This power was incidental to divorce proceeding, and was exercisable only when valid divorce was granted between parties. *Harmon v. Harmon*, 209 Ga. 474, 74 S.E.2d 75 (1953); *Griffis v. Griffis*, 229 Ga. 587, 193 S.E.2d 620 (1972).

Section does not apply unless divorce granted. — Court can make a final disposition of children only if divorce is granted. If case is terminated without divorce being granted to either party, court can exercise no such power. *Keppel v. Keppel*, 92 Ga. 506, 17 S.E. 976 (1893); *Black v. Black*, 165 Ga. 243, 140 S.E. 364 (1927).

Jurisdiction and venue. — Although a trial court may modify, sua sponte, visitation under certain circumstances pursuant to O.C.G.A. §§ 19-9-1(b) and 19-9-3(b), those provisions apply only when jurisdiction and venue are proper. *Rogers v. Baudet*, 215 Ga. App. 214, 449 S.E.2d 900 (1994).

When final award of custody ordinarily made. — Final award of custody can ordinarily be made only after divorce has been granted. *Brinson v. Jenkins*, 207 Ga. 218, 60 S.E.2d 440 (1950).

In custody case, state as parens patriae is materially concerned, and through agency of court is virtually a party to judgment, although action proceeded nominally as one between parents only. *Fortson v. Fortson*, 195 Ga. 750, 25 S.E.2d 518 (1943), later appeal, 197 Ga. 699, 30 S.E.2d 165 (1944).

Meaning of words "party not in default" in subsection (a). — Words "party not in default" in subsection (a) simply meant that in absence of proof of circumstances showing children's welfare will be better served by awarding custody to another party, judge must under this mandate of the law award custody to such party. But further provisions of that section plainly empowered judge in exercise of sound discretion to place children where in the judge's judgment based upon evidence, their best interest will be served, although this might deny custody to parent not in default in divorce case. *Gunnells v. Gunnells*, 225 Ga. 188, 167 S.E.2d 138 (1969).

O.C.G.A. §§ 19-9-1 and 19-9-3 construed together in child custody decisions. — Courts have construed former Code 1933, §§ 30-127 and 74-107 (see now O.C.G.A. §§ 19-9-1 and 19-9-3) together in decisions involving child custody in divorce actions, and have recognized right of trial judge to exercise sound legal discretion, looking to best interest of child or children, in awarding custody of children. *Brown v. Brown*, 222 Ga. 446, 150 S.E.2d 615 (1966).

Former Code 1933, §§ 30-127 and 30-206 (see now O.C.G.A. §§ 19-9-1 and 19-6-14), being in pari materia, must be construed together. *Zachry v. Zachry*, 140 Ga. 479, 79 S.E. 115 (1913).

Father's failure to file competing parenting plan. — Although a father failed to file a competing parenting plan in the mother's proceeding to modify their current plan, that did not compel adoption of the mother's plan. *Gilchrist v. Gilchrist*, 323 Ga. App. 555, 747 S.E.2d 75 (2013).

Terms of original parenting plan not modified remain in effect. — Con-

General Consideration (Cont'd)

trary to the husband's argument, the trial court's ruling did contain a parenting plan as the trial court's order explicitly stated that all the terms and conditions of the original parenting plan not modified would remain in full force and effect unless it conflicted with the trial court's order. *Williams v. Williams*, 295 Ga. 113, 757 S.E.2d 859 (2014).

Cited in *Williams v. Crosby*, 118 Ga. 296, 45 S.E. 282 (1903); *Milner v. Gatlin*, 143 Ga. 816, 85 S.E. 1045, 1916B L.R.A. 977 (1915); *Scott v. Scott*, 154 Ga. 659, 115 S.E. 2 (1922); *Dalton v. Dalton*, 170 Ga. 502, 153 S.E. 22 (1930); *Slate v. Coggins*, 181 Ga. 17, 181 S.E. 145 (1935); *Duke v. Duke*, 181 Ga. 21, 181 S.E. 161 (1935); *Chapin v. Cummings*, 191 Ga. 408, 12 S.E.2d 312 (1940); *Loggins v. Loggins*, 191 Ga. 779, 14 S.E.2d 91 (1941); *Barbee v. Barbee*, 201 Ga. 763, 41 S.E.2d 126 (1947); *Hodges v. Hodges*, 77 Ga. App. 86, 47 S.E.2d 823 (1948); *Gibson v. Wood*, 207 Ga. 282, 61 S.E.2d 125 (1950); *McBurnett v. Warren*, 208 Ga. 225, 66 S.E.2d 49 (1951); *Hammock v. Hammock*, 209 Ga. 751, 76 S.E.2d 15 (1953); *Rowell v. Rowell*, 212 Ga. 584, 94 S.E.2d 425 (1956); *Perry v. Perry*, 213 Ga. 847, 102 S.E.2d 534 (1958); *Hunnicutt v. Hunnicutt*, 214 Ga. 834, 108 S.E.2d 279 (1959); *Bartlett v. Bartlett*, 99 Ga. App. 770, 109 S.E.2d 821 (1959); *Perkins v. Courson*, 219 Ga. 611, 135 S.E.2d 388 (1964); *Minchew v. Minchew*, 222 Ga. 593, 151 S.E.2d 144 (1966); *Rigdon v. Rigdon*, 222 Ga. 679, 151 S.E.2d 712 (1966); *Burney v. Burney*, 222 Ga. 790, 152 S.E.2d 871 (1966); *Rogers v. Smith*, 222 Ga. 841, 152 S.E.2d 859 (1967); *Floyd v. Floyd*, 223 Ga. 275, 154 S.E.2d 580 (1967); *Waller v. Waller*, 226 Ga. 279, 174 S.E.2d 433 (1970); *Gray v. Gray*, 226 Ga. 767, 177 S.E.2d 575 (1970); *Short v. Short*, 230 Ga. 131, 196 S.E.2d 127 (1973); *Peacock v. Adams*, 230 Ga. 774, 199 S.E.2d 254 (1973); *Shaddrix v. Womack*, 231 Ga. 628, 203 S.E.2d 225 (1974); *Ward v. Ward*, 232 Ga. 189, 205 S.E.2d 852 (1974); *Spence v. Levi*, 133 Ga. App. 581, 211 S.E.2d 622 (1974); *Marshall v. Marshall*, 234 Ga. 393, 216 S.E.2d 117 (1975); *Vaughan v. Vaughan*, 236 Ga. 173, 223 S.E.2d 148 (1976); *Anderson v. Anderson*,

237 Ga. 886, 230 S.E.2d 272 (1976); *Nipper v. Rich*, 241 Ga. 123, 244 S.E.2d 237 (1978); *Sweeney v. Sweeney*, 241 Ga. 372, 245 S.E.2d 648 (1978); *Munday v. Munday*, 243 Ga. 863, 257 S.E.2d 282 (1979); *Stephens v. Stephens*, 244 Ga. 467, 260 S.E.2d 864 (1979); *Lawrence v. Day*, 247 Ga. 474, 277 S.E.2d 35 (1981); *Kennedy v. Adams*, 218 Ga. App. 120, 460 S.E.2d 540 (1995); *Lewis v. Lewis*, 252 Ga. App. 539, 557 S.E.2d 40 (2001); *Midkiff v. Midkiff*, 275 Ga. 136, 562 S.E.2d 177 (2002); *Hammond v. Gordon County*, 316 F. Supp. 2d 1262 (N.D. Ga. 2002); *Carr-MacArthur v. Carr*, 296 Ga. 30, 764 S.E.2d 840 (2014).

Trial Judge's Discretion Generally

Court must exercise discretion in awarding custody of minor children. *Waller v. Waller*, 202 Ga. 535, 43 S.E.2d 535 (1947); *Jackson v. Jackson*, 230 Ga. 499, 197 S.E.2d 705 (1973).

Trial judge exercises sound legal discretion in awarding custody of minor children pending application for divorce looking to best interest of children. *Lynn v. Lynn*, 202 Ga. 776, 44 S.E.2d 769 (1947); *Brannen v. Brannen*, 208 Ga. 88, 65 S.E.2d 161 (1951); *Harbuck v. Harbuck*, 210 Ga. 220, 78 S.E.2d 508 (1953).

Trial court has wide latitude and discretion regarding child's best interests. — Judge has wide latitude and discretion regarding children's best interest, welfare, and happiness. This discretion will be interfered with only in those cases when abuse is shown. *Barnes v. Tant*, 217 Ga. 67, 121 S.E.2d 125 (1961).

When custody of minor children is involved, the trial court has wide latitude and discretion so that best interests of children may be provided for, and this discretion will not be interfered with unless manifestly abused. *Yde v. Yde*, 231 Ga. 506, 202 S.E.2d 423 (1973).

Judicial discretion to make temporary custody award. — Pending divorce proceeding, judge in exercise of sound discretion may temporarily award custody of children. *Cason v. Cason*, 158 Ga. 395, 123 S.E. 713 (1924).

Award of custody not disturbed absent abuse of discretion. — In cases between parties involving custody of their

minor children, rule is established that judge exercises sound legal discretion, looking to the best interest of the child or children, and that this court does not interfere with the judge's judgment unless that discretion appears to have been abused. *Willingham v. Willingham*, 192 Ga. 405, 15 S.E.2d 514 (1941); *Adams v. Heffernan*, 217 Ga. 404, 122 S.E.2d 735 (1961).

When a trial judge in awarding custody of a minor child as between divorced parents, exercises sound legal discretion, the judge's judgment in making an award will not be controlled by the Supreme Court. *Bignon v. Bignon*, 202 Ga. 141, 42 S.E.2d 426 (1947); *Murphy v. Murphy*, 238 Ga. 130, 231 S.E.2d 743 (1977).

Supreme Court will not interfere with the trial judge's award of custody unless an abuse of discretion appears. *Lynn v. Lynn*, 202 Ga. 776, 44 S.E.2d 769 (1947); *Brannen v. Brannen*, 208 Ga. 88, 65 S.E.2d 161 (1951); *Harbuck v. Harbuck*, 210 Ga. 220, 78 S.E.2d 508 (1953); *Jackson v. Jackson*, 230 Ga. 499, 197 S.E.2d 705 (1973).

When the trial judge exercises sound legal discretion looking to the best interests of the child in determining the custody, the Supreme Court will not interfere with the judge's judgment unless it is shown that the judge's discretion was abused. *Harris v. Harris*, 240 Ga. 276, 240 S.E.2d 30 (1977).

In deciding issues of custody, the court is granted the power to exercise the court's sound discretion in making an award to either party. When the trial judge exercises sound legal discretion looking to the best interests of the child, the appellate court will not interfere with the judge's judgment unless it is shown that the judge's discretion was abused. *Sullivan v. Sullivan*, 241 Ga. 7, 243 S.E.2d 35 (1978).

Award not disturbed. — Award of temporary alimony, attorney's fees, and child custody not disturbed absent abuse of discretion. *Moody v. Moody*, 193 Ga. 699, 19 S.E.2d 504 (1942).

Judicial discretion generally not subject to review. — Absent exception to decree, discretion of judge in awarding custody is not subject to review. *Johnson v. Johnson*, 131 Ga. 606, 62 S.E. 1044 (1908).

When evidence conflicts regarding willful violation of custody, discretion of trial court will not be disturbed. *Shook v. Shook*, 242 Ga. 55, 247 S.E.2d 855 (1978).

If any evidence supports custody award, it will not be disturbed. — On appeal in child custody award pursuant to divorce decree, the appellate court will not reverse the trial court on ground of abuse of discretion if there is any evidence to support child custody award. *Gazaway v. Brackett*, 241 Ga. 127, 244 S.E.2d 238 (1978).

Evidence requiring reversal of trial court discretion. — Evidence must demand contrary verdict before appellate court will reverse discretion of trial court. *Weaver v. Weaver*, 238 Ga. 101, 230 S.E.2d 886 (1976).

Award of Custody

1. In General

Between parents neither has a prima facie right of custody, and judge can award custody to either parent within the judge's discretion. *Todd v. Todd*, 234 Ga. 156, 215 S.E.2d 4 (1975).

Court must look to and determine best interests of child in exercising discretion regarding custody. *Barnes v. Tant*, 217 Ga. 67, 121 S.E.2d 125 (1961).

Trial court's determination that a child's custody should be with the wife in the parties' divorce proceedings was based on the evidence from the guardian ad litem and from a psychologist that such an award was in the best interests of the child; thus, the court acted within the court's discretion. *Nguyen v. Dinh*, 278 Ga. 887, 608 S.E.2d 211 (2005).

Between parents, best interests of child control. — In divorce action in which child custody is an issue, test for use by trial court in determining which parent shall have child custody is best interests of child. *Gazaway v. Brackett*, 241 Ga. 127, 244 S.E.2d 238 (1978).

Upon a review of the trial court's final custody order, despite the wife's contrary claims, nothing in the custody order or the record showed that the court's custody ruling was based on any standard other than what was in the best interests of the

Award of Custody (Cont'd)**1. In General (Cont'd)**

children, and nothing showed that the court required the wife to disprove any allegations asserted by the husband. Moreover, the final custody determination need not be the same as that of any temporary order. *Hadden v. Hadden*, 283 Ga. 424, 659 S.E.2d 353 (2008).

Children's best interests control, regardless of one parent's apparent willingness to give custody to other parent. *Weaver v. Weaver*, 238 Ga. 101, 230 S.E.2d 886 (1976).

Mother's relocation to another state. — Although a mother's relocation out of state was not in itself harmful to the children, but the relocation did interfere with the children's family associations in Georgia, the trial court did not abuse the court's discretion in granting custody to the father during the school year. *Hardin v. Hardin*, 274 Ga. App. 543, 618 S.E.2d 169 (2005).

Mother's relocation out of country. — Trial court properly awarded joint legal custody to the parties with physical custody to the mother, and allowed the mother, a French citizen like the father, to move to France with the child. The record supported the findings that there was a special bond between the child, the mother, and the mother's family in France and that the mother could not obtain gainful employment in the United States; furthermore, the trial court applied the proper best interests standard in determining custody. *LaFont v. Rouviere*, 283 Ga. 60, 656 S.E.2d 522 (2008).

Agreement or consent to custody not controlling on court. — Any agreement or consent to custody between husband and wife is not controlling on court. *Weaver v. Weaver*, 238 Ga. 101, 230 S.E.2d 886 (1976).

If child custody is unresolved at the end of the evidence, the trial judge should either resolve the question of child custody and so inform the jury prior to their deliberations or, if for any reason the judge does not wish to tell the jury which parent will have custody, the judge must provide the jury with alternative jury forms in which the jury may make differ-

ent awards, if necessary, depending on which parent will have custody. *Curtis v. Curtis*, 255 Ga. 288, 336 S.E.2d 770 (1985), overruled on other grounds, *Grissom v. Grissom*, 282 Ga. 267, 647 S.E.2d 1 (2007).

Factors to be considered in awarding custody. — In awarding custody, court may properly consider each parent's fitness, character, personality, and general health. *Weaver v. Weaver*, 238 Ga. 101, 230 S.E.2d 886 (1976).

Improved health, conduct, and moral perspective, alone, will not require award of custody to that parent. *Floyd v. Floyd*, 218 Ga. 606, 129 S.E.2d 786 (1963).

Improvement of health is factor for consideration in awarding custody. — Improvement of health is now one of the many factors, germane but not of itself controlling, to be taken into consideration by trial judge in ascertaining to whom award of child custody should be made. *Floyd v. Floyd*, 218 Ga. 606, 129 S.E.2d 786 (1963).

Legitimacy of child is an appropriate issue in divorce proceeding. *McDonald v. Hester*, 115 Ga. App. 740, 155 S.E.2d 720 (1967).

Parent's conduct is relevant to issue of custody although divorce is granted on no-fault grounds. *Harris v. Harris*, 240 Ga. 276, 240 S.E.2d 30 (1977).

Adultery by both parents. — Trial court did not err in finding that the wife's adultery did not cause the dissolution of the parties' marriage as there was evidence of adultery by both parties as well as evidence that the husband had physically injured the wife and that the husband's return to Ohio to work for his father caused the dissolution of the marriage; accordingly, there was no merit to the husband's argument that he should have been awarded sole custody of the children on the theory that the wife was the "defaulting party." *Alejandro v. Alejandro*, 282 Ga. 453, 651 S.E.2d 62 (2007).

Court-imposed limitations upon custody awards. — In awarding custody, court may impose such limitations as may be required by existing facts adduced on trial of issue. *Tanner v. Tanner*, 221 Ga.

406, 144 S.E.2d 740 (1965).

Petition for divorce need not contain specific prayer for custody. — When petition for divorce alleged that there were minor children, naming the children, and that petitioner desired to have their custody, it was not necessary that such petition contain a specific prayer for custody. *Hammock v. Hammock*, 209 Ga. 647, 74 S.E.2d 859 (1953).

Court jurisdiction where parties move after action is instituted. — Where court had jurisdiction of parties at time action was instituted, removal by parties and minor child of their to another county pending final termination of cause as to custody of child, did not deprive court of jurisdiction to pass on question of custody. *Rowell v. Rowell*, 211 Ga. 127, 84 S.E.2d 23 (1954).

Effect of former decrees or judgments upon custody awards. — On final verdict for divorce, the court shall not be hampered by former decree of judgment, but will be at full liberty in providing for welfare of children. *Zachry v. Zachry*, 140 Ga. 479, 79 S.E. 115 (1913).

Court may reserve child custody issue for future determination. — When court, in entering final decree granting divorce and awarding permanent alimony, reserved therein for future determination prayers of parties as to custody of their minor child, court, at subsequent term, after notice and hearing, had jurisdiction to award custody of such child. *Rowell v. Rowell*, 211 Ga. 127, 84 S.E.2d 23 (1954).

When no award of child custody is made in final decree of divorce, court has power to reserve issue of child custody and determine custody at subsequent term of court. *Harwell v. Harwell*, 248 Ga. 578, 285 S.E.2d 12 (1981).

Custody of unborn child may be decided after birth. — When divorce decree does not determine custody of unborn child, issue may be passed upon in appropriate proceeding instituted for that purpose after birth. *Daughtry v. Daughtry*, 218 Ga. 557, 129 S.E.2d 788 (1963).

Best interest of child. — While the trial court may consider the conduct of the parties on the issue of custody, the court

ultimately must decide the custody question based on the best interest of the child. *Mock v. Mock*, 258 Ga. 407, 369 S.E.2d 255 (1988).

Court awarding custody cannot retain exclusive jurisdiction of matter thereafter. — Order of court in divorce decree, to effect that child of parties should remain within jurisdiction of court and that court retained jurisdiction of cause and parties thereto, constituted attempt on part of trial court to retain exclusive jurisdiction of case, which may not be done. *Gibbs v. North*, 211 Ga. 231, 84 S.E.2d 833 (1954).

Court's attempt to retain exclusive jurisdiction is a nullity. — Award of custody in divorce cases is a final judgment and any attempt by the trial court to retain jurisdiction for further orders regarding custody is a nullity and will not divest the award of its finality. *Taylor v. Taylor*, 231 Ga. 742, 204 S.E.2d 129 (1974).

Children need not be present at interlocutory hearing. — It is not necessary at interlocutory hearing in action for divorce to entitle court to award temporary custody of children of parties that such children be brought personally into court. *Moody v. Moody*, 193 Ga. 699, 19 S.E.2d 504 (1942).

Award of sole custody to one parent proper. — Trial court did not abuse court's discretion in awarding sole physical custody of two minor children to one parent when the grant was in the children's best interests and the other parent had an extramarital affair, but was granted liberal visitation with no restriction on the presence of the person with whom the affair had been conducted. *Patel v. Patel*, 276 Ga. 266, 577 S.E.2d 587 (2003).

Noncustodial parent not relieved of legal obligation to support child. — When wife obtains decree granting her a divorce and awarding to her custody of minor child, and no question as to support of such child by father has been made or passed on, he is not relieved of his legal obligation for proper support of such child. *Brown v. Brown*, 132 Ga. 712, 64 S.E. 1092, 131 Am. St. R. 229 (1909).

Court erred in granting custody of children to separate parties. — When

Award of Custody (Cont'd)**1. In General (Cont'd)**

custody of one child was given to wife (thus a finding that she had not lost her right to custody), the trial court erred in giving custody of the other child to the paternal grandmother and in ordering that child support for such child be paid to the grandmother. *Phelps v. Phelps*, 230 Ga. 243, 196 S.E.2d 426 (1973).

Foreign custody decrees are recognized, but subject to modification. — Decree of divorce awarding custody of children of parties, rendered by court of another state having jurisdiction of subject matter and of parties, shall be given full effect in this state. But such decree cannot anticipate changes which may occur in condition of parents, or in their character and fitness for care of their children. Accordingly, when, in proceeding in this state involving custody of child, change is shown in circumstances of parties materially affecting welfare of child since foreign decree, court in exercise of sound discretion may protect such welfare accordingly, the same as if there has been such a change since the decree rendered in this state. *Kniepkamp v. Richards*, 192 Ga. 509, 16 S.E.2d 24 (1941).

Procedure for excepting to child custody awards by direct exception. — When losing party in child-custody case desires to except to the judgment awarding custody of the child, the proper procedure is by direct exceptions to decree, and not by motion for new trial. *Alf v. Alf*, 226 Ga. 880, 178 S.E.2d 187 (1970).

Complainant in contempt proceeding for noncompliance not subject to counterclaims. — Filing of mere motion seeking to have party held in contempt for failure to obey custody decree is not tantamount to filing complaint which would subject complainant to jurisdiction of court or to filing of counterclaims. *Varn v. Varn*, 242 Ga. 309, 248 S.E.2d 667 (1978).

2. Temporary Awards

Distinction between temporary and permanent custody awards. — Temporary award of custody differs from permanent award, as latter is a final adjudication of rights of parties on existing facts, is

res judicata, and is subject to change only upon showing of change of conditions affecting the best interests of the child. No such finality exists as to a judgment awarding temporary custody. *Adams v. State*, 218 Ga. 130, 126 S.E.2d 624, answer conformed to, 106 Ga. App. 531, 127 S.E.2d 477 (1962).

Decree awarding temporary custody is not an adjudication of rights of parties, and is a matter of discretion with the court. *Adams v. State*, 218 Ga. 130, 126 S.E.2d 624, answer conformed to, 106 Ga. App. 531, 127 S.E.2d 477 (1962).

Court may award temporary custody pending divorce proceeding. — In all divorce suits, as well as suits for alimony without divorce, judges of superior courts are empowered to determine, not only who shall be entitled to care and custody of minor children pending litigation, but they are empowered to provide for their permanent custody thereafter. *Kniepkamp v. Richards*, 192 Ga. 509, 16 S.E.2d 24 (1941).

Court may award temporary custody to parent or third party. — Pending application for divorce, court may in the court's discretion award temporary custody of child to either party or to third party. *Adams v. State*, 218 Ga. 130, 126 S.E.2d 624, answer conformed to, 106 Ga. App. 531, 127 S.E.2d 477 (1962).

Permanent award not timely. — Court can make a final disposition of minor children of the parties only when a divorce is granted. Thus, the trial court erred in entering a "Permanent Order of Custody" before a divorce was granted. *Rowe v. Rowe*, 195 Ga. App. 493, 393 S.E.2d 750 (1990).

Award of temporary custody to grandmother a final judgment. — When court awarded temporary custody of minor children to grandmother, specifying a date on which further hearing would be held on request of either mother or father, the order was a final judgment and the court was without jurisdiction to amend or modify that judgment. *Draper v. Draper*, 170 Ga. App. 727, 318 S.E.2d 314 (1984).

3. Finality of Award

When doctrine of res judicata applies. — Doctrine of *res judicata* applies

when award of custody of minor children has been made; judge may thereafter exercise discretion as to custody of children only so far as there may be new and material conditions and circumstances substantially affecting interest and welfare of children. *Adams v. Heffernan*, 217 Ga. 404, 122 S.E.2d 735 (1961).

Custody of children of parties seeking divorce is a vital issue to be determined when divorce decree is granted, and parties are entitled to decision on this question as much so as on question of divorce, or amount of permanent alimony, if any, and such a decree becomes final on facts then existing. Any attempt to modify award of custody by declaring it temporary, leaving this issue indefinitely pending in abeyance, and seeking to retain jurisdiction for further investigation will not divest award of the award's finality. *Burton v. Furcron*, 207 Ga. 637, 63 S.E.2d 650 (1951).

Award is final despite words of limitation. — Judgment fixing custody of minor child of divorced parents is final on facts then existing and any attempt by the trial judge to retain jurisdiction of the child is a nullity, and once custody is awarded "until further order of court" it is awarded on a permanent basis and only a subsequent change in conditions could justify a further modification. *Yde v. Yde*, 231 Ga. 506, 202 S.E.2d 423 (1973).

Custody award is conclusive between parties absent changed circumstances. — Decree of divorce in which custody of child is awarded to one of the parents is conclusive as between parties to such decree as to right of that parent to custody of child, unless change of circumstances affecting welfare of child is shown. *Kniepkamp v. Richards*, 192 Ga. 509, 16 S.E.2d 24 (1941).

When award of custody of minor child has been duly made, it is conclusive on parties unless there are new and material conditions and circumstances substantially affecting interest and welfare of child. *Bagley v. Bagley*, 226 Ga. 742, 177 S.E.2d 255 (1970).

Custody award is conclusive between parties though based on agreement. — When, on grant of divorce between parents, custody of minor children

was awarded to the mother, the fact that the decree as to custody was based upon agreement did not deprive the decree of usual attribute of conclusiveness. While in all such cases, the paramount issue is the welfare of the children, the doctrine of *res adjudicata* is nevertheless applicable; and when an award has been made, the judge may thereafter exercise discretion as to the custody of the children only so far as there may be new and material conditions and circumstances substantially affecting their interest and welfare. *Fortson v. Fortson*, 195 Ga. 750, 25 S.E.2d 518 (1943), later appeal, 197 Ga. 699, 30 S.E.2d 165 (1944).

Custody cannot be modified in subsequent contempt proceedings. — Terms of final divorce decree as to custody cannot be modified in subsequent contempt proceedings because any change in custody must be accomplished through new proceedings based upon evidence showing change in circumstances affecting interest and welfare of minor children. *Parker v. Parker*, 242 Ga. 64, 247 S.E.2d 862 (1978).

Finality of order modifying custody. — An order modifying custody, issued following a "temporary" hearing under USCR 24.5, was final. In a post-decree custody modification action authorized by a prior version of O.C.G.A. § 19-9-3(b), the trial court was without authority to enter a "temporary" custody award. *Hightower v. Martin*, 198 Ga. App. 855, 403 S.E.2d 862 (1991), but see *Massey v. Massey*, 227 Ga. App. 906, 490 S.E.2d 205 (1997).

Parental Fitness

Question of fitness of parties seeking custody is always a proper subject of inquiry. *Adams v. Heffernan*, 217 Ga. 404, 122 S.E.2d 735 (1961).

Evidence of parties' character, conduct, and reputation is admissible. — Evidence touching character, conduct, and reputation of either of the parties, or any other evidence tending to throw light on their fitness to be the custodian of the child, is admissible; but conclusions deducible from this testimony are not subject-matter of opinion by witnesses. *Moore v. Dozier*, 128 Ga. 90, 57 S.E. 110

Parental Fitness (Cont'd)

(1907); *Milner v. Gatlin*, 143 Ga. 816, 85 S.E. 1045, 1916B L.R.A. 977 (1915).

Husband's alcoholism and resulting cruel treatment to wife and children are relevant to custodial fitness. *Weaver v. Weaver*, 238 Ga. 101, 230 S.E.2d 886 (1976).

Admissibility of evidence tending to show immorality of wife. — See *Goodin v. Goodin*, 166 Ga. 38, 142 S.E. 158 (1928).

Finding that mother should have partial custody. — Judgment that there has been an improvement in health of mother and that such improvement has progressed to extent that she should have partial custody of children on stated occasions consistent with best interests and welfare of children is necessarily a holding that she was not a fit and proper person to have complete custody of children. *Northcutt v. Northcutt*, 220 Ga. 245, 138 S.E.2d 377 (1964).

Award of custody to grandparents proper. — When evidence of parents' fitness is in conflict, award of custody to grandparents is proper. *Phillips v. Phillips*, 161 Ga. 79, 129 S.E. 644 (1925).

Trial judge's determination of fitness generally not disturbed. — When evidence is in conflict in regard to fitness of each of the divorced parents of minor child to have custody of the child, discretion of trial judge in awarding child to the child's mother will not be controlled. *Speer v. Speer*, 217 Ga. 341, 122 S.E.2d 84 (1961).

In contest between mother and father over their minor child, when evidence respecting fitness of parties is in conflict, discretion of trial judge in making award of custody to mother during nine months each year will not be controlled by reviewing court. *Everitt v. Everitt*, 217 Ga. 425, 122 S.E.2d 920 (1961).

When there is contest between mother and father over their minor child, and evidence respecting fitness of parties is in conflict, discretion of trial judge in making award will not be controlled by appellate court. *Brown v. Brown*, 222 Ga. 446, 150 S.E.2d 615 (1966).

Unless evidence demands finding con-

trary to trial court's judgment that parent is "fit" or "unfit," judgment of trial court on such issue is conclusive and will not be disturbed on appeal. *Hardy v. Hardee*, 225 Ga. 585, 170 S.E.2d 417 (1969).

On appeal from a custody modification order entered against a parent, pretermittting whether there was any evidence to support the court's finding that the parent was unfit, and even if the court unnecessarily included such a finding in the court's modification order, the parent failed to demonstrate that this finding constituted reversible error. *Weil v. Paseka*, 282 Ga. App. 403, 638 S.E.2d 833 (2006).

Award of Custody to Third Party

Trial judge has discretion to award custody to third person in custody proceeding, provided it appeared that such disposition is in best interest of children. *Shipps v. Shipps*, 186 Ga. 494, 198 S.E. 230 (1938).

Focus in determining whether third party is entitled to custody is on natural parents and whether or not they have forfeited their rights or are unfit. Thus, any relationship between the child and the child's foster parents is primarily irrelevant. *Drummond v. Fulton County Dep't of Family & Children Servs.*, 237 Ga. 449, 228 S.E.2d 839 (1976), cert. denied, 432 U.S. 905, 97 S. Ct. 2949, 53 L. Ed. 2d 1077 (1977).

When dispute was between natural parent and third party, the court must award custody of the child to the parent unless the parent has lost parental prerogatives under O.C.G.A. § 19-7-1 or was unfit. *Drummond v. Fulton County Dep't of Family & Children Servs.*, 237 Ga. 449, 228 S.E.2d 839 (1976), cert. denied, 432 U.S. 905, 97 S. Ct. 2949, 53 L. Ed. 2d 1077 (1977).

Best interests of the child test is used only between parents who both have equal right to the child, not between a natural parent and a third party. *Drummond v. Fulton County Dep't of Family & Children Servs.*, 237 Ga. 449, 228 S.E.2d 839 (1976), cert. denied, 432 U.S. 905, 97 S. Ct. 2949, 53 L. Ed. 2d 1077 (1977).

When parent is entitled to custody as against third party. — When a third party (e.g., a grandparent) is being awarded custody of child as part of divorce case, or when such third party sues to obtain child custody from the parent, the test is not simply the best interests or the welfare of the child because the parents are being deprived of the custody of their child. In such cases, a parent is entitled to be awarded custody by the trial court unless it is shown by clear and convincing evidence that such parent is unfit or otherwise not entitled to custody under the laws. *Gazaway v. Brackett*, 241 Ga. 127, 244 S.E.2d 238 (1978).

Custody of third party as opposed to natural parent. — Between a third party and a natural parent, the parent is entitled to custody unless it is shown by clear and convincing evidence that the parent either has lost the parental right to custody under O.C.G.A. §§ 19-7-1 and 19-7-4 or is unfit. *Blackburn v. Blackburn*, 168 Ga. App. 66, 308 S.E.2d 193 (1983).

When third person entitled to custody. — As between parent and third person, discretion of court does not exist and it is only when the parent has lost the right to custody that the child may be placed in the custody of the third person. *Phelps v. Phelps*, 230 Ga. 243, 196 S.E.2d 426 (1973); *Bowman v. Bowman*, 234 Ga. 348, 216 S.E.2d 103 (1975).

Judge cannot terminate parental rights in divorce proceedings. — Superior court judge, upon hearing divorce and child custody case, does not have jurisdiction to terminate parental rights, although the judge can exercise judicial discretion as to best interests of child to award custody to party other than parents. *Cothran v. Cothran*, 237 Ga. 487, 228 S.E.2d 872 (1976).

Custody award to third person based on parent's unfitness supported by reasonable evidence will be affirmed. *Gazaway v. Brackett*, 241 Ga. 127, 244 S.E.2d 238 (1978).

Custody award to third person requires clear and convincing evidence. — When custody is given to third persons, rather than one of natural parents, standard of proof to be applied is that of clear and convincing evidence.

Guest v. Williams, 240 Ga. 316, 240 S.E.2d 705 (1977).

Temporary custody of minor child to third party. — Temporary custody of minor child may be given to third party although parents are fit. *Foster v. Foster*, 230 Ga. 658, 198 S.E.2d 881 (1973).

Third parties awarded temporary custody cannot appeal revocation of order. — When presiding judge pending divorce proceeding places minor children of litigants in possession of third parties prior to final decree, such third parties do not become parties to divorce case, but are mere temporary custodians of children, agents of court, appointed for convenience of judge to aid the judge in seeing that children are adequately cared for until the judge's further order. Revocation of such an order by one subsequently entered, while divorce case is still pending, cannot be made subject of appeal by parties to whom children were temporarily entrusted. *Graham v. Graham*, 219 Ga. 193, 132 S.E.2d 66 (1963).

When judge may modify award of temporary custody. — Until final decree is entered, judge may modify the judge's orders in this respect and transfer possession of children from persons to whom custody was originally granted and commit the children into care of other and different parties. *Graham v. Graham*, 219 Ga. 193, 132 S.E.2d 66 (1963).

Discretion given trial judge in temporary award of custody of children pending suits for divorce is broad as long as case is in bosom of court and no permanent custody has been granted as in final divorce. Therefore, trial judge may, on the judge's own motion, change custody of children even in hearing set to hear contempt. *Mathews v. Mathews*, 230 Ga. 779, 199 S.E.2d 179 (1973).

Selection by Child

Constitutionality of this section's child selection provision. — Child selection provision of former Code 1933, § 30-127 (see now O.C.G.A. § 19-9-1) did not violate Ga. Const. 1976, Art. I, Sec. II, Para. IV (see now Ga. Const. 1983, Art. I, Sec. II, Para. III). *Froug v. Harper*, 220 Ga. 582, 140 S.E.2d 844 (1965).

Selection by Child (Cont'd)

Provision allowing children over 14 years to select custodial parent. — Intent of statute was to recognize that child of 14 years or more was mature enough to select parent with whom the child desires to live and that this right of selection was controlling despite previous adjudications of unfitness. *Harbin v. Harbin*, 238 Ga. 109, 230 S.E.2d 889 (1976).

Self-executing change of custody. — Absent a finding of unfitness, a self-executing change of custody, when a child's selection is controlling, serves the interest of judicial economy by effecting the change of custody and establishing child support obligations without the necessity of court proceedings. *Weaver v. Jones*, 260 Ga. 493, 396 S.E.2d 890 (1990).

Even as to children over 14 years, judge has discretion. — Though child 15 years of age has right to select which parent the child desires to live with, the trial judge must determine what is in the best interest, welfare, and happiness of the child and in making this determination the judge has wide latitude and discretion. *Pritchett v. Pritchett*, 219 Ga. 635, 135 S.E.2d 417 (1964).

Child's right to choose. — No parental right of custody by judgment or decree can defeat the child's right to choose. *Adams v. Adams*, 219 Ga. 633, 135 S.E.2d 428 (1964); *Harbin v. Harbin*, 238 Ga. 109, 230 S.E.2d 889 (1976).

Choice of child over 14 years is controlling. — Language of statute allowing selection by child who has reached age of 14 years of parent with whom he or she desires to live was controlling save and except in one situation which was expressly recited therein. That exception is when parent so selected is determined by trial court not to be a fit and proper custodian. *Froug v. Harper*, 220 Ga. 582, 140 S.E.2d 844 (1965).

Prior adjudication of unfitness of parent. — To hold that prior adjudication of unfitness is res judicata or evidence of present unfitness would overly restrict statutory right of child who has reached 14 years of age to select parent with whom the child wishes to live. *Harbin v. Harbin*,

238 Ga. 109, 230 S.E.2d 889 (1976).

When court has no discretion regarding child's selection. — Child's selection of parent with whom the child desires to live, when child has reached 14 years of age, is controlling absent finding that such parent is unfit. Without finding of unfitness, child's selection must be recognized and court has no discretion to act otherwise. *Harbin v. Harbin*, 238 Ga. 109, 230 S.E.2d 889 (1976).

Showing required to defeat child's right of selection. — Right of selection of child over 14 years can only be defeated by showing of present unfitness. *Harbin v. Harbin*, 238 Ga. 109, 230 S.E.2d 889 (1976).

Testimony of children unheard after parent found unfit. — Trial court did not err in a divorce proceeding by declining to hear the testimony of the parties' two minor children as to their preferences because the trial court declared the mother to be an unfit parent. *Moon v. Moon*, 277 Ga. 375, 589 S.E.2d 76 (2003).

Effect of denying child's request. — When trial court awards 14-year-old child to parent selected by such child as parent with whom the child desires to live, it is tantamount to finding that such parent is fit, just as denial of such child's request must be construed as finding that such parent is unfit. *Hardy v. Hardee*, 225 Ga. 585, 170 S.E.2d 417 (1969).

Effect of older child's selection on younger child. — After a 15-year-old daughter indicated that she wanted to change her custody arrangement and live with her mother, and the mother was found to be a fit and proper custodial parent, such change was ordered pursuant to O.C.G.A. § 19-9-1; upon such custody change of the older daughter, a material change in circumstances occurred such that the trial court should have made a determination whether it was in the younger daughter's best interests to also change custody to the mother as she wished and pursuant to O.C.G.A. § 19-9-3(a)(2). *Durham v. Gipson*, 261 Ga. App. 602, 583 S.E.2d 254 (2003).

Award of 14-year-old to parent of choice will not be disturbed. — When court awarded custody of 14-year-old to

parent with whom the child expressed a desire to live and evidence does not demand finding that such parent is unfit, judgment of trial court must be affirmed. *Hardy v. Hardee*, 225 Ga. 585, 170 S.E.2d 417 (1969).

Since there were no allegations of parental unfitness, a 14-year-old child was entitled to select which parent to live with; therefore, the trial court properly approved the parents' settlement agreement that reflected the child's desire to change residential custodians. *Ford v. Hanna*, 293 Ga. App. 863, 668 S.E.2d 271 (2008).

Parent resisting child's selection must bear burden of proving that parent selected is unfit. *Harbin v. Harbin*, 238 Ga. 109, 230 S.E.2d 889 (1976).

Change of Custody

1. In General

Requirement of new proceedings. — Petition for change of custody must be accomplished through new proceedings, not by motion. *Blalock v. Blalock*, 247 Ga. 548, 277 S.E.2d 655 (1981).

Limitation period inapplicable to parental request for change of custody. — Father's petition for a change in child custody that contained sufficient allegations of events materially affecting the child's welfare was not subject to the two-year limitation otherwise imposed by O.C.G.A. § 19-9-1. *Petry v. Romo*, 249 Ga. App. 99, 547 S.E.2d 736 (2001).

Trial judge has discretion in deciding to change custody. — While proof of changed conditions and that child's welfare will be protected by changing custody will authorize judgment to that effect, yet, if evidence does not demand finding to that effect, the matter is left to the discretion of the trial judge. *Floyd v. Floyd*, 218 Ga. 606, 129 S.E.2d 786 (1963).

When exercising court's discretion in relocation cases, as in all child custody cases, the trial court must consider the best interests of the child and cannot apply a bright-line test; this means that an initial custodial award will not always control after any new and material change in circumstances that affects the child is considered. When there was competent

evidence in the record that a father was neglecting the medical needs of his children and that the children were doing much better while living with the mother, such evidence was sufficient evidence of a material change in circumstances affecting the best interests of the children that warranted a transfer of custody from the father to the mother. *Frank v. Lake*, 266 Ga. App. 60, 596 S.E.2d 223 (2004).

Custody award may be forfeited by subsequent actions. — When divorce decree, awarding custody to father, vests prima facie right of custody in father, that prima facie right of custody may be forfeited by actions of father subsequent to rendition of decree. *Sessions v. Oliver*, 204 Ga. 425, 50 S.E.2d 54 (1948).

Parent awarded custody does not have vested right. — When award of custody is made to parent in divorce action and subsequently there is a change of circumstances and conditions affecting welfare of child, parent to whom custody was awarded does not have vested right of custody that will defeat further action by courts. *Adams v. Adams*, 219 Ga. 633, 135 S.E.2d 428 (1964).

Change of custody to promote child's health, happiness, or welfare. — Altered circumstances may render change in custody necessary in order to promote health, happiness, or welfare of child, and in determining whether or not there has been such a change, the trial judge is vested with discretion which will not be controlled by the appellate court unless the discretion is abused. *Madison v. Montgomery*, 206 Ga. 199, 56 S.E.2d 292 (1949).

Child's interests and welfare are main considerations in custody change based on new conditions. *Elders v. Elders*, 206 Ga. 297, 57 S.E.2d 83 (1950).

Judge cannot change custody absent evidence of new, material conditions. — Although the judge is given wide discretion, the judge is restricted to evidence, and is unauthorized to change custody if there is no evidence to show new and material conditions that affect the welfare of the children. *Young v. Young*, 216 Ga. 521, 118 S.E.2d 82 (1961); *Danner v. Robertson*, 221 Ga. 516, 145 S.E.2d 554 (1965).

Change of Custody (Cont'd)**1. In General (Cont'd)**

Findings of fact required. — Case was remanded to the trial court for the entry of findings of fact because without an explicit statement specifying the factual bases for the court's implicit conclusion that a change in material conditions or circumstances justified a change in custody, the Court of Appeals was not in a position to evaluate whether the court acted within the limits of the court's discretion. *Gordy v. Gordy*, 246 Ga. App. 802, 542 S.E.2d 536 (2000).

Change of custody from one natural parent to the other. — As between natural parents, change in custody of minor child may be awarded only upon a showing of a change in material conditions or circumstances of the parties or the child, subsequent to the original decree of divorce and award of custody, and that the change of custody would be in the best interests of the child. *Blackburn v. Blackburn*, 168 Ga. App. 66, 308 S.E.2d 193 (1983).

Court's continuing jurisdiction to modify decree due to changed circumstances. — Judge of superior court granting divorce is not only vested with plenary authority in awarding custody of child but has continuing jurisdiction over that subject matter, in event it should later be made to appear that there has been a subsequent change of circumstances materially affecting the welfare of the child. *Ponder v. Ponder*, 198 Ga. 781, 32 S.E.2d 801 (1945).

Court awarding custody in divorce does not retain exclusive jurisdiction. — It cannot be said that the judge of the superior court, by awarding custody of minor children in decree of divorce, acquired exclusive jurisdiction as to their future custody, under former Code 1933, § 30-127 (see now O.C.G.A. § 19-9-1) and Ga. Const. 1976, Art. VI, Sec. IV, Para. I (see now Ga. Const. 1983, Art. VI, Sec. IV, Para. I). Interest and welfare of minor children being paramount issue, even in contest between parents, or by other persons against parents, state is also *parens patriae*, and neither child nor state was finally concluded by divorce proceedings.

Fortson v. Fortson, 200 Ga. 116, 35 S.E.2d 896 (1945).

Court can change custody when custodial parent resides in Georgia. — When mother and child now reside in this state, and when father filed petition in superior court of this state for injunction against mother, court would be authorized, if there was competent evidence of change in condition of parties since decree, materially affecting child's welfare, to make new award of custody. *Kniepkamp v. Richards*, 192 Ga. 509, 16 S.E.2d 24 (1941).

Where change of custody actions must be brought. — Proceedings relating to custody of minor children, against person awarded custody by divorce court, must be brought in county of such person's residence. *Brinson v. Jenkins*, 207 Ga. 218, 60 S.E.2d 440 (1950).

Trial court has no jurisdiction to modify original divorce decree to change custody of minor children, when action is not brought in jurisdiction of residence of parent having legal custody, who in legal contemplation has possession of children. *Fernandez v. Fernandez*, 232 Ga. 697, 208 S.E.2d 498 (1974).

Despite child's attaining age of 14 and residing in Georgia with noncustodial parent, Georgia court is not authorized to relitigate issue of legal custody. Only a court where custodial parent resides has right to award change in custody. *Bayard v. Willis*, 241 Ga. 459, 246 S.E.2d 315 (1978).

Any action for a change of legal custody shall be brought as a separate action in the county of residence of the legal custodian of the child, and the trial court cannot entertain a counterclaim for a change of custody in the county of legal residence of the non-custodial parent. *Bullington v. Bullington*, 181 Ga. App. 256, 351 S.E.2d 700 (1986).

Inasmuch as the record shows that divorce action terminated with the entry of a final judgment and decree; that the wife subsequently changed her residence to another county; and that the husband filed his motion to modify outside the term of court, the trial court erred in ruling on the husband's motion to modify visitation. *Ward v. Ward*, 194 Ga. App. 669, 391 S.E.2d 480 (1990).

Full faith and credit principles do not prevent custody change. — It is well established that giving full faith and credit to custody decree of sister state does not bar court of this state from considering and changing custody based on a change of condition subsequent to decree. *Lodge v. Lodge*, 230 Ga. 652, 198 S.E.2d 861 (1973).

Judgments of other states awarding custody are subject to modification. — Judgment awarding custody of child, whether rendered by courts of sister state or by courts of Georgia, may be modified upon application when it is shown that there is such change of conditions since rendition of decree as will affect the welfare of the child. *Peeples v. Newman*, 209 Ga. 53, 70 S.E.2d 749 (1952).

Court did not lose jurisdiction despite age of child. — Trial court did not lose jurisdiction to consider a parent's petition for a change in custody. While the child had selected the parent as the custodial parent, the court had authority to intervene in that selection at the time the petition was filed, and the trial court did not lose that authority simply because the child turned 18 by the time the court was considering the petition. *Wade v. Corinthian*, 283 Ga. 514, 661 S.E.2d 532 (2008).

Change in custody not reversed when supported by reasonable evidence. — If the trial judge finds from evidence that welfare of children is affected and changes their custody, that decision will be affirmed on appeal when there is reasonable evidence to support the decision. However, if the trial judge finds from evidence that welfare of children is not affected and refuses to change their custody, that decision also will be affirmed on appeal. *Hawkins v. Hawkins*, 240 Ga. 30, 239 S.E.2d 358 (1977).

On appeal when the permanent child custody award has been made, the appellate court will not reverse if there is any reasonable evidence to support the change in custody. *Gazaway v. Brackett*, 241 Ga. 127, 244 S.E.2d 238 (1978).

When a change of custody between natural parents has been awarded because of a material change of conditions affecting the welfare of the child, the Court of

Appeals will affirm if there is reasonable evidence to support the decision. *Blackburn v. Blackburn*, 168 Ga. App. 66, 308 S.E.2d 193 (1983).

Contempt proceeding. — Trial court cannot modify terms of divorce decree and change child custody in a contempt proceeding. *Groover v. Simpson*, 234 Ga. 714, 217 S.E.2d 163 (1975).

Trial court exceeded the court's authority by entering an order within the context of a contempt proceeding which had the effect of modifying custody. *McCall v. McCall*, 246 Ga. App. 770, 542 S.E.2d 168 (2000).

Custody cannot be changed by modification of visitation rights. — Trial court cannot seek to effect a change in legal custody under the exercise of the court's power to modify a parent's visitation rights. It was therefore error to indirectly effect a custody change by modifying a visitation schedule. *Martin v. Buglioli*, 185 Ga. App. 702, 365 S.E.2d 866 (1988).

2. Application

Evidence of change confined to matters transpiring subsequent to decree. — In action for child custody based on change of conditions after original decree awarded custody to one parent, evidence of unfitness of parties must be confined to matters transpiring subsequent to decree. *Mallette v. Mallette*, 220 Ga. 401, 139 S.E.2d 322 (1964).

Record supported the trial court's judgment transferring primary physical custody of three children from their mother to their father after their mother entered into a relationship with another woman who displayed hostility towards their father, their mother moved to California to take care of her parents, and their mother showed financial irresponsibility. *Weickert v. Weickert*, 268 Ga. App. 624, 602 S.E.2d 337 (2004).

Change of custody based on changes since custody award. — Once a permanent child custody award has been entered, the test for use by a trial court in change of child custody suits is whether there has been a change of conditions affecting the welfare of the child.

Change of Custody (Cont'd)**2. Application (Cont'd)**

Gazaway v. Brackett, 241 Ga. 127, 244 S.E.2d 238 (1978).

Evidence of conditions existing before decree. — Since on inquiry as to custody of child after previous divorce decree, only evidence showing change of conditions is material, evidence as to former finances, alleged misconduct, or character and temperament, all existing before decree, ordinarily are incompetent. Kniepkamp v. Richards, 192 Ga. 509, 16 S.E.2d 24 (1941).

Change in custody based on denial of visitation. — Mother repeatedly precluding the father from exercising court-ordered visitation with the parties' six-year-old son was a change in circumstances adversely affecting the child which entitled the father to obtain a change in custody. Jones v. Kimes, 287 Ga. App. 526, 652 S.E.2d 171 (2007).

Divorce decree is prima facie evidence in mother's favor. — Decree in divorce suit awarding custody to mother is prima facie evidence in her favor and father cannot regain custody without showing affirmatively that material change in circumstances affecting welfare of children has occurred since original decree. Fortson v. Fortson, 195 Ga. 750, 25 S.E.2d 518 (1943), later appeal, 197 Ga. 699, 30 S.E.2d 165 (1944).

Voluntary surrender of custody is change in condition authorizing court to consider a new issue of custody. Wilt v. Wilt, 229 Ga. 658, 193 S.E.2d 833 (1972); Lodge v. Lodge, 230 Ga. 652, 198 S.E.2d 861 (1973).

Surrender of custody is change of condition. — Surrender by mother of custody of children to their paternal grandmother is such a change in condition as will authorize court to consider again the question of custody. Askew v. Askew, 212 Ga. 46, 90 S.E.2d 409 (1955).

Forfeiture of custody by custodial parent automatically vests prima facie right in noncustodial parent. Sessions v. Oliver, 204 Ga. 425, 50 S.E.2d 54 (1948).

Upon death of custodial parent under divorce decree, right to custody automatically inures to surviving parent.

Girtman v. Girtman, 191 Ga. 173, 11 S.E.2d 782 (1940); Howard v. Greenway, 223 Ga. 252, 154 S.E.2d 367 (1967).

Natural rights of father are not annulled by award of custody in divorce proceedings but are only suspended for time being and are revived in full force and effect upon death of parent to whom custody was awarded. Adams v. State, 218 Ga. 130, 126 S.E.2d 624, answer conformed to, 106 Ga. App. 531, 127 S.E.2d 477 (1962).

When parents themselves cannot transfer custody by new agreement. — After custody decree, parents themselves cannot by new agreement transfer custody to father without consent of court as representative of state and children. Nor would their private recitals in an attempted agreement be binding upon court as evidence of change in condition. Fortson v. Fortson, 195 Ga. 750, 25 S.E.2d 518 (1943), later appeal, 197 Ga. 699, 30 S.E.2d 165 (1944).

Changes relating primarily to parents and not affecting child's welfare. — When evidence as to change in circumstances and conditions subsequent to divorce decree related primarily to parents and not child, and there was no evidence showing material change of circumstances or conditions affecting welfare of child, court erred in awarding custody to defendant mother. Young v. Young, 216 Ga. 521, 118 S.E.2d 82 (1961).

Showing of custodial parent's unfitness not essential. — It is not essential when seeking custody change to show unfitness of custodial parent. Adams v. Heffernan, 217 Ga. 404, 122 S.E.2d 735 (1961).

When moral unfitness may be considered regarding custody change. — Moral unfitness may be considered in petition for change of custody if substantial change materially affecting welfare of child can be shown. Johnson v. Edison, 235 Ga. 820, 221 S.E.2d 813 (1976).

Changed circumstances not limited to moral or financial condition. — Change of circumstances that would render prior judgment inconclusive is not necessarily limited to change in moral or financial condition of parent to whom initial award was made. Adams v. Heffernan,

217 Ga. 404, 122 S.E.2d 735 (1961).

Improvement in parent's health. — Continued progress by an alcoholic parent in a 12-step program and continued sobriety over a substantial period of time constitutes a factual predicate from which a court may infer that the parent's health has improved, and this constitutes one factor which can be considered in determining a change of condition. In re R.R., 222 Ga. App. 301, 474 S.E.2d 12 (1996).

Past mental problems of parent are insufficient grounds for change. — Although past mental problems of parent are insufficient grounds on which to base present change of custody, reasonable evidence which supports finding that conditions have changed that have had present affect on child, warrants custody change. McNair v. McNair, 242 Ga. 105, 249 S.E.2d 572 (1978).

Remarriage of parent alone is insufficient to authorize modification of custody award; an engagement to marry would likewise be insufficient. North v. North, 209 Ga. 883, 76 S.E.2d 617 (1953).

Remarriage alone of one of the parties is not such a change of circumstances affecting welfare of child as will justify change in custody. Fennell v. Fennell, 209 Ga. 815, 76 S.E.2d 387 (1953).

Remarriage of father is not such change of condition as authorizes modification of custody award. Bagley v. Bagley, 226 Ga. 742, 177 S.E.2d 255 (1970).

Custodial parent's remarriage and plans to move to another state. — Fact that defendant has remarried, and intends to remove children to another state with her present husband, does not constitute or amount to such change of condition as would authorize modification of decree. Mercer v. Foster, 210 Ga. 546, 81 S.E.2d 458 (1954).

Relocation to another state. — Georgia law does not permit a modification of custody based solely on a custodial parent's relocation to another state. Ofchus v. Isom, 239 Ga. App. 738, 521 S.E.2d 871 (1999).

Notice of relocation. — Lack of notice to the other parent of relocation of a child, standing alone, does not constitute a material change affecting the welfare of the child; however, any adverse emotional im-

pact caused a child by the child's sudden unannounced relocation constitutes a factor which can be considered in the totality of the circumstances. In re R.R., 222 Ga. App. 301, 474 S.E.2d 12 (1996).

Custodial parents could not simply pick up and move on a moment's notice given the requirements of O.C.G.A. § 19-9-1 and that fact supported the holding that any self-executing change of child custody provision that failed to give paramount import to a child's best interests in a change of custody as between parents violated Georgia's public policy. Scott v. Scott, 276 Ga. 372, 578 S.E.2d 876 (2003).

Refusing to permit visitation and turning children against noncustodial parent. — Allegations that father had moved the children over 1000 miles away from mother's residence, that when she travels that distance to see children, he refuses to let her visit them or lets her see them only when it pleases him, that he has insulted her and intimidated her, has prejudiced children against her, instructed them not to call her mother and told them that she was not their mother, were such allegations of fact as would support conclusion that he was an unfit person to have their custody and, if proven to be true, to authorize change in custody. Jones v. White, 209 Ga. 412, 73 S.E.2d 187 (1952).

Effect of 14-year-old's change of custody upon younger child. — Award of custody of the 14-year-old child to father was a sufficient change in condition to warrant change of custody of a younger child to the father as well since the trial court found that the younger child had become dependent upon the 14-year-old and that it was in the younger child's best interest that the child not be separated from the older child after an election to live with the father. Parkerson v. Parkerson, 167 Ga. App. 265, 306 S.E.2d 97 (1983).

Evidence supported finding of no material change in condition. — There was ample evidence to support the trial judge's finding that there was no material change in condition warranting a change in custody since there was evidence that both parties were involved in meretricious relationships in the presence of the child

Change of Custody (Cont'd)**2. Application (Cont'd)**

but no evidence that either party committed sexual acts in the presence of the child. *Hayes v. Hayes*, 199 Ga. App. 132, 404 S.E.2d 276, cert. denied, 199 Ga. App. 906, 404 S.E.2d 276 (1991).

Parties' disagreement not a change in circumstance. — Fact that parties had been in agreement but, at the time of modification, were not in agreement, was not a change of circumstance. *Templeman v. Earnest*, 209 Ga. App. 557, 434 S.E.2d 106 (1993).

Visitation Rights

Portion of custody award concerning visitation may be modified. — In any case in which judgment has been entered awarding custody of minor, on motion of any party or on motion of court, that portion of judgment concerning visitation rights between parties and their minor children may be subject to review and modification or alteration. *Tirado v. Shelnutt*, 159 Ga. App. 624, 284 S.E.2d 641 (1981).

Jurisdiction over custody issues includes visitation rights. — Court whose jurisdiction over issues involving custody was first invoked has full authority to determine all such issues, including visitation rights. *Tirado v. Shelnutt*, 159 Ga. App. 624, 284 S.E.2d 641 (1981).

Modification of visitation rights by court. — Court in which petition to change custody is brought may also modify visitation rights. *Tirado v. Shelnutt*, 159 Ga. App. 624, 284 S.E.2d 641 (1981).

Submission to parenting plan in custody and modification actions. — Provisions of O.C.G.A. § 19-9-1(a), which require the parties to submit parenting plans in custody and modification actions, and contemplate the inclusion of a parenting plan in legal actions involving custody, apply to petitions to modify visitation. *Moore v. Moore-McKinney*, 297 Ga. App. 703, 678 S.E.2d 152 (2009).

Divorced parent has natural right of access to the child awarded to other parent, and only under exceptional circumstances should right or privilege be

denied. *Shook v. Shook*, 242 Ga. 55, 247 S.E.2d 855 (1978).

When court should specify times, places, and circumstances of visitation. — When parent was not shown to be unfit, trial judge abused discretion in refusing to amend divorce decree to specify times, places, and circumstances for visitation since parties had been unable to agree between themselves. *Shook v. Shook*, 242 Ga. 55, 247 S.E.2d 855 (1978).

Counterclaim for increased support in visitation rights modification proceeding. — When divorced nonresident had voluntarily submitted himself to jurisdiction of the court in order to assert his claims to modify visitation rights, mother is not required to state her claim requesting increase in child support in an independent and separate action. *Houck v. Houck*, 248 Ga. 419, 284 S.E.2d 12 (1981).

Visitation rights do not constitute custody. — Party awarded permanent custody of minor children is only party with "custody" of children until changed by court order; visitation rights, even extensive visitation rights, do not constitute custody. *Atkins v. Zachary*, 243 Ga. 453, 254 S.E.2d 837 (1979).

Parent not deprived of visitation rights despite children's unwillingness to visit. — Desires of children under 14 years of age in not wanting to visit their father is not sufficient to deny him his right of visitation. They may, however, be taken into consideration by trial judge in deciding appropriate circumstances under which father may visit children. *Shook v. Shook*, 242 Ga. 55, 247 S.E.2d 855 (1978).

Effect of nonpayment of child support or alimony upon visitation. — Visitation rights should not be dependent upon whether child support or alimony has been paid. *Price v. Dawkins*, 242 Ga. 41, 247 S.E.2d 844 (1978).

Noncustodial parent's past delinquency not ground for denying visitation rights. — When custody is awarded to one parent, it is usual and proper to permit other parent to have reasonable access to child. But court may in proper case forbid access by one spouse to child whose custody is awarded to

other, or limit right to visit child to particular time and place; but mere past delinquency of parent is not ground for withholding enjoyment of right. *Scott v. Scott*, 154 Ga. 659, 115 S.E. 2 (1922), overruled on other grounds, *Price v. Dawkins*, 242 Ga. 41, 247 S.E.2d 844 (1978).

“Specific” visitation privileges following award of “reasonable” visitation. — Statute allowed trial judge who had made award of permanent custody with “reasonable” visitation privileges to provide specific visitation privileges once in two-year period following date of entry of such judgment. *Edwards v. Edwards*, 237 Ga. 779, 229 S.E.2d 632 (1976).

Filing of petition under subsection (b) does not affect ability to file petition under § 19-6-18. — Ga. L. 1964, p. 713, § 1 (see now O.C.G.A. § 19-6-18) related strictly to petitions for modification of alimony or child support, and should not be read so as to prohibit filing of such petition within two years of filing of petition for change of custody by same party under former Code 1933, § 30-127 (see now O.C.G.A. § 19-9-1). *Wilde v. Wilde*, 239 Ga. 750, 239 S.E.2d 3 (1977).

Enforcement of visitation rights incorporated into final decree of divorce. — See *Shook v. Shook*, 242 Ga. 55, 247 S.E.2d 855 (1978).

Modification of visitation rights in contempt proceeding is permissible. — Statute allowed modification of visitation rights on motion of either party or on motion of trial judge in contempt proceeding. *Sampson v. Sampson*, 240 Ga. 118, 239 S.E.2d 519 (1977); *Parker v. Parker*, 242 Ga. 64, 247 S.E.2d 862 (1978); *Kent v. Tankersley*, 243 Ga. 471, 254 S.E.2d 851 (1979); *Munday v. Munday*, 152 Ga. App. 232, 262 S.E.2d 543 (1979).

Court in which contempt action is brought has authority to modify visitation rights. *Tirado v. Shelnett*, 159 Ga. App. 624, 284 S.E.2d 641 (1981).

Visitation rights may be modified on motion of trial judge in contempt action, and such a motion is not a new action, but is simply a motion in the original case. *Blalock v. Blalock*, 247 Ga. 548, 277 S.E.2d 655 (1981); *Stewart v. Stewart*, 245 Ga. App. 20, 537 S.E.2d 157 (2000).

Section authorizes modification of visitation rights on motion of any

party to the former case (including grandparents), without necessity of showing a change of conditions. *George v. Sizemore*, 238 Ga. 525, 233 S.E.2d 779 (1977).

Visitation rights may be modified on motion of either party, and such a motion is not a new action, but is simply a motion in the original case. *Blalock v. Blalock*, 247 Ga. 548, 277 S.E.2d 655 (1981).

Modification by motion. — Any conflict between the provisions of O.C.G.A. §§ 19-9-1(b) and 19-9-3(b) with those of O.C.G.A. § 19-9-23, insofar as seeking modification of visitation rights by motion is concerned, is harmonized by holding that the former come into play only when jurisdiction and venue are also proper. *Bennett v. Wood*, 188 Ga. App. 630, 373 S.E.2d 645 (1988).

Modification of child visitation rights is a matter of discretion with trial court. *Parker v. Parker*, 242 Ga. 781, 251 S.E.2d 523 (1979).

Modification of child visitation rights is a matter of discretion with trial court and may be based upon existing circumstances even if the circumstances have not changed since prior award. *Tirado v. Shelnett*, 159 Ga. App. 624, 284 S.E.2d 641 (1981).

Showing of changed circumstances is unnecessary for modifying visitation rights. — Statute provided means of changing custody without necessity of evidence of change in conditions and circumstances. *Froug v. Harper*, 220 Ga. 582, 140 S.E.2d 844 (1965).

New proceeding based upon evidence showing change in circumstances affecting interest and welfare of minor children is not only way visitation rights may be modified, but such a new proceeding based upon evidence showing change in circumstances is required as regards a modification of custody. *Parker v. Parker*, 242 Ga. 64, 247 S.E.2d 862 (1978).

When third party has been awarded permanent custody of child, parent may obtain custody by showing change of conditions affecting welfare of child, but such parent may obtain increased visitation without necessity of showing such change of conditions. *Gazaway v. Brackett*, 241 Ga. 127, 244 S.E.2d 238 (1978).

Increase or decrease in visitation will be affirmed unless trial court abused

Visitation Rights (Cont'd)

the court's discretion. *Gazaway v. Brackett*, 241 Ga. 127, 244 S.E.2d 238 (1978).

Trial judge is fully authorized to modify visitation rights without necessity of any showing of change in conditions. *Tirado v. Shelnutt*, 159 Ga. App. 624, 284 S.E.2d 641 (1981).

Father's sexual impropriety towards daughter rendered increased visitation rights error. — When evidence showed sexual impropriety of father towards daughter under 14 and daughter's dislike of father, it was error for the trial judge to increase the father's visitation rights. *Ledford v. Bowers*, 248 Ga. 804, 286 S.E.2d 293 (1982).

Visitation with homosexual parent. — Primary consideration in determining custody and visitation issues is not the sexual mores or behavior of the parent, but whether the child will somehow be harmed by the conduct of the parent. *In re R.E.W.*, 220 Ga. App. 861, 471 S.E.2d 6 (1996).

Father's deployment. — Upon father's deployment, the trial court did not

abuse the court's discretion in prohibiting the child from leaving the U.S. as the order did not purport to place exclusive jurisdiction in the trial court and attempted to continue the child's relationship with the mother; furthermore, even if the father was assigned to duty overseas, he retained primary physical custody of the child and maintained the right to move for modification if his circumstances changed. *Curtis v. Klimowicz*, 279 Ga. App. 425, 631 S.E.2d 464 (2006).

Fourteen year olds' election rights limited by 1986 amendment. — Visitation is part of custody. Having made the wishes of a 14-year-old as to custody binding upon the court unless the parent chosen is unfit, the 1986 legislation could not have intended to preclude consideration of the child's wishes as to visitation. O.C.G.A. §§ 19-9-1(a) and 19-9-3(a) preserve the authority of the trial court to set visitation rights based upon the best interests of the child, but do not prohibit the court from using the wishes of a child over 14 years of age together with other factors as the basis for the court's decision. *Worley v. Whiddon*, 261 Ga. 218, 403 S.E.2d 799 (1991).

OPINIONS OF THE ATTORNEY GENERAL

Permanent custody determination upon divorce being entered. — When a superior court transfers the question of custody determination to a juvenile court pursuant to O.C.G.A. § 15-11-6(b), the juvenile court may make only a temporary

custody determination pending the outcome of the divorce action; but if the divorce is entered it can then make a permanent custody determination. 1994 Op. Att'y Gen. No. U94-1.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 19 Am. Jur. Pleading and Practice Forms, Parent and Child, § 23.

Am. Jur. Trials. — Relocation of Children by the Custodial Parent, 65 Am. Jur. Trials 127.

ALR. — Attempt to bastardize child as affecting right to custody of the child, 4 ALR 1119; 37 ALR 531.

Validity of agreement by parent to surrender custody of child in consideration of

promise to leave property to child, 15 ALR 223.

Attempt to bastardize child as affecting right to custody of the child, 37 ALR 531.

Action between parents for the sole purpose of determining custody of child as a proper remedy, 40 ALR 940.

Condition of health of child as consideration in awarding custody, 48 ALR 137.

Power of court to modify the provisions of its decree respecting custody of child as

affected by absence of parent or child from its territorial jurisdiction, 70 ALR 526.

Extraterritorial effect of provisions in decree of divorce as to custody of child, 72 ALR 441.

Jurisdiction acquired by court in divorce suit over custody and maintenance of child as excluding jurisdiction of other local courts, or as rendering its exercise improper, 146 ALR 1153.

Induction into military service of one to whom custody of children has been awarded in divorce suit, 151 ALR 1498; 155 ALR 1477; 156 ALR 1476, 157 ALR 1472, 158 ALR 1489, 158 ALR 1490.

Decree for alimony in installments as within full faith and credit provision, 157 ALR 170.

Extraterritorial effect of provision in decree of divorce as to custody of child, 160 ALR 400.

Jurisdiction of trial or appellate court in respect of custody of children pending appeal from order or decree in divorce suit, 163 ALR 1319.

Jurisdiction to award custody of child having legal domicil in another state, 4 ALR2d 7.

Material facts existing at the time of rendition of decree of divorce but not presented to court, as ground for modification of provision as to custody of child, 9 ALR2d 623.

Nonresidence as affecting one's right to custody of child, 15 ALR2d 432.

Power of court, on its own motion, to modify provisions of divorce decree as to custody of children, upon application for other relief, 16 ALR2d 664.

Alienation of child's affections as affecting custody award, 32 ALR2d 1005.

Consideration of investigation by welfare agency or the like in making or modifying award as between parents of custody of children, 35 ALR2d 629.

Right to custody of child as affected by death of custodian appointed by divorce decree, 39 ALR2d 258.

Remarriage of parent as ground for modification of divorce decree as to custody of child, 43 ALR2d 363.

Opening or modification of divorce decree as to custody or support of child not provided for in the decree, 71 ALR2d 1370.

Complete denial of visitation rights of

divorced parent, 88 ALR2d 148; 51 ALR3d 520; 22 ALR4th 971.

"Split," "divided," or "alternate" custody of children, 92 ALR2d 695.

Violation of custody or visitation provision of agreement or decree as affecting child support payment provision, and vice versa, 95 ALR2d 118.

Propriety of court conducting private interview with child in determining custody, 99 ALR2d 954.

Child's wishes as factor in awarding custody, 4 ALR3d 1396.

Power of court which denied divorce, legal separation, or annulment, to award custody or make provisions for support of child, 7 ALR3d 1096.

Award of custody of child to parent against whom divorce is decreed, 23 ALR3d 6.

Award of custody of child where contest is between child's father and grandparent, 25 ALR3d 7.

Award of custody of child where contest is between child's mother and grandparent, 29 ALR3d 366.

Award of custody of child where contest is between child's grandparent and one other than the child's parent, 30 ALR3d 290.

Divorce: necessity of notice of application for temporary custody of child, 31 ALR3d 1378.

Noncustodial parent's rights as respects education of child, 36 ALR3d 1093.

Right, in child custody proceedings, to cross-examine investigating officer whose report is used by court in its decision, 59 ALR3d 1337.

Effect, in subsequent proceedings, of paternity findings or implications in divorce or annulment decree or in support or custody order made incidental thereto, 78 ALR3d 846.

Right to require psychiatric or mental examination for party seeking to obtain or retain custody of child, 99 ALR3d 268.

Custodial parent's sexual relations with third person as justifying modification of child custody order, 100 ALR3d 625; 65 ALR5th 591.

Validity and effect, as between former spouses, of agreement releasing parent from payment of child support provided for in an earlier divorce decree, 100 ALR3d 1129.

Admissibility of social worker's expert testimony on child custody issues, 1 ALR4th 837.

Visitation rights of persons other than natural parents or grandparents, 1 ALR4th 1270.

Parent's physical disability or handicap as factor in custody award or proceedings, 3 ALR4th 1044.

Initial award or denial of child custody to homosexual or lesbian parent, 6 ALR4th 1297.

Race as factor in custody award or proceedings, 10 ALR4th 796.

Desire of child as to geographical location of residence or domicile as factor in awarding custody or terminating parental rights, 10 ALR4th 827.

Necessity of requiring presence in court of both parties in proceedings relating to custody or visitation of children, 15 ALR4th 864.

Religion as factor in child custody and visitation cases, 22 ALR4th 971.

Effect of remarriage of spouses to each other on child custody and support provisions of prior divorce decree, 26 ALR4th 325.

Interference by custodian of child with noncustodial parent's visitation rights as ground for change of custody, 28 ALR4th 9.

Court-authorized permanent or temporary removal of child by parent to foreign country, 30 ALR4th 548.

Visitation rights of homosexual or lesbian parent, 36 ALR4th 997.

Primary caretaking role of respective parents as factor in awarding custody of child, 41 ALR4th 1129.

Mother's status as "working mother" as factor in awarding child custody, 62 ALR4th 259.

Withholding visitation rights for failure to make alimony or support payments, 65 ALR4th 1155.

Child custody: separating children by custody awards to different parents — post 1975 cases, 67 ALR4th 354.

Rights and obligations resulting from human artificial insemination, 83 ALR4th 295.

Child custody: when does state that issued previous custody determination

have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A, 83 ALR4th 742.

Child custody and visitation rights of person infected with AIDS, 86 ALR4th 211.

Denial or restriction of visitation rights to parent charged with sexually abusing child, 1 ALR5th 776.

Significant connection jurisdiction of court under § 3(a)(2) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(B), 5 ALR5th 550; 67 ALR5th 1.

Abandonment and emergency jurisdiction of court under § 3(a)(3) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(C), 5 ALR5th 788.

Continuity of residence as factor in contest between parent and nonparent for custody of child who has been residing with nonparent—modern status, 15 ALR5th 692.

Age of parent as factor in awarding custody, 34 ALR5th 57.

Validity and construction of provisions for arbitration of disputes as to alimony or support payments or child visitation or custody matters, 38 ALR5th 69.

Mental health of contesting parent as factor in award of child custody, 53 ALR5th 375.

Custodial parent's relocation as grounds for change of custody, 70 ALR5th 377.

Child custody and visitation rights arising from same-sex relationship, 80 ALR5th 1.

Religion as factor in visitation cases, 95 ALR5th 533.

Restrictions on parent's child visitation rights based on parent's sexual conduct, 99 ALR5th 475.

Religion as factor in child custody cases, 124 ALR5th 203.

Construction and application of International Child Abduction Remedies Act (42 USCS § 11601 et seq.), 125 ALR Fed. 217.

19-9-1.1. Parental agreement to binding arbitration on issue of child custody and related matters.

In all proceedings under this article, it shall be expressly permissible for the parents of a child to agree to binding arbitration on the issue of child custody and matters relative to visitation, parenting time, and a parenting plan. The parents may select their arbiter and decide which issues will be resolved in binding arbitration. The arbiter's decisions shall be incorporated into a final decree awarding child custody unless the judge makes specific written factual findings that under the circumstances of the parents and the child the arbiter's award would not be in the best interests of the child. In its judgment, the judge may supplement the arbiter's decision on issues not covered by the binding arbitration. (Code 1981, § 19-9-1.1, enacted by Ga. L. 2007, p. 554, § 5/HB 369.)

Editor's notes. — Ga. L. 2007, p. 554, § 1/HB 369, not codified by the General Assembly, provides: "The General Assembly of Georgia declares that it is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage or relationship."

Ga. L. 2007, p. 554, § 8/HB 369, not codified by the General Assembly, provides that this Code section shall apply to all child custody proceedings and modifications of child custody filed on or after January 1, 2008.

Law reviews. — For survey article on domestic relations law, see 60 Mercer L. Rev. 121 (2008). For article, "Comprehensive Arbitration of Domestic Relations Cases in Georgia," see 14 Ga. St. B.J. 20 (2008).

19-9-1.2. Required domestic relations case filing information form.

Pursuant to Code Section 9-11-3, and in addition to the filing requirements contained in Code Section 19-6-15, in all proceedings under this article the plaintiff shall file a domestic relations case filing information form as set forth in Code Section 9-11-133. (Code 1981, § 19-9-1.2, enacted by Ga. L. 2007, p. 554, § 5/HB 369.)

Editor's notes. — Ga. L. 2007, p. 554, § 1/HB 369, not codified by the General Assembly, provides: "The General Assembly of Georgia declares that it is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encourage parents to share in the rights and responsibilities of rearing

their children after the parents have separated or dissolved their marriage or relationship."

Ga. L. 2007, p. 554, § 8/HB 369, not codified by the General Assembly, provides that this Code section shall apply to all child custody proceedings and modifications of child custody filed on or after January 1, 2008.

19-9-2. Right of surviving parent to custody of child; discretion of judge.

Upon the death of either parent, the survivor is entitled to custody of the child; provided, however, that the judge, upon petition, may exercise discretion as to the custody of the child, looking solely to the child's best interest and welfare. (Orig. Code 1863, § 1745; Code 1868, § 1785; Code 1873, § 1794; Code 1882, § 1794; Civil Code 1895, § 2503; Civil Code 1910, § 3022; Code 1933, § 74-106; Ga. L. 1979, p. 466, § 42; Ga. L. 1996, p. 412, § 2; Ga. L. 2007, p. 554, § 5/HB 369.)

Editor's notes. — Ga. L. 2007, p. 554, § 1/HB 369, not codified by the General Assembly, provides: "The General Assembly of Georgia declares that it is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage or relationship."

Ga. L. 2007, p. 554, § 8/HB 369, not codified by the General Assembly, provides that the 2007 amendment shall apply to all child custody proceedings and modifications of child custody filed on or after January 1, 2008.

Law reviews. — For article, "The Child as a Party in Interest in Custody Proceedings," see 10 Ga. St. B.J. 577

(1974). For article criticizing parental rights doctrine and advocating best interests of child doctrine in parent-third party custody disputes, see 27 Emory L.J. 209 (1978). For article surveying developments in Georgia domestic relations law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 109 (1981). For article, "Domestic Relations Law," see 53 Mercer L. Rev. 265 (2001). For annual survey on domestic relations law, see 64 Mercer L. Rev. 121 (2012).

For note criticizing *Quiner v. Quiner*, 57 Cal. Rptr. 503 (Ct. App. 1967), holding abnormal religious convictions of mother were not sufficient grounds upon which to deny custody of child, see 17 J. of Pub. L. 193 (1968). For review of 1996 domestic relations legislation, see 13 Ga. St. U.L. Rev. 155 (1996).

For comment on "Grandparents' Visitation Rights in Georgia," see 29 Emory L.J. 1083 (1980).

JUDICIAL DECISIONS

On death of custodial parent under divorce decree, right to custody automatically inures to surviving parent. *Girtman v. Girtman*, 191 Ga. 173, 11 S.E.2d 782 (1940); *Raily v. Smith*, 202 Ga. 185, 42 S.E.2d 491 (1947); *Land v. Wrobel*, 220 Ga. 260, 138 S.E.2d 315 (1964); *Porter v. Johnson*, 242 Ga. 188, 249 S.E.2d 608 (1978).

Scope of court's discretion under section. — Notwithstanding anything implied in O.C.G.A. § 19-9-2, concerning interests and welfare of the child, the court has no authority in the court's discretion to deprive surviving parent of custody after death of spouse, absent showing of abandonment, cruel treatment, termi-

nation of parental rights, unfitness, or other grounds authorized by law. *Brant v. Bazemore*, 159 Ga. App. 659, 284 S.E.2d 674 (1981).

Surviving parent entitled to custody unless rights have been terminated. — When mother of child is dead, father has prima facie right of custody, and in order to sustain contention that he has lost his parental power by reason of failure to provide necessities for his child or by abandonment of his family, a clear and strong case must be made. *Chambers v. Lee*, 215 Ga. 629, 112 S.E.2d 614 (1960).

In determining whether parent or third parties should have custody of child, trial court was required by law to recognize

that upon death of one parent, legal right to child automatically inures to surviving parent, and that parent was entitled to the child's custody absent showing that the surviving parent had lost parental rights in any one of the ways provided in O.C.G.A. § 19-7-1 or was an unfit person to have custody, which unfitness must be shown by strong and satisfactory proof. *Peck v. Shierling*, 222 Ga. 60, 148 S.E.2d 491 (1966), later appeal, 223 Ga. 1, 152 S.E.2d 868 (1967).

It is clear that when parent having custody dies, legal custody reverts to other parent unless the other parent has lost parental rights as provided under O.C.G.A. § 19-7-1, or was shown to be presently unfit. *Porter v. Johnson*, 242 Ga. 188, 249 S.E.2d 608 (1978).

Absent showing of abandonment, cruel treatment, termination of parental rights, unfitness, or other grounds authorized by law, trial court lacks discretion to deprive surviving parent of his or her child. *Bryant v. Wigley*, 246 Ga. 155, 269 S.E.2d 418 (1980).

Surviving parent becomes the legal custodian of the child at the moment of the custodial parent's death, unless there has been a prior termination of the survivor's parental rights. *Spires v. Lance*, 167 Ga. App. 331, 306 S.E.2d 317 (1983).

Court must exercise discretion in awarding custody. — Discretion of judge must be exercised in favor of surviving parent who has legal right to custody of child, unless evidence shows that welfare and interest of child justify the judge in awarding custody to someone else. *Hill v. Rivers*, 200 Ga. 354, 37 S.E.2d 386 (1946); *Sherrill v. Sherrill*, 202 Ga. 288, 42 S.E.2d 921 (1947).

In every case where custody of minor children is involved, the law requires that court having jurisdiction shall exercise discretion in awarding custody. *Waller v. Waller*, 202 Ga. 535, 43 S.E.2d 535 (1947).

While judge is vested with discretion in determining to whom custody shall be given, such discretion should be governed by rules of law, and be exercised in favor of party having legal right, unless evidence shows that interest and welfare of child justify judge in awarding custody to another. *Perkins v. Courson*, 219 Ga. 611, 135 S.E.2d 388 (1964).

Legitimation of child following mother's death. — Former husband, a resident of Mississippi who had disclaimed paternity in a divorce decree, did not become entitled to custody upon the mother's death in Georgia; nor could the mother unilaterally substitute her former husband as the child's legal custodian without the consent of the father. Thus, the child was a Georgia resident for purposes of a legitimation proceeding by the biological father. *Hardy v. Arcemont*, 213 Ga. App. 243, 444 S.E.2d 327 (1994).

Court's limited discretion. — Statute gave court only limited discretion in custody dispute between parent and third party. *Spitz v. Holland*, 243 Ga. 9, 252 S.E.2d 406 (1979) (see O.C.G.A. § 19-9-2).

Nature of discretion vested in trial judge. — Statute permitted trial court discretion to consider whether child had been abandoned or subjected to cruel treatment by surviving parent, or to suspend proceeding to enable juvenile court to consider termination of parental rights of survivor, or to consider whether surviving parent was shown by clear and satisfactory proof to be unfit to have custody of child, or to consider such other matters as may be authorized by statute, and discretion to suspend proceeding to enable another court to consider such matters as the court had jurisdiction to consider. *Bryant v. Wigley*, 246 Ga. 155, 269 S.E.2d 418 (1980).

Judicial discretion must respect parties' established rights. — In exercising discretion, judge cannot disregard or impair acknowledged or established rights of any party; to do so, constitutes an abuse of discretion. *Hill v. Rivers*, 200 Ga. 354, 37 S.E.2d 386 (1946).

If either parent is a proper and suitable person and has not surrendered his or her parental right of custody, it is an abuse of discretion to award minor child to third parties over claim of such parent. *Camp v. Bookman*, 204 Ga. 670, 51 S.E.2d 391 (1949).

In all cases, welfare of child is controlling. — In all cases when custody of minor child is involved, paramount consideration is welfare and best interests of child. The court has broad discretion in this respect. *Hodges v. Hodges*, 77 Ga. App. 86, 47 S.E.2d 823 (1948).

In contest between parents over custody of minor children, paramount issue is welfare and best interest of children, and award based upon evidence and in exercise of sound discretion will not be controlled by Supreme Court. *Jordan v. Jordan*, 195 Ga. 771, 25 S.E.2d 500 (1943); *Handley v. Handley*, 204 Ga. 57, 48 S.E.2d 827 (1948).

In contest between two fit parties, the one having legal right should prevail. If both are proper parties, but neither has a legal right, the one having strongest moral claims should prevail. But in every case, regardless of parties, welfare of child is controlling and important fact. *Camp v. Bookman*, 204 Ga. 670, 51 S.E.2d 391 (1949).

Surviving parent may give custody to a third party. — Surviving parent had right to give temporary custody of child of tender years to her brother, that he might care for the child. When brother accepted request and offer of sister, and complied faithfully with his obligation, it would be a clear miscarriage of justice for court to have awarded custody to grandparents. *Brant v. Bazemore*, 159 Ga. App. 659, 284 S.E.2d 674 (1981).

Act, before death, of giving child to another. — Court errs in granting custody to third parties on ground that father, who was first awarded custody but is deceased at time of mother's action for custody of child, had given child to third parties, that they had had child since, and were fit and proper parties to have custody, as custody could only be taken from parent having legal right thereto by showing that parent had lost her parental rights to child under former Code 1933, § 74-108 (see now O.C.G.A. § 19-7-1), or by clear and satisfactory proof, that she was an unfit person to have custody. *Peck v. Shierling*, 222 Ga. 60, 148 S.E.2d 491 (1966), later appeal, 223 Ga. 1, 152 S.E.2d 868 (1967).

Custodial parent's contract cannot deprive noncustodial parent of rights. *Landrum v. Landrum*, 159 Ga. 324, 125 S.E. 832, 38 A.L.R. 217 (1924), overruled on other grounds, *Camp v. Camp*, 213 Ga. 65, 97 S.E.2d 125 (1957).

When surviving parent may lose right. — Surviving parent's right may be

lost by a clear, definite, and certain voluntary contractual release of such right to child to a third person. Such an agreement is not subject to revocation without good cause shown. *Durden v. Johnson*, 194 Ga. 689, 22 S.E.2d 514 (1942).

Grandparents seeking custody after surviving parent allegedly murdered the other. — Trial court erroneously concluded that the grandparents' petition seeking custody of a mother's children failed to state a claim because the custody petition gave fair notice that the grandparents sought custody of the child under O.C.G.A. §§ 19-7-1(b.1) and 19-9-2 based upon the mother's alleged murder of the father; those allegations were sufficient to survive a motion to dismiss. *Scott v. Scott*, 311 Ga. App. 726, 716 S.E.2d 809 (2011).

Challenge to legal and parental right to custody. — Legal and parental right to custody is subject to challenge on ground of unfitness for trust. *Peck v. Shierling*, 222 Ga. 60, 148 S.E.2d 491 (1966), later appeal, 223 Ga. 1, 152 S.E.2d 868 (1968).

Proof required to establish unfitness. — Unfitness must be established by clear and satisfactory proof, and for grave and substantial cause, not merely that child might have better financial, educational, or even moral advantages. *Peck v. Shierling*, 222 Ga. 60, 148 S.E.2d 491 (1966), later appeal, 223 Ga. 1, 152 S.E. 868 (1967).

Parental unfitness must be shown by clear and convincing evidence. *Wigley v. Bryant*, 247 Ga. 508, 277 S.E.2d 246 (1981).

Court errs in awarding custody to grandparent when parent fit. — When father of child is man of good character, has regular job, is well able financially to support child, maintains home of good environment, and there is no evidence showing his abuse or ill treatment of child, trial judge abused discretion in awarding custody of child to maternal grandmother. *Hill v. Rivers*, 200 Ga. 354, 37 S.E.2d 386 (1946).

Grandparents seeking custody. — Trial court properly determined that collateral estoppel did not bar the grandparents' petition for custody of a mother's

children because different issues were actually and necessarily decided in the grandparents' visitation action; in the visitation action, the issues were harm to the child if visitation was not granted and whether visitation would be in the best interest of the children, and in the custody action, the issues were whether the children would suffer physical or emotional harm if custody remained with the mother. *Scott v. Scott*, 311 Ga. App. 726, 716 S.E.2d 809 (2011).

Surviving parent who failed to provide necessities. — When the father had both negligently and willfully failed to fulfill his statutory duty to provide "the necessities" for his minor children but no proceeding to establish abandonment, unfitness, or forfeiture of rights was instituted prior to the mother's death, O.C.G.A. § 19-9-2, which gives custody to the surviving parent absent a contrary judicial holding based on strong, clear, and convincing evidence, was probably operative at the time of the mother's death, and appellee at that time became, and continued to be, the children's legal custodian. *Harper v. Landers*, 180 Ga. App. 154, 348 S.E.2d 698 (1986).

Court's exclusive right to award custody. — Generally, court where custodial parent resides has exclusive right to award change of custody; this is true whether legal custodian lives in another state or in another county, and irrespective of physical presence of child. *Matthews v. Matthews*, 238 Ga. 201, 232 S.E.2d 76 (1977).

Proceeding to change decree of custody may not be brought against custodial parent by noncustodial parent in county in which noncustodial parent resides. *Matthews v. Matthews*, 238 Ga. 201, 232 S.E.2d 76 (1977).

Third party who illegally withholds custody from surviving parent in another jurisdiction cannot counterclaim and contest custody when parent is forced to file a habeas petition in the foreign jurisdiction. *Canning v. Evans*, 250 Ga. 85, 295 S.E.2d 741 (1982).

Habeas corpus proceeding. — Person claiming no legal right of custody cannot institute habeas corpus proceeding. *Spitz v. Holland*, 243 Ga. 9, 252 S.E.2d 406 (1979).

Cited in *City of Albany v. Lindsey*, 11 Ga. App. 573, 75 S.E. 911 (1912); *Barlow v. Barlow*, 141 Ga. 535, 81 S.E. 433, 52 L.R.A. (n.s.) 683 (1914); *Lucas v. Oglesby*, 28 Ga. App. 427, 111 S.E. 579 (1922); *Chapin v. Cummings*, 191 Ga. 408, 12 S.E.2d 312 (1940); *Walden v. Walden*, 191 Ga. 182, 12 S.E.2d 345 (1940); *Fortson v. Fortson*, 195 Ga. 750, 25 S.E.2d 518 (1943); *Thigpen v. Batts*, 199 Ga. 161, 33 S.E.2d 424 (1945); *King v. King*, 203 Ga. 811, 48 S.E.2d 465 (1948); *Handley v. Handley*, 204 Ga. 57, 48 S.E.2d 827 (1948); *Whitehurst v. Singletary*, 77 Ga. App. 811, 50 S.E.2d 80 (1948); *Good v. Good*, 205 Ga. 112, 52 S.E.2d 610 (1949); *Johnson v. Johnson*, 211 Ga. 791, 89 S.E.2d 166 (1955); *Bartlett v. Bartlett*, 99 Ga. App. 770, 109 S.E.2d 821 (1959); *Blood v. Earnest*, 217 Ga. 642, 123 S.E.2d 913 (1962); *Smith v. Smith*, 219 Ga. 739, 135 S.E.2d 866 (1964); *Harper v. Ballensinger*, 121 Ga. App. 390, 174 S.E.2d 182 (1970); *Barnwell v. Cordle*, 438 F.2d 236 (5th Cir. 1971); *Sanchez v. Walker County Dep't of Family & Children Servs.*, 237 Ga. 406, 229 S.E.2d 66 (1976); *Matthews v. Matthews*, 238 Ga. 201, 232 S.E.2d 76 (1977); *Anglon v. Griffin*, 241 Ga. 546, 246 S.E.2d 666 (1978); *Abrams v. Daffron*, 155 Ga. App. 182, 270 S.E.2d 278 (1980).

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Am. Jur. 2d. — 59 Am. Jur. 2d, Parent and Child, § 32.

C.J.S. — 67A C.J.S., Parent and Child, § 58.

ALR. — What items of damage on account of personal injury to infant belong to him and what to parent, 37 ALR 11; 32 ALR2d 1060.

Attempt to bastardize child as affecting right to custody of the child, 37 ALR 531.

Appointment of guardian for infant as affecting rights and duties of parent, 63 ALR 1147.

Death of mother of child whose custody has been awarded to her or to third person by divorce decree as reviving father's

common-law duty to support, or right to custody of, child, 128 ALR 989.

Right to custody of child as affected by death of custodian appointed by divorce decree, 39 ALR2d 258.

"Split," "divided," or "alternate" custody of children, 92 ALR2d 695.

Child custody provisions of divorce or separation decree as subject to modification on habeas corpus, 4 ALR3d 1277.

Award of custody of child where contest is between child's father and grandparent, 25 ALR3d 7.

Award of custody of child where contest is between child's mother and grandparent, 29 ALR3d 366.

Award of custody of child where contest is between child's grandparent and one other than the child's parent, 30 ALR3d 290.

Award of custody of child where contest

is between child's parents and grandparents, 31 ALR3d 1187.

Extraterritorial effect of valid award of custody of child of divorced parents, in absence of substantial change in circumstances, 35 ALR3d 520.

Remarriage of surviving parent as affecting action for wrongful death of child, 69 ALR3d 1038.

Right to require psychiatric or mental examination for party seeking to obtain or retain custody of child, 99 ALR3d 268.

Parent's physical disability or handicap as factor in custody award or proceedings, 3 ALR4th 1044.

Award of custody of child where contest is between natural parent and stepparent, 10 ALR4th 767.

Religion as factor in child custody and visitation cases, 22 ALR4th 971.

19-9-3. Discretion of judge in custody disputes; right of child 14 years old or older to select custodial parent; consideration of child's educational needs; review of visitation rights; grandparent visitation; policy; retention of jurisdiction; attorney's fees; filing of domestic relations final disposition form; application to military parents.

(a)(1) In all cases in which the custody of any child is at issue between the parents, there shall be no prima-facie right to the custody of the child in the father or mother. There shall be no presumption in favor of any particular form of custody, legal or physical, nor in favor of either parent. Joint custody may be considered as an alternative form of custody by the judge and the judge at any temporary or permanent hearing may grant sole custody, joint custody, joint legal custody, or joint physical custody as appropriate.

(2) The judge hearing the issue of custody shall make a determination of custody of a child and such matter shall not be decided by a jury. The judge may take into consideration all the circumstances of the case, including the improvement of the health of the party seeking a change in custody provisions, in determining to whom custody of the child should be awarded. The duty of the judge in all such cases shall be to exercise discretion to look to and determine solely what is for the best interest of the child and what will best promote the child's welfare and happiness and to make his or her award accordingly.

(3) In determining the best interests of the child, the judge may consider any relevant factor including, but not limited to:

(A) The love, affection, bonding, and emotional ties existing between each parent and the child;

(B) The love, affection, bonding, and emotional ties existing between the child and his or her siblings, half siblings, and stepsiblings and the residence of such other children;

(C) The capacity and disposition of each parent to give the child love, affection, and guidance and to continue the education and rearing of the child;

(D) Each parent's knowledge and familiarity of the child and the child's needs;

(E) The capacity and disposition of each parent to provide the child with food, clothing, medical care, day-to-day needs, and other necessary basic care, with consideration made for the potential payment of child support by the other parent;

(F) The home environment of each parent considering the promotion of nurturance and safety of the child rather than superficial or material factors;

(G) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

(H) The stability of the family unit of each of the parents and the presence or absence of each parent's support systems within the community to benefit the child;

(I) The mental and physical health of each parent;

(J) Each parent's involvement, or lack thereof, in the child's educational, social, and extracurricular activities;

(K) Each parent's employment schedule and the related flexibility or limitations, if any, of a parent to care for the child;

(L) The home, school, and community record and history of the child, as well as any health or educational special needs of the child;

(M) Each parent's past performance and relative abilities for future performance of parenting responsibilities;

(N) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child;

(O) Any recommendation by a court appointed custody evaluator or guardian ad litem;

(P) Any evidence of family violence or sexual, mental, or physical child abuse or criminal history of either parent; and

(Q) Any evidence of substance abuse by either parent.

(4) In addition to other factors that a judge may consider in a proceeding in which the custody of a child or visitation or parenting time by a parent is at issue and in which the judge has made a finding of family violence:

(A) The judge shall consider as primary the safety and well-being of the child and of the parent who is the victim of family violence;

(B) The judge shall consider the perpetrator's history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily injury, or assault to another person;

(C) If a parent is absent or relocates because of an act of domestic violence by the other parent, such absence or relocation for a reasonable period of time in the circumstances shall not be deemed an abandonment of the child for the purposes of custody determination; and

(D) The judge shall not refuse to consider relevant or otherwise admissible evidence of acts of family violence merely because there has been no previous finding of family violence. The judge may, in addition to other appropriate actions, order supervised visitation or parenting time pursuant to Code Section 19-9-7.

(5) In all custody cases in which the child has reached the age of 14 years, the child shall have the right to select the parent with whom he or she desires to live. The child's selection for purposes of custody shall be presumptive unless the parent so selected is determined not to be in the best interests of the child. The parental selection by a child who has reached the age of 14 may, in and of itself, constitute a material change of condition or circumstance in any action seeking a modification or change in the custody of that child; provided, however, that such selection may only be made once within a period of two years from the date of the previous selection and the best interests of the child standard shall apply.

(6) In all custody cases in which the child has reached the age of 11 but not 14 years, the judge shall consider the desires and educational needs of the child in determining which parent shall have custody. The judge shall have complete discretion in making this determination, and the child's desires shall not be controlling. The judge shall further have broad discretion as to how the child's desires are to be considered, including through the report of a guardian ad litem. The best interests of the child standard shall be controlling. The parental

selection of a child who has reached the age of 11 but not 14 years shall not, in and of itself, constitute a material change of condition or circumstance in any action seeking a modification or change in the custody of that child. The judge may issue an order granting temporary custody to the selected parent for a trial period not to exceed six months regarding the custody of a child who has reached the age of 11 but not 14 years where the judge hearing the case determines such a temporary order is appropriate.

(7) The judge is authorized to order a psychological custody evaluation of the family or an independent medical evaluation. In addition to the privilege afforded a witness, neither a court appointed custody evaluator nor a court appointed guardian ad litem shall be subject to civil liability resulting from any act or failure to act in the performance of his or her duties unless such act or failure to act was in bad faith.

(8) If requested by any party on or before the close of evidence in a contested hearing, the permanent court order awarding child custody shall set forth specific findings of fact as to the basis for the judge's decision in making an award of custody including any relevant factor relied upon by the judge as set forth in paragraph (3) of this subsection. Such order shall set forth in detail why the court awarded custody in the manner set forth in the order and, if joint legal custody is awarded, a manner in which final decision making on matters affecting the child's education, health, extracurricular activities, religion, and any other important matter shall be decided. Such order shall be filed within 30 days of the final hearing in the custody case, unless extended by order of the judge with the agreement of the parties.

(b) In any case in which a judgment awarding the custody of a child has been entered, on the motion of any party or on the motion of the judge, that portion of the judgment effecting visitation rights between the parties and their child or parenting time may be subject to review and modification or alteration without the necessity of any showing of a change in any material conditions and circumstances of either party or the child, provided that the review and modification or alteration shall not be had more often than once in each two-year period following the date of entry of the judgment. However, this subsection shall not limit or restrict the power of the judge to enter a judgment relating to the custody of a child in any new proceeding based upon a showing of a change in any material conditions or circumstances of a party or the child. A military parent's absences caused by the performance of his or her deployments, or the potential for future deployments, shall not be the sole factor considered in supporting a claim of any change in material conditions or circumstances of either party or the child;

provided, however, that the court may consider evidence of the effect of a deployment in assessing a claim of any change in material conditions or circumstances of either party or the child.

(c) In the event of any conflict between this Code section and any provision of Article 3 of this chapter, Article 3 shall apply.

(d) It is the express policy of this state to encourage that a child has continuing contact with parents and grandparents who have shown the ability to act in the best interest of the child and to encourage parents to share in the rights and responsibilities of raising their child after such parents have separated or dissolved their marriage or relationship.

(e) Upon the filing of an action for a change of child custody, the judge may in his or her discretion change the terms of custody on a temporary basis pending final judgment on such issue. Any such award of temporary custody shall not constitute an adjudication of the rights of the parties.

(f)(1) In any case in which a judgment awarding the custody of a child has been entered, the court entering such judgment shall retain jurisdiction of the case for the purpose of ordering the custodial parent to notify the court of any changes in the residence of the child.

(2) In any case in which visitation rights or parenting time has been provided to the noncustodial parent and the court orders that the custodial parent provide notice of a change in address of the place for pickup and delivery of the child for visitation or parenting time, the custodial parent shall notify the noncustodial parent, in writing, of any change in such address. Such written notification shall provide a street address or other description of the new location for pickup and delivery so that the noncustodial parent may exercise such parent's visitation rights or parenting time.

(3) Except where otherwise provided by court order, in any case under this subsection in which a parent changes his or her residence, he or she must give notification of such change to the other parent and, if the parent changing residence is the custodial parent, to any other person granted visitation rights or parenting time under this title or a court order. Such notification shall be given at least 30 days prior to the anticipated change of residence and shall include the full address of the new residence.

(g) Except as provided in Code Section 19-6-2, and in addition to the attorney's fee provisions contained in Code Section 19-6-15, the judge may order reasonable attorney's fees and expenses of litigation, experts, and the child's guardian ad litem and other costs of the child custody action and pretrial proceedings to be paid by the parties in proportions

and at times determined by the judge. Attorney's fees may be awarded at both the temporary hearing and the final hearing. A final judgment shall include the amount granted, whether the grant is in full or on account, which may be enforced by attachment for contempt of court or by writ of fieri facias, whether the parties subsequently reconcile or not. An attorney may bring an action in his or her own name to enforce a grant of attorney's fees made pursuant to this subsection.

(h) In addition to filing requirements contained in Code Section 19-6-15, upon the conclusion of any proceeding under this article, the domestic relations final disposition form as set forth in Code Section 9-11-133 shall be filed.

(i) Notwithstanding other provisions of this article, whenever a military parent is deployed, the following shall apply:

(1) A court shall not enter a final order modifying parental rights and responsibilities under an existing parenting plan earlier than 90 days after the deployment ends, unless such modification is agreed to by the deployed parent;

(2) Upon a petition to establish or modify an existing parenting plan being filed by a deploying parent or nondeploying parent, the court shall enter a temporary modification order for the parenting plan to ensure contact with the child during the period of deployment when:

(A) A military parent receives formal notice from military leadership that he or she will deploy in the near future, and such parent has primary physical custody, joint physical custody, or sole physical custody of a child, or otherwise has parenting time with a child under an existing parenting plan; and

(B) The deployment will have a material effect upon a deploying parent's ability to exercise parental rights and responsibilities toward his or her child either in the existing relationship with the other parent or under an existing parenting plan;

(3) Petitions for temporary modification of an existing parenting plan because of a deployment shall be heard by the court as expeditiously as possible and shall be a priority on the court's calendar;

(4)(A) All temporary modification orders for parenting plans shall include a reasonable and specific transition schedule to facilitate a return to the predeployment parenting plan over the shortest reasonable time period after the deployment ends, based upon the child's best interest.

(B) Unless the court determines that it would not be in the child's best interest, a temporary modification order for a parenting

plan shall set a date certain for the anticipated end of the deployment and the start of the transition period back to the predeployment parenting plan. If a deployment is extended, the temporary modification order for a parenting plan shall remain in effect, and the transition schedule shall take effect at the end of the extension of the deployment. Failure of the nondeploying parent to notify the court in accordance with this paragraph shall not prejudice the deploying parent's right to return to the predeployment parenting plan once the temporary modification order for a parenting plan expires as provided in subparagraph (C) of this paragraph.

(C) A temporary modification order for a parenting plan shall expire upon the completion of the transition period and the predeployment parenting plan shall establish the rights and responsibilities between parents for the child;

(5) Upon a petition to modify an existing parenting plan being filed by a deploying parent and upon a finding that it serves the best interest of the child, the court may delegate for the duration of the deployment any portion of such deploying parent's parenting time with the child to anyone in his or her extended family, including but not limited to an immediate family member, a person with whom the deploying parent cohabits, or another person having a close and substantial relationship to the child. Such delegated parenting time shall not create any separate rights to such person once the period of deployment has ended;

(6) If the court finds it to be in the child's best interest, a temporary modification order for a parenting plan issued under this subsection may require any of the following:

(A) The nondeploying parent make the child reasonably available to the deploying parent to exercise his or her parenting time immediately before and after the deploying parent departs for deployment and whenever the deploying parent returns to or from leave or furlough from his or her deployment;

(B) The nondeploying parent facilitate opportunities for the deployed parent to have regular and continuing contact with his or her child by telephone, e-mail exchanges, virtual video parenting time through the Internet, or any other similar means;

(C) The nondeploying parent not interfere with the delivery of correspondence or packages between the deployed parent and child of such parent; and

(D) The deploying parent provide timely information regarding his or her leave and departure schedule to the nondeploying parent;

(7) Because actual leave from a deployment and departure dates for a deployment are subject to change with little notice due to military necessity, such changes shall not be used by the nondeploying parent to prevent contact between the deployed parent and his or her child;

(8) A court order temporarily modifying an existing parenting plan or other order governing parent-child rights and responsibilities shall specify when a deployment is the basis for such order and it shall be entered by the court only as a temporary modification order or interlocutory order;

(9) A relocation by a nondeploying parent during a period of a deployed parent's absence and occurring during the period of a temporary modification order for a parenting plan shall not act to terminate the exclusive and continuing jurisdiction of the court for purposes of later determining custody or parenting time under this chapter;

(10) A court order temporarily modifying an existing parenting plan or other order shall require the nondeploying parent to provide the court and the deploying parent with not less than 30 days' advance written notice of any intended change of residence address, telephone numbers, or e-mail address;

(11) Upon a deployed parent's final return from deployment, either parent may file a petition to modify the temporary modification order for a parenting plan on the grounds that compliance with such order will result in immediate danger or substantial harm to the child, and may further request that the court issue an ex parte order. The deployed parent may file such a petition prior to his or her return. Such petition shall be accompanied by an affidavit in support of the requested order. Upon a finding of immediate danger or substantial harm to the child based on the facts set forth in the affidavit, the court may issue an ex parte order modifying the temporary parenting plan or other parent-child contact in order to prevent immediate danger or substantial harm to the child. If the court issues an ex parte order, the court shall set the matter for hearing within ten days from the issuance of the ex parte order;

(12) Nothing in this subsection shall preclude either party from filing a petition for permanent modification of an existing parenting plan under subsection (b) of this Code section; provided, however, that the court shall not conduct a final hearing on such petition until at least 90 days after the final return of the deploying parent. There shall exist a presumption favoring the predeployment parenting plan or custody order as one that still serves the best interest of the child, and the party seeking to permanently modify such plan or order shall

have the burden to prove that it no longer serves the best interest of the child;

(13) When the deployment of a military parent has a material effect upon his or her ability to appear in person at a scheduled hearing, then upon request by the deploying parent and provided reasonable advance notice is given to other interested parties, the court may allow a deployed parent to present testimony and other evidence by electronic means for any matter considered by the court under this subsection. For purposes of this paragraph, the term “electronic means” shall include, but not be limited to, communications by telephone, video teleconference, Internet connection, or electronically stored affidavits or documents sent from the deployment location or elsewhere;

(14)(A) When deployment of a military parent appears imminent and there is no existing parenting plan or other order setting forth the parent’s rights and responsibilities, then upon a petition filed by either parent the court shall:

(i) Expedite a hearing to establish a temporary parenting plan;

(ii) Require that the deploying parent shall have continued access to the child, provided that such contact is in the child’s best interest;

(iii) Ensure the disclosure of financial information pertaining to both parties;

(iv) Determine the child support responsibilities under Code Section 19-6-15 of both parents during the deployment; and

(v) Determine the child’s best interest and consider delegating to any third parties with close contacts to the child any reasonable parenting time during the deployment. In deciding such request the court shall consider the reasonable requests of the deployed parent.

(B) Any pleading filed to establish a parenting plan or child support order under this paragraph shall be identified at the time of filing by stating in the text of the pleading the specific facts related to the deployment and by referencing this paragraph and subsection of this Code section;

(15) When an impending deployment precludes court expedited adjudication before deployment, the court may agree to allow the parties to arbitrate any issues as allowed under Code Section 19-9-1.1, or order the parties to mediation under any court established alternative dispute resolution program. For purposes of arbi-

tration or mediation, each party shall be under a duty to provide to the other party information relevant to any parenting plan or support issues pertaining to the children or the parties;

(16) Each military parent shall be under a continuing duty to provide written notice to the nondeploying parent within 14 days of the military parent's receipt of oral or written orders requiring deployment or any other absences due to military service that will impact the military parent's ability to exercise his or her parenting time with a child. If deployment orders do not allow for 14 days' advance notice, then the military parent shall provide written notice to the other parent immediately upon receiving such notice; and

(17) A military parent shall ensure that any military family care plan that he or she has filed with his or her commander is consistent with any existing court orders for his or her child. In all instances any court order will be the first course of action for the care of a child during the absence of a military parent, and the military family care plan will be the alternative plan if the nondeploying parent either refuses to provide care for the child or acknowledges an inability to provide reasonable care for the child. A military parent shall not be considered in contempt of any court order or parenting plan when he or she in good faith implements his or her military family care plan based upon the refusal or claimed inability of a nondeploying parent to provide reasonable care for a child during a deployment. (Ga. L. 1913, p. 110, § 1; Code 1933, § 74-107; Ga. L. 1957, p. 412, § 2; Ga. L. 1962, p. 713, § 2; Ga. L. 1976, p. 1050, § 3; Ga. L. 1978, p. 258, § 3; Ga. L. 1982, p. 3, § 19; Ga. L. 1984, p. 22, § 19; Ga. L. 1986, p. 1000, § 2; Ga. L. 1990, p. 1423, § 1; Ga. L. 1991, p. 1389, § 1; Ga. L. 1993, p. 1983, § 1; Ga. L. 1995, p. 863, § 6; Ga. L. 1999, p. 329, § 4; Ga. L. 2000, p. 1292, § 2; Ga. L. 2004, p. 780, § 3; Ga. L. 2007, p. 554, § 5/HB 369; Ga. L. 2011, p. 274, § 3/SB 112.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1991, subsection (c), which was added by Ga. L. 1991, p. 1389, was redesignated as subsection (d).

Pursuant to Code Section 28-9-5, in 2007, "its" was deleted preceding "discretion" in the last sentence of paragraph (a)(2), and "educational" was substituted for "education" in subparagraph (a)(3)(J).

Editor's notes. — Ga. L. 2007, p. 554, § 1/HB 369, not codified by the General Assembly, provides: "The General Assembly of Georgia declares that it is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their chil-

dren and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage or relationship."

Ga. L. 2007, p. 554, § 8/HB 369, not codified by the General Assembly, provides that the 2007 amendment shall apply to all child custody proceedings and modifications of child custody filed on or after January 1, 2008.

Ga. L. 2011, p. 274, § 1/SB 112, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Military Parents Rights Act.'"

Law reviews. — For article recom-

mending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969). For article, "The Child as a Party in Interest in Custody Proceedings," see 10 Ga. St. B.J. 577 (1974). For article, "Domestic Relations Law," see 53 Mercer L. Rev. 265 (2001). For survey article on domestic relations cases for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 223 (2003). For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004). For annual survey of domestic relations law, see 58 Mercer L. Rev. 133 (2006). For survey article on domestic relations law, see 59 Mercer L. Rev. 139 (2007). For survey article on domestic relations law, see 60 Mercer L. Rev. 121 (2008). For annual survey of law on domestic relations, see 62 Mercer L. Rev. 105 (2010).

For note, "Surrogate Mother Agree-

ments in Georgia: Conflict and Accord with Statutory and Case Law," see 4 Ga. St. U.L. Rev. 153 (1988). For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 122 (1993).

For comment on *Stanton v. Stanton*, 213 Ga. 545, 100 S.E.2d 289 (1957), holding that parents cannot by contract restrict the discretion of the court in awarding custody and provision regulating the religious upbringing of the child may be entirely disregarded by the court, see 20 Ga. B.J. 546 (1958). For comment on *Bodrey v. Cape*, 120 Ga. App. 859, 172 S.E.2d 643 (1969), see 7 Ga. St. B.J. 256 (1970). For comment on "Grandparents' Visitation Rights in Georgia," see 29 Emory L.J. 1083 (1980). For comment on *In re A.R.B.*, 209 Ga. App. 324, 433 S.E.2d 411 (1993), regarding redefinition of the best interests standard, see 11 Ga. St. U.L. Rev. 711 (1995).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

AWARD OF CUSTODY

1. IN GENERAL
2. CHILD'S BEST INTERESTS AND WELFARE
3. APPLICATION
4. FINALITY OF AWARD

PARENTAL FITNESS

SELECTION BY CHILD

CHANGE OF CUSTODY

1. IN GENERAL
2. APPLICATION

VISITATION RIGHTS

General Consideration

Contact provisions cannot be based upon racial considerations. — Although a court may validly provide, under appropriate circumstances, that a child is to have no contact with particular individuals who are deemed harmful to the child, such provision cannot be based solely upon racial considerations as such ruling would violate the public policy of the state. *Turman v. Boleman*, 235 Ga. App. 243, 510 S.E.2d 532 (1998).

Award of joint legal custody within the court's authority. — When the court awarded physical custody to the father in

the court's modification order and the father did not contest the award of joint legal custody, the trial court properly exercised the court's authority in consideration of the best interests of the children to award joint legal custody to both parents. *Walker v. Walker*, 248 Ga. App. 177, 546 S.E.2d 315 (2001).

Statute dealt with custody of minor children as between parents. *Chapin v. Cummings*, 191 Ga. 408, 12 S.E.2d 312 (1940); *Rogers v. Smith*, 222 Ga. 841, 152 S.E.2d 859 (1967).

Statute was applicable only when contest was between child's parents, in which case father had no prima facie right

to the child's custody; it had no application to disputes between father and third person. *Waldrup v. Crane*, 203 Ga. 388, 46 S.E.2d 919 (1948).

In custody case, state as parens patriae is materially concerned, and through agency of court is virtually a party to judgment, although action proceeds nominally as one between parents only. *Fortson v. Fortson*, 195 Ga. 750, 25 S.E.2d 518 (1943), later appeal, 197 Ga. 699, 30 S.E.2d 165 (1944).

Custody is issue for court, not jury, determination. — When divorce is sought by either party, court, not jury, has duty of disposing of custody of parties' minor children in their best interests. *Weaver v. Weaver*, 238 Ga. 101, 230 S.E.2d 886 (1976).

Statute conferred no jurisdiction on court. *Painter v. Painter*, 231 Ga. 184, 200 S.E.2d 888 (1973).

Jurisdiction and venue. — Although a trial court may modify, sua sponte, visitation under certain circumstances pursuant to O.C.G.A. §§ 19-9-1(b) and 19-9-3(b), those provisions apply only when jurisdiction and venue are proper. *Rogers v. Baudet*, 215 Ga. App. 214, 449 S.E.2d 900 (1994).

Court must first have jurisdiction to hear custody issue before discretion authorized can be exercised. *Painter v. Painter*, 231 Ga. 184, 200 S.E.2d 888 (1973).

Court cannot determine custody on complaint for support against non-resident father. — Trial court does not have jurisdiction to determine custody of minor child on complaint for child support and custody unaccompanied by divorce suit brought by newly resident mother against nonresident father. *Painter v. Painter*, 231 Ga. 184, 200 S.E.2d 888 (1973).

Superior court judge lacks jurisdiction to terminate parental rights. — Superior court judge, upon hearing divorce and child custody case, lacks jurisdiction to terminate parental rights, although the judge can exercise judicial discretion as to best interests of the child to award custody to party other than parents. *Cothran v. Cothran*, 237 Ga. 487, 228 S.E.2d 872 (1976).

Court has construed former Code 1933, §§ 30-127 and 74-107 (see now O.C.G.A. §§ 19-9-1 and 19-9-3) together in decisions involving custody in divorce actions, and has recognized the right of the trial judge to exercise sound legal discretion, looking to the best interest of the child or children, in awarding custody of children. *Brown v. Brown*, 222 Ga. 446, 150 S.E.2d 615 (1966).

Determination of custody issues by juvenile court. — Generally, the purpose of the Juvenile Court Code of Georgia, (O.C.G.A. Ch. 11, T. 15) is not to settle questions of custody by and between parents of a minor child or children; however, it is proper for the juvenile court to decide custody issues when properly transferred to it by the superior court. *Neal v. Washington*, 158 Ga. App. 39, 279 S.E.2d 294 (1981).

Consideration of factors in adoption proceeding. — Trial court did not abuse the court's discretion by considering the factors listed in O.C.G.A. § 19-9-3 in a petition for adoption filed by a child's paternal grandmother and paternal step-grandfather, although the court recognized that the factors were listed in the statute governing custody between parents because the child's maternal grandmother posed no objection when the trial court announced the court's decision in open court and noted specifically that the court utilized O.C.G.A. § 19-9-3 in the court's analysis. *Barr v. Gregor*, 316 Ga. App. 269, 728 S.E.2d 868 (2012).

Prohibition against exposure of children to members of gay and lesbian community prohibited. — Blanket prohibition pursuant to O.C.G.A. § 19-9-3(d) in a divorce against exposure of the parties' children to members of the gay and lesbian community who were acquainted with the husband was improper because there was no evidence that any member of the excluded community had engaged in inappropriate conduct in the presence of the children. *Mongerson v. Mongerson*, 285 Ga. 554, 678 S.E.2d 891 (2009), overruled on other grounds, 288 Ga. 670, 706 S.E.2d 456 (2011).

Evidence of parent's alleged suicide attempt held irrelevant. — In ruling on a parent's petition to modify custody, as

General Consideration (Cont'd)

the trial court made no finding of the existence of family violence under O.C.G.A. § 19-9-3(a)(4), whether the other parent had sought the help of a mental health professional or had attempted to commit suicide many years earlier was not probative of any material issue in the case. Therefore, such evidence was properly excluded. *Moore v. Moore-McKinney*, 297 Ga. App. 703, 678 S.E.2d 152 (2009).

Custody evaluation properly ordered in visitation dispute. — It was not error for a trial court to order a custody evaluation in a visitation dispute because: (1) O.C.G.A. § 19-9-22(1) included visitation in the definition of “custody”; and (2) O.C.G.A. § 19-9-3(a)(7) authorized the court to order an evaluation. *Gottschalk v. Gottschalk*, 311 Ga. App. 304, 715 S.E.2d 715 (2011).

Parties financial condition not relevant to award of attorney’s fees. — Trial court did not err in awarding a mother attorney’s fees after granting the mother’s petition to modify custody because the mother submitted a letter brief expressly seeking an award of attorney’s fees pursuant to O.C.G.A. § 19-9-3(g); subsection (g) of § 19-9-3 does not require a trial court to consider the parties’ financial circumstances in making the grant of attorney’s fees. Therefore, to the extent *Harris v. Williams*, 304 Ga. App. 390 (2010) holds that O.C.G.A. § 19-9-3(g) does not authorize an award of attorney’s fees in an action seeking modification of child custody, the case is overruled. *Viskup v. Visкуп*, 291 Ga. 103, 727 S.E.2d 97 (2012).

Allocation of attorney fee award not required. — Full amount of attorney’s fees award of \$35,000 to a father in a child custody dispute was justified by the trial court’s findings under either O.C.G.A. § 9-15-14 or O.C.G.A. § 19-9-3(g); therefore, the trial court was not required to allocate the amount the court was awarding under each statute. *Taylor v. Taylor*, 293 Ga. 615, 748 S.E.2d 873 (2013).

Attorney fees award not supported by statutory basis or factual findings. — Because there was no statutory basis

given, no statutory language used, and no findings of fact presented regarding the award of attorney fees to the wife, there was no way to be certain whether the trial court awarded fees based on O.C.G.A. § 19-9-3 or some other statute. *Williams v. Williams*, 295 Ga. 113, 757 S.E.2d 859 (2014).

Failure to address motion for fees and costs. — In a post-divorce matter, the trial court erred by failing to address a father’s motion for attorney fees and costs because the trial court held that a number of the mother’s post-trial motions were frivolous and vexatious, but did not mention or rule on the father’s long-standing request for fees and costs incurred up to and including trial. *Bankston v. Warbington*, No. A14A1515, 2015 Ga. App. LEXIS 185 (Mar. 24, 2015).

Attorney fee award upheld. — Trial court properly awarded the mother attorney fees for first counsel that had withdrawn because the father failed to cite any authority for the proposition that attorney fees cannot be awarded under O.C.G.A. § 19-9-3 for one who has withdrawn from representation as the statutory language provides that fees may be ordered to be paid by the parties in proportions and at times determined by the judge and as the interests of justice may require. *Neal v. Hibbard*, 770 S.E.2d 600, No. S14A1673, 2015 Ga. LEXIS 183 (2015).

Failure to indicate statutory basis for attorney fee award. — In a child support and custody proceeding, the order awarding the mother attorney fees was vacated and the case was remanded for the trial court to reconsider the issue because the court failed to state the statutory basis for any award and any necessary findings to support the award. *Blumenshine v. Hall*, 329 Ga. App. 449, 765 S.E.2d 647 (2014).

Cited in *Lockhart v. Lockhart*, 173 Ga. 846, 162 S.E. 129 (1931); *Butts v. Griffith*, 189 Ga. 296, 5 S.E.2d 907 (1939); *Loggins v. Loggins*, 191 Ga. 779, 14 S.E.2d 91 (1941); *Moody v. Moody*, 193 Ga. 699, 19 S.E.2d 504 (1942); *Attaway v. Attaway*, 194 Ga. 448, 22 S.E.2d 50 (1942); *Bond v. Norwood*, 195 Ga. 383, 24 S.E.2d 289 (1943); *Connor v. Rainwater*, 200 Ga. 866, 38 S.E.2d 805 (1946); *Carter v. Carter*, 201

Ga. 850, 41 S.E.2d 532 (1947); *Good v. Good*, 205 Ga. 112, 52 S.E.2d 610 (1949); *Fennell v. Fennell*, 209 Ga. 815, 76 S.E.2d 387 (1953); *Johnson v. Johnson*, 211 Ga. 791, 89 S.E.2d 166 (1955); *Boge v. McCollum*, 212 Ga. 214, 91 S.E.2d 619 (1956); *Rowell v. Rowell*, 212 Ga. 584, 94 S.E.2d 425 (1956); *Boge v. McCollum*, 212 Ga. 741, 95 S.E.2d 665 (1956); *Slade v. Slade*, 212 Ga. 758, 95 S.E.2d 680 (1956); *Perry v. Perry*, 213 Ga. 847, 102 S.E.2d 534 (1958); *Mathews v. Murray*, 101 Ga. App. 216, 113 S.E.2d 232 (1960); *Stephens v. Sudderth*, 216 Ga. 222, 115 S.E.2d 519 (1960); *Blood v. Earnest*, 217 Ga. 642, 123 S.E.2d 913 (1962); *Adams v. State*, 218 Ga. 130, 126 S.E.2d 624 (1962); *Faulk v. Faulk*, 219 Ga. 457, 133 S.E.2d 863 (1965); *Smith v. Smith*, 219 Ga. 739, 135 S.E.2d 866 (1964); *Bennett v. Kovacik*, 220 Ga. 482, 139 S.E.2d 484 (1964); *Snell v. Snell*, 220 Ga. 899, 142 S.E.2d 791 (1965); *McJunkin v. McJunkin*, 221 Ga. 625, 146 S.E.2d 638 (1966); *Thomas v. Thomas*, 221 Ga. 652, 146 S.E.2d 724 (1966); *Adams v. Adams*, 221 Ga. 710, 146 S.E.2d 759 (1966); *Rigdon v. Rigdon*, 222 Ga. 679, 151 S.E.2d 712 (1966); *Rogers v. Smith*, 222 Ga. 841, 152 S.E.2d 859 (1967); *Whaley v. Disbrow*, 225 Ga. 145, 166 S.E.2d 343 (1969); *Lowery v. Adams*, 225 Ga. 248, 167 S.E.2d 636 (1969); *Tuten v. Tuten*, 227 Ga. 228, 180 S.E.2d 233 (1971); *Padgett v. Penland*, 230 Ga. 824, 199 S.E.2d 210 (1973); *Peacock v. Adams*, 230 Ga. 774, 199 S.E.2d 254 (1973); *Drummond v. Fulton County Dep't of Family & Children Servs.*, 237 Ga. 440, 228 S.E.2d 839 (1976); *Lowry v. Lowry*, 238 Ga. 593, 234 S.E.2d 509 (1977); *Guest v. Williams*, 240 Ga. 316, 240 S.E.2d 705 (1977); *Sweeney v. Sweeney*, 241 Ga. 372, 245 S.E.2d 648 (1978); *Davidson v. Peck*, 242 Ga. 198, 249 S.E.2d 557 (1978); *Sanders v. Sanders*, 242 Ga. 641, 250 S.E.2d 488 (1978); *Sachs v. Walzer*, 242 Ga. 742, 251 S.E.2d 302 (1978); *Munday v. Munday*, 243 Ga. 863, 257 S.E.2d 282 (1979); *Goldfarb v. Goldfarb*, 246 Ga. 24, 268 S.E.2d 648 (1980); *Lawrence v. Day*, 247 Ga. 474, 277 S.E.2d 35 (1981); *Carter v. Foster*, 158 Ga. App. 701, 282 S.E.2d 180 (1981); *Lifsey v. Lifsey*, 256 Ga. 613, 351 S.E.2d 637 (1987); *Graham v. Holmes*, 218 Ga. App. 796, 463 S.E.2d 513 (1995); *Steed v. Deal*, 225 Ga.

App. 35, 482 S.E.2d 527 (1997); *Martin v. True*, 232 Ga. App. 435, 502 S.E.2d 285 (1998); *Perrin v. Stansell*, 243 Ga. App. 475, 533 S.E.2d 458 (2000); *Stills v. Johnson*, 272 Ga. 645, 533 S.E.2d 695 (2000); *Brandenburg v. Brandenburg*, 274 Ga. 183, 551 S.E.2d 721 (2001); *Lewis v. Lewis*, 252 Ga. App. 539, 557 S.E.2d 40 (2001); *Baca v. Baca*, 256 Ga. App. 514, 568 S.E.2d 746 (2002); *Moore v. Moore-McKinney*, 297 Ga. App. 703, 678 S.E.2d 152 (2009); *Murillo v. Murillo*, 300 Ga. App. 61, 684 S.E.2d 126 (2009); *Harris v. Williams*, 304 Ga. App. 390, 696 S.E.2d 131 (2010); *Avren v. Garten*, 289 Ga. 186, 710 S.E.2d 130 (2011); *Caldwell v. Meadows*, 312 Ga. App. 70, 717 S.E.2d 668 (2011); *El v. Martin*, 317 Ga. App. 676, 732 S.E.2d 539 (2012); *Lacy v. Lacy*, 320 Ga. App. 739, 740 S.E.2d 695 (2013).

Award of Custody

1. In General

No prima facie right of custody. — As between parents ordinarily no prima facie right of custody exists. *Hill v. Rivers*, 200 Ga. 354, 37 S.E.2d 386 (1946); *Benefield v. Benefield*, 216 Ga. 593, 118 S.E.2d 464 (1961).

When contest is between parents, there is no prima facie right of custody; but the court, in the exercise of the court's sound discretion, shall place children where in the court's judgment their best interest will be best served. *Folsom v. Folsom*, 228 Ga. 536, 186 S.E.2d 752 (1972).

Although the parties had difficulty communicating with each other, both parents were fit and proper parents and each had a loving relationship with the child, to the extent that a joint custody award, with the husband having primary physical custody, was supported by the evidence; thus, the appeals court refused to hold that the trial court abused the court's discretion in awarding primary physical custody of the child to the husband. *Powell v. Powell*, 277 Ga. 878, 596 S.E.2d 616 (2004).

Mother and father have equal status. *Gambrell v. Gambrell*, 244 Ga. 178, 259 S.E.2d 439 (1979).

Court must exercise discretion in awarding custody. — In every case when custody of minor children is in-

Award of Custody (Cont'd)**1. In General (Cont'd)**

involved, law requires that court having jurisdiction shall exercise discretion in awarding custody. *Waller v. Waller*, 202 Ga. 535, 43 S.E.2d 535 (1947).

Broad judicial discretion over custody in divorce case. — Judge in divorce case has broad discretion in determining which parent is entitled to custody of minor child or children. *Newman v. Newman*, 223 Ga. 278, 154 S.E.2d 581 (1967).

Exercise of sound legal discretion in awarding custody shall not be controlled. *Willingham v. Willingham*, 192 Ga. 405, 15 S.E.2d 514 (1941); *Jordan v. Jordan*, 195 Ga. 771, 25 S.E.2d 500 (1943); *Bignon v. Bignon*, 202 Ga. 141, 42 S.E.2d 426 (1947); *Handley v. Handley*, 204 Ga. 57, 48 S.E.2d 87 (1948); *Benefield v. Benefield*, 216 Ga. 593, 118 S.E.2d 464 (1961).

When trial judge has exercised discretion in making award of minor children as between divorced parents, the supreme court will not interfere unless evidence clearly shows abuse of the discretion vested in the judge. *Adams v. Adams*, 206 Ga. 881, 59 S.E.2d 366 (1950).

Law vests broad discretion in trial court judge regarding custody awards, and unless it appears that such discretion has been manifestly abused, action in awarding custody of minor child will not be disturbed by the appellate court. *Lynn v. Lynn*, 202 Ga. 776, 44 S.E.2d 769 (1947); *Hodges v. Hodges*, 77 Ga. App. 86, 47 S.E.2d 823 (1948); *Adams v. Heffernan*, 217 Ga. 404, 122 S.E.2d 735 (1961).

In questions of custody, judge has wide latitude and discretion in determining what is in children's best interest, welfare, and happiness. This discretion will be interfered with only in those cases when abuse is shown. *Barnes v. Tant*, 217 Ga. 67, 121 S.E.2d 125 (1961).

When no abuse of judicial discretion appears from the record, the appellate court will not interfere to control trial court judgment. *Murphy v. Dixon*, 218 Ga. 111, 126 S.E.2d 616 (1962).

Trial court did not abuse the court's discretion in awarding primary physical

custody of the parties' older son, who had been adopted by the husband, to the wife and primary physical custody of the younger daughter to the husband because the court's factual findings were supported by evidence that the husband had cared for the children by feeding, clothing, and bathing the children, taking the children to medical appointments, caring for the children while the wife was out of town, and helping the son with schoolwork, whereas the wife had deliberately misrepresented matters to the court, was not a credible witness, had put her own desires and perceived needs ahead of and to the detriment of her children, and lacked the moral fiber to be a role model for her children. *Anderson v. Anderson*, 278 Ga. 713, 606 S.E.2d 251 (2004).

As a trial court did not base the court's custody decision in the parties' divorce action solely on their postnuptial reconciliation agreement pursuant to O.C.G.A. § 19-9-5(b), but instead, the court found that the custody arrangement encompassed within the agreement was in the children's best interests pursuant to the factors under O.C.G.A. § 19-9-3(a)(3)(A-Q), there was no abuse of discretion in the custody award. *Spurlin v. Spurlin*, 289 Ga. 818, 716 S.E.2d 209 (2011).

Evidence supported award of custody to father. — Father was properly awarded primary physical custody of the parties' minor child utilizing a best interests of the child standard under O.C.G.A. § 19-9-3(a)(2) because allegations of sexual abuse by the father were inconclusive and the mother's handling of the allegations had a negative effect on the relationship between the child and the father; the trial court also properly relied on testimony from, inter alia, the guardian ad litem, the child's therapist, and a psychologist who had evaluated the mother. *King v. King*, 284 Ga. 364, 667 S.E.2d 30 (2008).

Award of custody based upon conflicting evidence does not of itself show abuse of discretion. *Adams v. Adams*, 206 Ga. 881, 59 S.E.2d 366 (1950).

Custody not determined in legitimation action. — In a proceeding on a father's petition for custody, when the issue of custody had not been determined

in a prior legitimation action, the court erred in requiring the father to show a material change of condition affecting the well being of the child; rather, the dispute must be resolved under the best interest of the child test. *Kennedy v. Adams*, 218 Ga. App. 120, 460 S.E.2d 540 (1995).

2. Child's Best Interests and Welfare

Between parents, child's best interests control. — Statute imposed upon court duty of making the court's award of custody in accordance with best interests of child; and this consideration alone must control judgment of court. Any rule of law that would defeat this single purpose is contrary to that section and should not be sustained. *Pruitt v. Butterfield*, 189 Ga. 593, 6 S.E.2d 786 (1940).

In all cases between parents for custody of minor child, law imposes upon trial judge duty to exercise sound discretion and let welfare of child control the judge's award. *Pruitt v. Butterfield*, 189 Ga. 593, 6 S.E.2d 786 (1940); *Dyche v. Dyche*, 218 Ga. 833, 131 S.E.2d 104 (1963).

In contest between parents over custody of minor children, paramount issue is welfare and best interest of children. *Jordan v. Jordan*, 195 Ga. 771, 25 S.E.2d 500 (1943); *Handley v. Handley*, 204 Ga. 57, 48 S.E.2d 827 (1948); *Durden v. Durden*, 224 Ga. 417, 162 S.E.2d 385 (1968).

In cases between parties involving custody of their minor children, rule is established that judge exercises sound legal discretion, looking to best interests of child or children. *Parr v. Parr*, 196 Ga. 805, 27 S.E.2d 687 (1943); *Lynn v. Lynn*, 202 Ga. 776, 44 S.E.2d 769 (1947); *Adams v. Heffernan*, 217 Ga. 404, 122 S.E.2d 735 (1961).

In all cases where custody of minor child is involved, paramount consideration is welfare and best interest of child. *Hodges v. Hodges*, 77 Ga. App. 86, 47 S.E.2d 823 (1948).

Fundamental basis for fixing custody as between parents is welfare of children. *Bettes v. Bettes*, 223 Ga. 732, 157 S.E.2d 742 (1967).

In all custody cases with respect to child or children under 14 years of age, trial court has wide discretion in awarding custody and in exercising such discretion;

it is the trial court's duty to look to and determine solely what is in best interests of child or children. *Whaley v. Disbrow*, 225 Ga. 145, 166 S.E.2d 343 (1969).

In divorce action in which child custody is an issue, test for use by trial court in determining which parent shall have child custody is "best interests of child." *Higbee v. Tuck*, 242 Ga. 376, 249 S.E.2d 62 (1978).

When trial court states that both parties are fit and proper persons to have custody of minor child and that interests of child will be best served by awarding permanent custody of child to mother, it is utilizing appropriate test, and does not abuse the court's discretion. *Dorminy v. Dorminy*, 242 Ga. 326, 249 S.E.2d 49 (1978).

Upon a review of the trial court's final custody order, despite the wife's contrary claims, nothing in the custody order or the record showed that the court's custody ruling was based on any standard other than what was in the best interests of the children, and nothing showed that the court required the wife to disprove any allegations asserted by the husband. Moreover, the final custody determination need not be the same as that of any temporary order. *Hadden v. Hadden*, 283 Ga. 424, 659 S.E.2d 353 (2008).

Award of primary physical custody of a minor child to the father served the child's best interests because of the child's close relationship with his father, the continued use of the same speech therapist, and other evidence relating to stability, continuity, and the child's adjustment to relocation. *Haskell v. Haskell*, 286 Ga. 112, 686 S.E.2d 102 (2009).

Court must further children's best interests, regardless of one parent's willingness to give custody to other. *Weaver v. Weaver*, 238 Ga. 101, 230 S.E.2d 886 (1976).

Child's welfare is controlling factor regardless of parties involved. — In contest for custody between two parties, both of whom are fit and proper persons, one having legal right should prevail. If both are proper parties, but neither has a legal right, one having stronger moral claim should prevail. But in every case, regardless of parties, welfare of child is the controlling and important fact. *Hill v.*

Award of Custody (Cont'd)
2. Child's Best Interests and
Welfare (Cont'd)

Rivers, 200 Ga. 354, 37 S.E.2d 386 (1946).

No biological parent preference over adoptive parent. — In a custody dispute between a biological parent and an adoptive parent, preference cannot be given to the biological parent. The test is the best interest of the child. *Ivey v. Ivey*, 264 Ga. 435, 445 S.E.2d 258 (1994).

Custody dispute involving orphaned children. — In a custody dispute involving children orphaned by the murder-suicide of their parents, a trial court did not err by awarding custody of the children to the paternal grandmother over the petition of an aunt because the aunt was involved in a divorce proceeding, had a precarious financial situation, and otherwise was unable to show that she could support her own child let alone that of her niece and nephew; plus, the aunt made representations to the niece and nephew that they would be living with her permanently, knowing that the custody matter had not yet been decided. *Stone-Crosby v. Mickens-Cook*, 318 Ga. App. 313, 733 S.E.2d 842 (2012).

Court is not to merely ratify parties' agreement. — Trial court has an independent duty in cases of joint custody to make an award of custody that is in the best interest of the children and is not authorized to merely ratify the practices of the parties. *Templeman v. Earnest*, 209 Ga. App. 557, 434 S.E.2d 106 (1993).

Judge must hear evidence from both parties regarding disposition which would be in child's best interest. *Mitchell v. Ward*, 231 Ga. 671, 203 S.E.2d 484 (1974).

Considerations relevant in determining best interests of child. — As to conditions occurring after custody award, court has full discretion in awarding custody of child, and in exercise of such discretion the court may look to circumstances relating to child's ordinary comfort and contentment, its intellectual and moral development, and award custody to either parents according as it may be to best interests of child. *Milner v. Gatlin*, 143 Ga. 816, 85 S.E. 1045, 1916B L.R.A.

977 (1915); *Gillens v. Gillens*, 148 Ga. 631, 97 S.E. 669 (1918).

Moving as factor for consideration — There was evidence to support the trial court's determination that a move to Utah would be disruptive to the child, including evidence that the child had lived in Georgia most of the child's life, had relatives in Georgia, and had been unhappy on trips to Utah; such disruption was a permitted factor in considering the child's best interests as required by O.C.G.A. § 19-9-3. *Curtice v. Harwell*, 313 Ga. App. 263, 721 S.E.2d 200 (2011).

Trial court did not err by modifying a father's custody of a son because the father had been involved in a criminal rape trial involving a former babysitter, which caused the father to move to a different city due to the notoriety, and it was proper for the trial court to consider the logistics of visitation and a relocation of a parent in determining the best interests of the child. *Neal v. Hibbard*, 770 S.E.2d 600, No. S14A1673, 2015 Ga. LEXIS 183 (2015).

Award of sole custody to one parent proper. — Trial court did not abuse the court's discretion in awarding sole physical custody of two minor children to one parent where the grant was in the children's best interests and the other parent had an extramarital affair, but was granted liberal visitation with no restriction on the presence of the person with whom the affair had been conducted. *Patel v. Patel*, 276 Ga. 266, 577 S.E.2d 587 (2003).

Custody award to husband justified. — Trial court did not err in awarding primary physical custody of the child to the husband based on best interest of the child because the husband's employment schedule enabled the husband to devote more time to the child, the child was better behaved when the child was reared by the husband, and the husband provided more nutritious meals for the child. *Rose v. Rose*, 294 Ga. 719, 755 S.E.2d 737 (2014).

Best interest standard applied after child legitimized. — Trial court erred in applying the change in circumstances standard to a father's custody petition as the father had legitimized the child, but no previous custody determina-

tion had been made; the best interest of the child standard set forth in O.C.G.A. § 19-9-3(a) should have been used. *Braynon v. Hilbert*, 275 Ga. App. 511, 621 S.E.2d 529 (2005).

Best interest of the child standard set forth in O.C.G.A. § 19-9-3(a) should be used after a child is legitimized if no previous adjudication of custody has been made. *Braynon v. Hilbert*, 275 Ga. App. 511, 621 S.E.2d 529 (2005).

3. Application

Parents cannot by contract control discretion and duty of court in determining question of custody, and court may disregard contract and award children to either parent or to third party if best interests of children require it. *Stanton v. Stanton*, 213 Ga. 545, 100 S.E.2d 289 (1957); *Crisp v. McGill*, 229 Ga. 389, 191 S.E.2d 836 (1972).

Any agreement or consent to custody between husband and wife is not controlling on court. *Weaver v. Weaver*, 238 Ga. 101, 230 S.E.2d 886 (1976).

Father of child rendered legitimate by court order has claim to parental and custodial rights with respect to his child. *Mitchell v. Ward*, 231 Ga. 671, 203 S.E.2d 484 (1974).

Juvenile court judge cannot disregard parental right to custody. — When question of custody has been transferred to juvenile court by superior court in divorce action, the general law pertaining to right of parents to have custody of their children (unless they have forfeited their right in manner provided by law) cannot be disregarded by judge of juvenile court. *Matthews v. Matthews*, 213 Ga. 87, 97 S.E.2d 158 (1957).

Adopting parent on equal footing as biological. — Trial court did not err in awarding primary physical custody of the couple's biological child to the wife as the court's determination that splitting the siblings would cause emotional harm to both children was sufficient to overcome the statutory presumption in favor of the husband with respect to custody of the older child, who was the biological child of the husband and adopted by the wife. *Hastings v. Hastings*, 291 Ga. 782, 732 S.E.2d 272 (2012).

That father has no prima facie right to custody does not enlarge third parties' rights. *Knox v. Knox*, 226 Ga. 619, 176 S.E.2d 712 (1970).

Depriving father of all visitation rights was error in the absence of any probative evidence that he was morally unfit to exercise his right of access to his children. *Woodruff v. Woodruff*, 272 Ga. 485, 531 S.E.2d 714 (2000).

Father has prima facie right to custody as against stepfather. — In suit by father for custody of his child against child's stepfather, the mother having died, prima facie right to custody is in father, and will not be overturned absent strong case as to welfare of child so as to authorize award of child to stepfather. *Chapin v. Cummings*, 191 Ga. 408, 12 S.E.2d 312 (1940).

Judicial discretion to award custody to third person. — Trial judge in custody proceeding is vested with discretion to award custody to third person, provided it appears that such disposition is in best interests of children. *Shipp v. Shipp*, 186 Ga. 494, 198 S.E. 230 (1938).

When custody should not ordinarily be awarded to third party. — While, as between parents, court has very broad discretion — looking always to best interest of child — and may award child to one, to exclusion of other, though latter may not be an unfit person to exercise custody, or has not otherwise lost right of custody, still the court, in controversy between parents, should not, ordinarily, award child to third party, if one or both parents are morally fit and custody has not otherwise been lost in one of the modes provided by law. *Hill v. Rivers*, 200 Ga. 354, 37 S.E.2d 386 (1946); *Knox v. Knox*, 226 Ga. 619, 176 S.E.2d 712 (1970).

Custody award to third person, based on parental unfitness, not reversed if supported by reasonable evidence. *Gazaway v. Brackett*, 241 Ga. 127, 244 S.E.2d 238 (1978).

Factors to be considered by court. — In making award, court may consider fitness for custody, character, personality, and general health. *Weaver v. Weaver*, 238 Ga. 101, 230 S.E.2d 886 (1976).

Witness testimony in contest between parents. — In contest between

Award of Custody (Cont'd)**3. Application (Cont'd)**

parents over possession of child, witnesses should not be permitted to give their opinion that one or the other of the parents is unfit and improper, or that interest of child will be best subserved by awarding custody to one of the contesting parties. *Milner v. Gatlin*, 143 Ga. 816, 85 S.E. 1045, 16 L.R.A. 977 (1915).

Judge may exclude parties from courtroom while child involved in custody dispute is testifying, but judge is not required to do so, as a matter of law. *Brooks v. Thomas*, 193 Ga. 696, 19 S.E.2d 497 (1942).

If evidence of each parent's fitness conflicts, award not disturbed. — When evidence is in conflict regarding fitness of each of the divorced parents of minor child to have the child's custody, discretion of trial judge in awarding child to the mother will not be controlled. *Speer v. Speer*, 217 Ga. 341, 122 S.E.2d 84 (1961); *Brown v. Brown*, 222 Ga. 446, 150 S.E.2d 615 (1966).

When evidence heard by trial judge is conflicting on issue of relative fitness, appellate court cannot hold that judge abused judicial discretion in an award of custody made by the judge. *Hobson v. Hobson*, 222 Ga. 530, 150 S.E.2d 655 (1966).

In a divorce, a trial court's award of primary physical custody of the parties' children to the husband was not disturbed because there was evidence that both parties were fit and proper parents, and, although the husband admitted hitting the wife and crashing into the wife's car after learning of the wife's extramarital affair, the trial court properly considered this evidence under O.C.G.A. § 19-9-3(a)(3), and the award was not an abuse of discretion. *Brock v. Brock*, 279 Ga. 119, 610 S.E.2d 29 (2005).

Effect of custody decree upon rights of noncustodial parent. — Natural rights of father are not annulled by provision in divorce decree awarding custody of child to mother; they are only suspended for time being, and are revived in full force upon mother's death, or upon her forfeiture of her right of custody. *Hill*

v. Rivers, 200 Ga. 354, 37 S.E.2d 386 (1946).

Court deciding custody cannot retain exclusive jurisdiction over future custody. — Final decree in divorce case awarding custody of minor children to one or the other of the parties thereto is conclusive as between parties as to right of such custody, unless change of circumstances affecting interest and welfare of such children is shown and this is true even when decree, after specifically awarding such custody, is immediately followed by sentence, "subject to the further order of this court." *Fuller v. Fuller*, 197 Ga. 719, 30 S.E.2d 600 (1944).

When child is involved in granting of divorce decree, it is duty of trial judge to award custody; and while superior court in which divorce decree was rendered may have sought to retain exclusive jurisdiction over custody of child involved by subjecting judgment to such further order as court might pass, such judgment will not divest award of award's finality, nor retain exclusive jurisdiction over custody of child when change of condition affecting child's welfare occurs. *Hanson v. Stegall*, 208 Ga. 403, 67 S.E.2d 109 (1951).

Order of court in divorce decree, to effect that child of parties should remain within jurisdiction of court and that court retained jurisdiction of cause and parties thereto, constituted an attempt on part of the trial court to retain exclusive jurisdiction of case, which may not be done. *Gibbs v. North*, 211 Ga. 231, 84 S.E.2d 833 (1954).

Custody decrees of other states are generally given full effect. — General rule is that decree of divorce awarding custody of children of parties, rendered by court of another state having jurisdiction of subject matter and of parties, will be given full effect in another state. *Brandon v. Brandon*, 154 Ga. 661, 115 S.E. 115 (1922).

Out-of-state custody decree given full effect in Georgia. — Decree of divorce awarding custody of children of parties, rendered by court of another state having jurisdiction of subject matter and of parties, shall be given full effect in this state. *Kniepkamp v. Richards*, 192 Ga. 509, 16 S.E.2d 24 (1941).

Out-of-state custody award not subject to change absent changed circumstances. — If there is no apparent change in status of parties before institution of proceeding in this state, decree of foreign state awarding custody will not be changed if court had jurisdiction of subject matter and of parties. *Hammond v. Hammond*, 90 Ga. 527, 16 S.E. 265 (1892); *Brandon v. Brandon*, 154 Ga. 661, 115 S.E. 115 (1922).

Decisions as to religious training of children. — Absent contrary agreement, custodial parent may determine religious training children are to receive. *Appelbaum v. Hames*, 159 Ga. App. 552, 284 S.E.2d 58 (1981).

Courts should be loath to interfere with religious training sanctioned by custodian, since no end of difficulties would arise if judges sought to prescribe or proscribe selection of a religious faith made by a custodial parent. *Appelbaum v. Hames*, 159 Ga. App. 552, 284 S.E.2d 58 (1981).

Custody award to husband justified. — In a divorce action, a trial court did not abuse the court's discretion in making a husband the primary physical custodian under O.C.G.A. § 19-9-3(a)(3) because the wife had been romantically involved with a married man prior to the divorce, the wife intended to go back to school full-time to attain a bachelor's degree and a law degree, and the wife had threatened the life of a neighbor; the husband intended to remain in the marital home and was seeking to transfer from his position as a commercial airline pilot to a position in the flight training department. *Rembert v. Rembert*, 285 Ga. 260, 674 S.E.2d 892 (2009).

Father's abandonment of children to start a new life. — Evidence that a father had left his wife and four young children with their relatives in Texas with no job, money, or home, and then returned to Georgia where he obtained a unilateral divorce, along with evidence that he did not support the children and seldom visited the children, supported a trial court's finding that a change in custody to the mother was in the children's best interests under O.C.G.A. § 19-9-3(a)(3). *Saravia v. Mendoza*, 303 Ga. App. 758, 695 S.E.2d 47 (2010).

4. Finality of Award

Custody decree is conclusive absent change of circumstances. — Judgment in proceeding between parents to secure custody of minor children is conclusive upon the parents unless a material change of circumstances affecting the welfare of the children is made to appear. *Kniepkamp v. Richards*, 192 Ga. 509, 16 S.E.2d 24 (1941); *Brooks v. Thomas*, 193 Ga. 696, 19 S.E. 497 (1942); *Jordan v. Jordan*, 195 Ga. 771, 25 S.E.2d 500 (1943); *Fortson v. Fortson*, 197 Ga. 699, 30 S.E.2d 165 (1944); *Handley v. Handley*, 204 Ga. 57, 48 S.E.2d 827 (1948).

Doctrine of *res judicata* applies in custody case when award of custody has been made; and judge may thereafter exercise discretion as to custody of children only so far as there may be new and material conditions and circumstances substantially affecting interest and welfare of children. *Benefield v. Benefield*, 216 Ga. 593, 118 S.E.2d 464 (1961); *Adams v. Heffernan*, 217 Ga. 404, 122 S.E.2d 735 (1961).

Conclusiveness of custody decree relates to status existing at time of rendition of such judgment. *Handley v. Handley*, 204 Ga. 57, 48 S.E.2d 827 (1948).

Award of custody of children in divorce decree is binding upon parties thereto upon principles of *res judicata* under facts then existing. *Durden v. Durden*, 224 Ga. 417, 162 S.E.2d 385 (1968).

Agreement does not affect award's conclusiveness on existing facts. — When on grant of divorce between parents, custody of minor children was awarded to mother, the fact that decree as to custody was based upon agreement did not deprive decree of usual attribute of conclusiveness. While in all such cases paramount issue is welfare of children, doctrine of *res adjudicata* is nevertheless applicable; and when award has been made, the judge may thereafter exercise discretion as to custody of children only so far as there may be new and material conditions and circumstances substantially affecting their interest and welfare. *Fortson v. Fortson*, 195 Ga. 750, 25 S.E.2d 518 (1943), later appeal, 197 Ga. 699, 30 S.E.2d 165 (1944).

Award of Custody (Cont'd)**4. Finality of Award (Cont'd)**

Permanent award not timely. — Court can make a final disposition of minor children of the parties only when a divorce is granted. Thus, the trial court erred in entering a "Permanent Order of Custody" before a divorce was granted. *Rowe v. Rowe*, 195 Ga. App. 493, 393 S.E.2d 750 (1990).

Finality of order modifying custody. — An order modifying custody, issued following a "temporary" hearing under USCR 24.5, was final. In a post-decree custody modification action authorized by a prior version of O.C.G.A. § 19-9-1(b), the trial court was without authority to enter a "temporary" custody award. *Hightower v. Martin*, 198 Ga. App. 855, 403 S.E.2d 862 (1991), but see *Massey v. Massey*, 227 Ga. App. 906, 490 S.E.2d 205 (1997).

Parental Fitness

Fitness of parties seeking custody of minor children is always a proper subject of inquiry. *Adams v. Heffernan*, 217 Ga. 404, 122 S.E.2d 735 (1961).

Joint custody. — When the trial court determines that both parents are fit and equally capable of caring for the child, the court must consider joint custody but is not required to enter such an order unless the court specifically finds that to do so would be in the best interest of the child. *Baldwin v. Baldwin*, 265 Ga. 465, 458 S.E.2d 126 (1995).

Parent not unfit for failure to maintain close relationship with child. — Father cannot be considered unfit merely because he has not maintained a close relationship with his daughter during former wife's custody of child since it appears that such relationship was made difficult, if not impossible, by the attitude and behavior of the mother. *Knox v. Knox*, 226 Ga. 619, 176 S.E.2d 712 (1970).

Husband's alcoholism and resulting cruel treatment of wife and children are relevant to custodial fitness. *Weaver v. Weaver*, 238 Ga. 101, 230 S.E.2d 886 (1976).

Sexual relationship not dispositive. — Mother's dating man with whom she

had a sexual relationship did not render her unfit in the absence of any evidence of cohabitation or of open sexual activity, rendering the trial court's finding of meretricious relationship erroneous and the child's independent selection of the mother as her guardian controlling. *Saxon v. Saxon*, 207 Ga. App. 471, 428 S.E.2d 376 (1993).

Being a prisoner on parole renders parent unfit for custody. — While commission of crime might not absolutely forfeit father's right to custody for all time, being a prisoner on parole makes him a person unfit to care for his child. *Yancey v. Watson*, 217 Ga. 215, 121 S.E.2d 772 (1961).

Effect of finding that mother may have partial custody. — Judgment that there has been an improvement in health of mother and that such improvement has progressed to extent that she should have partial custody of children on stated occasions consistent with their best interests and welfare is necessarily a holding that she was not a fit and proper person to have complete custody of children. *Northcutt v. Northcutt*, 220 Ga. 245, 138 S.E.2d 377 (1964).

Court's judgment regarding fitness is conclusive unless evidence demands otherwise. — Unless evidence demands finding contrary to trial court's judgment that parent is fit or unfit, judgment of trial court on such issue is conclusive and will not be disturbed on appeal. *Hardy v. Hardee*, 225 Ga. 585, 170 S.E.2d 417 (1969); *Weaver v. Weaver*, 238 Ga. 101, 230 S.E.2d 886 (1976).

Award when both parents found fit was not abuse of discretion. — Trial court, which had found that the husband was a suitable primary physical custodian, did not err in awarding primary physical custody to the wife; when a trial court found both parents to be fit custodians, the court's decision assigning primary physical custody to one would not be disturbed absent an abuse of discretion, which had not been shown here. *Alejandro v. Alejandro*, 282 Ga. 453, 651 S.E.2d 62 (2007).

Restrictions on overnight guests. — Provision in a divorce agreement prohibiting either party from having unrelated

overnight guests of the opposite gender while the parties' children were present was not overly broad or unduly burdensome, nor did the provision violate public policy, and a trial court did not err in enforcing the provision and finding the mother in contempt for the provision's violation. *Norman v. Norman*, 329 Ga. App. 502, 765 S.E.2d 677 (2014).

Selection by Child

Child selection provision constitutional. — Child selection provision of former Code 1933, § 74-107 (see now O.C.G.A. § 19-9-3) did not violate Ga. Const. 1976, Art. I, Sec. II, Para. IV (see now Ga. Const. 1983, Art. I, Sec. II, Para. III). *Froug v. Harper*, 220 Ga. 582, 140 S.E.2d 844 (1965).

Step-father is not parent within the meaning of O.C.G.A. § 19-9-3. In re A.P.H., 236 Ga. App. 762, 514 S.E.2d 46 (1999).

Giving child choice provides means of changing custody without showing changed conditions and circumstances. *Froug v. Harper*, 220 Ga. 582, 140 S.E.2d 844 (1965).

Child's election invalid. — In reading O.C.G.A. § 19-9-3(a)(4) and (5) so as to give these two sections sensible and intelligent effect, the court of appeals held that a trial court retains exclusive authority to grant joint physical custody; thus, when the parties' 14-year-old child specifically requested that the parties be awarded joint legal and physical custody, the trial court properly held that the election was invalid because the election interfered with the court's authority. *Sharpe v. Perkins*, 284 Ga. App. 376, 644 S.E.2d 178 (2007), cert. denied, 2007 Ga. LEXIS 509 (Ga. 2007).

When choice given to children over 14 applies. — Provision which gives child who has reached age of 14 years the right to select parent with whom the child desires to live, unless such parent is not a fit and proper person to have custody of the child, applies only when custody of minor child is in controversy between parents. *Fort v. Alewine*, 223 Ga. 359, 155 S.E.2d 12 (1967).

Parental right of custody cannot defeat choice of child over 14. — No

parental right of custody by judgment or decree can defeat right of child reaching 14 years of age to select parent with whom that child desires to live. *Adams v. Adams*, 219 Ga. 633, 135 S.E.2d 428 (1964); *Harbin v. Harbin*, 238 Ga. 109, 230 S.E.2d 889 (1976).

Choice of child over 14 does not preclude judicial discretion. — Though child 15 years of age has right to select which parent the child desires to live with, the trial judge must determine what is in the best interest, welfare, and happiness of the child; and in making this determination the judge has wide latitude and discretion. *Pritchett v. Pritchett*, 219 Ga. 635, 135 S.E.2d 417 (1964).

Choice of child over 14 is generally controlling. — Language of former Code 1933, § 74-107 (see now O.C.G.A. § 19-9-3) allowing selection, by child who has reached age of 14 years, of parent with whom he or she desires to live is controlling save and except in one situation, which is when parent so selected is determined by the trial court not to be a fit and proper custodian. *Froug v. Harper*, 220 Ga. 582, 140 S.E.2d 844 (1965).

Right of selection of child who has reached 14 years of age can only be defeated by showing of present unfitness. *Harbin v. Harbin*, 238 Ga. 109, 230 S.E.2d 889 (1976).

Since there were no allegations of parental unfitness, a 14-year-old child was entitled to select which parent to live with; therefore, the trial court properly approved the parents' settlement agreement that reflected the child's desire to change residential custodians. *Ford v. Hanna*, 293 Ga. App. 863, 668 S.E.2d 271 (2008).

Choice did not mandate modification if election was not sincere. — Trial court did not err in denying the father's request to modify custody as to the 15-year-old child as, despite the fact that the child expressed an interest in remaining with the father, there was some evidence that the child's election was not sincere, including the guardian ad litem's testimony that the guardian thought the children's letters to the guardian were written with assistance of the father and the father's family. *Driver v. Sene*, 327 Ga.

Selection by Child (Cont'd)

App. 275, 758 S.E.2d 613 (2014).

When court lacks discretion to override child's choice. — Child's selection of parent with whom child desires to live, when child has reached 14 years of age, is controlling absent finding that such parent is unfit. Without finding of unfitness, child's selection must be recognized and court has no discretion to act otherwise. *Harbin v. Harbin*, 238 Ga. 109, 230 S.E.2d 889 (1976).

Statutory adjudication of unfitness not res judicata. — To hold that prior adjudication of unfitness is res judicata or evidence of present unfitness would overly restrict statutory right of child who has reached 14 years of age to select parent with whom the child wishes to live. *Harbin v. Harbin*, 238 Ga. 109, 230 S.E.2d 889 (1976).

Effect of custody award based upon child's choice. — When trial court awards 14-year-old child to parent selected by such child as parent with whom the child desires to live, it is tantamount to finding that such parent is fit, just as denial of such child's request must be construed as finding that such parent is unfit. *Hardy v. Hardee*, 225 Ga. 585, 170 S.E.2d 417 (1969).

Parent resisting child's selection bears burden of proving that parent selected is unfit. *Harbin v. Harbin*, 238 Ga. 109, 230 S.E.2d 889 (1976).

Change of Custody**1. In General**

Award of custody does not give custodial parent vested right. — When award of custody is made to parent in divorce action and subsequently there is a change of circumstances and conditions substantially affecting welfare of child, parent to whom custody was awarded does not have vested right of custody that will defeat further action by courts. *Adams v. Adams*, 219 Ga. 633, 135 S.E.2d 428 (1964).

Prima facie right to custody conferred by decree may be forfeited. — When divorce decree, awarding custody to father, vests prima facie right of custody

in father, that prima facie right of custody may be forfeited by actions of father subsequent to rendition of decree. *Sessions v. Oliver*, 204 Ga. 425, 50 S.E.2d 54 (1948).

Custody award is not conclusive in proceeding involving subsequent neglect. — Decree awarding custody cannot anticipate changes which may occur in condition of parents, or in their character and fitness for care of their children. For this reason such decree is at best but prima facie evidence of legal right to the child's custody; and is not conclusive in subsequent proceedings when neglect or mistreatment of child, or unfitness of parent since date of decree, is involved. *Williams v. Crosby*, 118 Ga. 296, 45 S.E. 282 (1903); *Barlow v. Barlow*, 141 Ga. 535, 81 S.E. 433, 52 L.R.A. (n.s.) 683 (1914); *Milner v. Gatlin*, 143 Ga. 816, 85 S.E. 1045, 1916B L.R.A. 977 (1915); *Gillens v. Gillens*, 148 Ga. 631, 97 S.E. 669 (1918); *Brandon v. Brandon*, 154 Ga. 661, 115 S.E. 115 (1922).

Changed circumstances may render change of custody necessary. — Change of status may authorize a different judgment in subsequent proceeding. Capacity, ability, or fitness of party to whom child was awarded in previous proceeding may thereafter become entirely different. The status of both such parties and the child may have changed. Change of circumstances may render change necessary in order to promote health, happiness, or welfare of child. *Handley v. Handley*, 204 Ga. 57, 48 S.E.2d 827 (1948).

Prerequisite to changing custody. — Once permanent child custody award has been entered, test for use by trial court in change of child custody suits is whether there has been a change of conditions affecting welfare of child. *Gazaway v. Brackett*, 241 Ga. 127, 244 S.E.2d 238 (1978).

Prerequisite to modification of out-of-state custody award. — Judgment of court of competent jurisdiction of sister state may be modified only when it appears that there has been such change in conditions since original decree as would authorize modification of similar judgment rendered by courts of this state. *Kniepkamp v. Richards*, 192 Ga. 509, 16 S.E.2d 24 (1941); *Bowen v. Bowen*, 223 Ga.

800, 158 S.E.2d 233 (1967), overruled on other grounds, *Crumbley v. Stewart*, 238 Ga. 169, 231 S.E.2d 772 (1977).

Power of court to amend award of custody. — See *Banister v. Banister*, 240 Ga. 513, 241 S.E.2d 247 (1978).

Court having exclusive right to award change of custody. — Generally, court where legal custodian resides has exclusive right to award change of custody; this is true whether legal custodian lives in another state or in another county, and irrespective of physical presence of child. *Matthews v. Matthews*, 238 Ga. 201, 232 S.E.2d 76 (1977).

Proceeding to change custody may not be brought in county in which noncustodial parent resides. *Matthews v. Matthews*, 238 Ga. 201, 232 S.E.2d 76 (1977).

Only court where custodial parent resides can change custody. — Despite child's attaining age of 14 and residing in Georgia with noncustodial parent, Georgia court is not authorized to relitigate issue of legal custody. Only court where custodial parent resides has right to award change in custody. *Bayard v. Willis*, 241 Ga. 459, 246 S.E.2d 315 (1978).

Petition seeking custody change without alleging changed circumstances is subject to dismissal on oral motion. *Fuller v. Fuller*, 197 Ga. 719, 30 S.E.2d 600 (1944).

Self executing provision for change of custody. — Self-executing change in custody failed to provide for a determination whether the custody change was in the best interest of the child at the time the change would automatically occur; thus, the change violated Georgia's public policy as expressed in O.C.G.A. § 19-9-3 that a trial court take into account the factual situation at the time the custody modification is sought, with the court's paramount concern always remaining the best interests and welfare of the minor child. *Bankston v. Warbington*, No. A14A1515, 2015 Ga. App. LEXIS 185 (Mar. 24, 2015).

In *Scott v. Scott*, 276 Ga. 372 (2003), the Supreme Court of Georgia has held that a self-executing change of custody designed to take effect on a triggering event such as remarriage or relocation violates O.C.G.A.

§ 19-9-3(a)(2), which requires that a trial court exercise the court's discretion concerning a change in custody in light of the child's best interests as evaluated at the time of the proposed change. *Bankston v. Warbington*, No. A14A1515, 2015 Ga. App. LEXIS 185 (Mar. 24, 2015).

Evidence of unfitness confined to matters transpiring subsequent to decree. — In action to change custody, evidence of unfitness must be confined to matters transpiring subsequent to decree. *Mallette v. Mallette*, 220 Ga. 401, 139 S.E.2d 322 (1964).

Unless evidence demands change of custody, judge may exercise discretion. — While proof of changed conditions and that child's welfare will be protected by changing custody will authorize judgment to that effect, since evidence does not demand finding to that effect, matter is left to discretion of the trial judge. *Floyd v. Floyd*, 218 Ga. 606, 129 S.E.2d 786 (1963).

Change of custody supported by reasonable evidence will not be reversed. — On appeal, when permanent child custody award has been made, appellate court will not reverse if there is any reasonable evidence to support change in custody. *Dearman v. Rhoden*, 235 Ga. 457, 219 S.E.2d 704 (1975); *Gazaway v. Brackett*, 241 Ga. 127, 244 S.E.2d 238 (1978).

In habeas proceeding to recover child from noncustodial, resident parent. — When nonresident parent who has been awarded custody of child by court order enters this state to regain that child from noncustodial parent and files habeas corpus petition, trial court may not reconsider question of legal custody. *Bayard v. Willis*, 241 Ga. 459, 246 S.E.2d 315 (1978).

Remand of attorney fee award required. — In a child custody modification proceeding, the trial court erred by awarding attorney fees to the father in the amount of \$4,000 under O.C.G.A. § 19-9-3 as the award was not supported by the record since the trial court did not explain the statutory basis for the award and did not enter any findings necessary to support the award as required by O.C.G.A. § 19-6-15(k)(5). *Kuehn v. Key*,

Change of Custody (Cont'd)**1. In General (Cont'd)**

325 Ga. App. 512, 754 S.E.2d 103 (2014).

Award of attorney's and guardian ad litem fees proper. — In a father's petition for a change of custody, in which he requested the appointment of a guardian ad litem and did not prevail, the trial court did not err in determining that the father should pay two-thirds of the guardian ad litem's fees of \$6,200 and the mother should pay one-third, pursuant to O.C.G.A. § 19-9-3(g) and Ga. Unif. Sup. Ct. R. 24.9(8)(g); the father was also ordered to pay a portion of the mother's attorney's fees. *Gordon v. Abrahams*, 330 Ga. App. 795, 769 S.E.2d 544 (2015).

Nondischargeability of fee awards in bankruptcy. — Awards in the amount of \$2,474 and \$11,865 which a Georgia court made under O.C.G.A. § 19-9-3 to a Chapter 7 debtor's ex-husband and a guardian ad litem, respectively, in a change of custody proceeding the ex-husband filed against the debtor, were nondischargeable under 11 U.S.C. § 523 because they were "in the nature of support" for the child. *Rackley v. Rackley* (In re Rackley), 502 B.R. 615 (Bankr. N.D. Ga. 2013).

2. Application

Best interests of child are controlling as to custody changes. — On petition of divorced parent to change custody of child based on new conditions, main question to consider is interests and welfare of children. *Elders v. Elders*, 206 Ga. 297, 57 S.E.2d 83 (1950).

While self-executing change of custody provisions are not expressly prohibited by statutory law, any such provision that fails to give paramount import to the child's best interests in a change of custody as between parents violates Georgia's public policy as expressed in the statute; therefore, such a provision that provided for an automatic change of custody upon a custodial parent's move from a particular county could not stand. *Scott v. Scott*, 276 Ga. 372, 578 S.E.2d 876 (2003).

Transfer of case to juvenile court for investigation. — When change of circumstances is alleged, trial judge may

transfer case to juvenile court for investigation. *Slate v. Coggins*, 181 Ga. 17, 181 S.E. 145 (1935); *Fortson v. Fortson*, 197 Ga. 699, 30 S.E.2d 165 (1944).

When evidence of changed circumstances conflicts, disposition by trial court will not be disturbed. *Bosson v. Bosson*, 223 Ga. 793, 158 S.E.2d 231 (1967).

Decree is prima facie evidence in mother's favor. — Decree in divorce suit awarding custody to mother is prima facie evidence in her favor and father cannot regain custody without showing affirmatively that a material change in circumstances affecting welfare of children occurred since original decree. *Fortson v. Fortson*, 195 Ga. 750, 25 S.E.2d 518 (1943), later appeal, 197 Ga. 699, 30 S.E.2d 165 (1944).

Decree in divorce suit, granted by court having jurisdiction of subject matter and of parties, and awarding custody of child to one parent, is at best but prima facie evidence of legal right to child's custody, but is not conclusive when neglect or mistreatment of child, or unfitness of parent since date of decree, is involved. *Fortson v. Fortson*, 200 Ga. 116, 35 S.E.2d 896 (1945).

Parents cannot transfer custody by agreement without court consent. — After custody decree, parents themselves cannot by new agreement transfer custody without consent of court as representative of state and children. Nor would their private recitals in an attempted agreement be binding upon court as evidence of change in condition. *Fortson v. Fortson*, 195 Ga. 750, 25 S.E.2d 518 (1943), later appeal, 197 Ga. 699, 30 S.E.2d 165 (1944).

Whether particular circumstances warrant custody change is question of fact. — Whether there are changed conditions affecting welfare of child occurring after rendition of former final custody judgment which will warrant changing custody is essentially a fact question in each individual case. *Dearman v. Rhoden*, 235 Ga. 457, 219 S.E.2d 704 (1975).

Relevant changes are not confined to those of custodial parent. — Change of circumstances that would render prior judgment inconclusive is not necessarily

limited to change in moral or financial condition of parent to whom initial award was made. *Handley v. Handley*, 204 Ga. 57, 48 S.E.2d 827 (1948); *Adams v. Heffernan*, 217 Ga. 404, 122 S.E.2d 735 (1961).

Relevant changes include those of circumstances of either parent or child. — Change of circumstances that would render prior judgment inconclusive includes any new and material change in circumstances of either parent or of children which might substantially affect health, happiness, or welfare of children. *Handley v. Handley*, 204 Ga. 57, 48 S.E.2d 827 (1948).

Forfeiture of parental rights not prerequisite to custody change. — In order to change award of custody, trial court does not necessarily have to find that legal custodian has forfeited parental rights under former Code 1933, § 74-108 or §§ 74-109 and 74-110 (see now O.C.G.A. § 19-7-1 or O.C.G.A. § 19-7-4). *Adams v. Heffernan*, 217 Ga. 404, 122 S.E.2d 735 (1961); *Dearman v. Rhoden*, 235 Ga. 457, 219 S.E.2d 704 (1975).

Effect of custodial parent's forfeiture of custodial rights. — When custody of minor child awarded by divorce decree is forfeited in mother by reason of her unfitness, custody automatically inures to father, unless it is lost in one of the modes provided by law, or unless he is "unfit" to have custody. *Hill v. Rivers*, 200 Ga. 354, 37 S.E.2d 386 (1946); *Knox v. Knox*, 226 Ga. 619, 176 S.E.2d 712 (1970).

Parent's surrender of custody is change in condition authorizing court to reconsider question of custody. *Askew v. Askew*, 212 Ga. 46, 90 S.E.2d 409 (1955); *Wilt v. Wilt*, 229 Ga. 658, 193 S.E.2d 833 (1972).

Trial court did not err in granting a father's petition for a change of custody and awarding the father primary physical custody of his child because the mother voluntarily surrendered physical custody and control over the child to the maternal grandmother, resulting in a material change in condition; after the entry of a consent order modifying the father's visitation rights, the grandmother limited some of the father's visitation with the child, the mother and grandmother exhib-

ited an ongoing pattern of excluding the father from important medical decisions affecting the child, and the mother and grandmother failed to notify the father whenever the mother executed a power of attorney in loco parentis in favor of the grandmother. *Shotwell v. Filip*, 314 Ga. App. 93, 722 S.E.2d 906 (2012).

Trial court did not abuse the court's discretion by denying a mother's motion for a new trial with regard to a custody modification based on the mother voluntarily giving up custody because there was no affidavit as to the mother's mental condition attached to the motion and the fact that the father could be deployed for an extensive period was clearly contemplated in the court's final order and incorporated parenting plan. *Carr-MacArthur v. Carr*, 296 Ga. 30, 764 S.E.2d 840 (2014).

When custodial parent dies, prima facie right of custody automatically enures to surviving parent. *Hill v. Rivers*, 200 Ga. 354, 37 S.E.2d 386 (1946).

Denial of visitation rights and turning children against noncustodial parent. — Allegations that father had moved children over 1000 miles away from mother's residence, that when she travels that distance to see children, he refuses to let her visit them or lets her see them only when it pleases him, that he has insulted her and intimidated her, has prejudiced children against her, instructed them not to call her "mother" and told them that she was not their mother, were such allegations of fact as would support conclusion that he was an unfit person to have their custody and, if proven to be true, to authorize a change in custody. *Jones v. White*, 209 Ga. 412, 73 S.E.2d 187 (1952).

In an action for change of custody, the judge could conclude from the evidence that the father's behavior toward the mother, in large part contemptuous of the court's authority, and his negative attitude and overt antipathy toward her relationship with the children, warranted modification of custody. *Arp v. Hammonds*, 200 Ga. App. 715, 409 S.E.2d 275, cert. denied, 200 Ga. App. 895, 409 S.E.2d 275 (1991).

Denial of visitation supported by evidence. — Father was properly denied

Change of Custody (Cont'd)**2. Application (Cont'd)**

visitation when there was evidence that the father had not seen the child in 18 months, the father had been arrested twice for operating a vehicle while under the influence of alcohol or drugs, and had been cited for failure to maintain a lane while driving, and the father failed to demonstrate that the child was a priority in the father's life. *Bishop v. Baumgartner*, 292 Ga. 460, 738 S.E.2d 604 (2013).

Refusal to return children after visitation. — Trial court properly held a parent in contempt in a post-divorce matter as the parent acknowledged that the parent refused to return the parties' children to the custodial parent after summer visitation and helped the children obtain legal counsel to file a modification of custody proceeding, which was prohibited by prior trial court orders. Further, the custodial parent properly filed the contempt petition in the county wherein that parent resided. Because the custodial parent was successful in having the other parent found in contempt, the custodial parent was properly awarded attorney fees. *Brochin v. Brochin*, 294 Ga. App. 406, 669 S.E.2d 203 (2008).

Religious differences between parents not basis for denying custody change. — It is not ground upon which to deny custody to father, who has not lost such right in any of the modes provided by law, that he may feel it his duty to bring his child up in his own faith, even though child has been taught a different faith heretofore under mother's custody. *Knox v. Knox*, 226 Ga. 619, 176 S.E.2d 712 (1970).

Remarriage of parent, alone, is insufficient to authorize modification of award of custody; an engagement to marry would likewise be insufficient. *North v. North*, 209 Ga. 883, 76 S.E.2d 617 (1953).

Remarriage, alone, of one of parties is not such change of circumstances affecting welfare of child as will justify change in custody. *Fennell v. Fennell*, 209 Ga. 815, 76 S.E.2d 387 (1953).

Remarriage and removal of child to another state not basis for modification

of custody decree. *Mercer v. Foster*, 210 Ga. 546, 81 S.E.2d 458 (1954).

Mother's lesbian relationship. — Trial court's order modifying custody of the parties' daughter was reversed as: (1) the father was married when the mother was granted primary physical custody, the mother's lesbian relationships were the primary focus of the original custody hearing, and the mother was in a more stable relationship than when she was awarded primary physical custody; (2) in granting the modification petition, the mother was originally given only visitation rights, but later the daughter's wish to spend equal time with each parent was granted; and (3) still later, the mother was not ordered to change her lifestyle; the trial court implicitly reversed itself on the finding that the court had held justified a custody change and merely reduced the child's time with the mother and her partner. *Moses v. King*, 281 Ga. App. 687, 637 S.E.2d 97 (2006), cert. dismissed, 2007 Ga. LEXIS 84 (Ga. 2007).

Improvement in parent's health, conduct, and moral perspective. — Even if there has been marked improvement in health, conduct, and moral perspective of parent, this alone does not as a matter of law require that minor children of parties be awarded to that parent's custody. *Floyd v. Floyd*, 218 Ga. 606, 129 S.E.2d 786 (1963).

Effect of temporary, voluntary relinquishment of custody upon permanent custody. — Temporary, voluntary relinquishment of actual custody to legitimate child's father for period of time necessary for mother's recuperation from back injuries and sickness does not constitute acquiescence to permanent custody in father so as to amount to abandonment as a matter of law. *Porter v. Johnson*, 242 Ga. 188, 249 S.E.2d 608 (1978).

General talk in community about mother's immorality. — When, on hearing of wife's petition seeking custody of her two minor children, upon alleged change in conditions since judgment awarding custody to husband, only evidence of change was husband's admission that there was general talk in the community about the mother and, knowing that others would tell the children, he told

them that she was immoral and did not love them, it was an abuse of discretion to award custody to wife upon this ground alone. *Elders v. Elders*, 206 Ga. 297, 57 S.E.2d 83 (1950).

Children's preference. — Evidence that children preferred to live with their father rather than move to another state with their mother supported a change in custody of the children from their mother to their father. *Elder v. Elder*, 184 Ga. App. 167, 361 S.E.2d 46 (1987).

Change of older child's custody warranted change of younger child's custody. — Award of custody of the 14-year-old child to father was a sufficient change in condition to warrant change of custody of a younger child to the father as well where the trial court found that the younger child had become dependent upon the 14-year-old and that it was in the younger child's best interest that the child not be separated from the older child after an election to live with her father. *Parkerson v. Parkerson*, 167 Ga. App. 265, 306 S.E.2d 97 (1983).

Effect of older child's selection on younger child. — When a 15-year-old daughter indicated that she wanted to change her custody arrangement and live with her mother, and the mother was found to be a fit and proper custodial parent, such change was ordered pursuant to O.C.G.A. § 19-9-1; upon such custody change of the older daughter, a material change in circumstances occurred such that the trial court should have made a determination whether it was in the younger daughter's best interests to also change custody to the mother as she wished and pursuant to O.C.G.A. § 19-9-3(a)(2). *Durham v. Gipson*, 261 Ga. App. 602, 583 S.E.2d 254 (2003).

Fact that a parent was in arrears on child support payments, while a factor the trial court could consider in determining what was in the best interest of the children and what would best promote their welfare and happiness, did not mandate that the other parent retain custody of the children. *Green v. Krebs*, 245 Ga. App. 756, 538 S.E.2d 832 (2000).

Change of custody held in child's best interest. — Trial court committed no error in finding that it would be in the

child's best interest to live with the father rather than the maternal grandmother because the father presented evidence from a licensed psychologist who opined that the father was a fit and qualified parent to have primary physical custody of the child and would be able to meet the needs of the child in adjusting to a new home; the father had been gainfully employed without a lapse of employment until April 2010 and had been applying for jobs with potential employers, and there was some evidence that the father's wife maintained suitable employment and made adequate income for the family to provide for the child's necessary basic care. *Shotwell v. Filip*, 314 Ga. App. 93, 722 S.E.2d 906 (2012).

Trial court did not err in granting the father's request to modify custody as to the two children the father had with different mothers because the change was in the children's best interest, based on the father's ability to engage in hands-on parenting and synchronize the two boys' school, sports, and church activities. *New v. Goss*, 327 Ga. App. 413, 759 S.E.2d 266 (2014).

Trial court did not abuse the court's discretion by modifying child custody in favor of the father because the record before the trial court included evidence and findings that although both parties were capable of providing for the child, the mother had sufficiently undermined the child's relationship with the father to justify a modification of primary physical custody in favor of the father for at least 18 months as in the best interest of the child. *Bankston v. Warbington*, No. A14A1515, 2015 Ga. App. LEXIS 185 (Mar. 24, 2015).

Evidence held ample to justify change. — See *Milner v. Milner*, 181 Ga. App. 760, 353 S.E.2d 628 (1987).

Joint custody award was properly modified to give a father physical custody because the child was of school age and could no longer rotate between the parents every six months, and the father had a strong support system in Missouri, where the child had spent considerable time and developed a strong bond with the grandparents. *Mitcham v. Spry*, 300 Ga. App. 386, 685 S.E.2d 374 (2009).

Change of Custody (Cont'd)**2. Application (Cont'd)**

Change of custody was warranted due to a material change in circumstances affecting the child's welfare under O.C.G.A. § 19-9-3(a) because: (1) the mother had abandoned the child; (2) the mother had forged a court order, in an attempt to regain physical custody of the child; and (3) the child had excelled in school while residing with the father. *Lynch v. Horton*, 302 Ga. App. 597, 692 S.E.2d 34 (2010), cert. denied, U.S. , 131 S. Ct. 2447, 179 L. Ed. 2d 1210 (2011).

Trial court did not err in granting a mother's petition for modification of custody and awarding the mother permanent primary physical custody of the parties' child because the trial court's findings that the mother's circumstances had improved dramatically since the divorce and that the father had been held in contempt of court for violation of the visitation order and had taken steps to undermine the mother were supported by the evidence. *Viskup v. Visкуп*, 291 Ga. 103, 727 S.E.2d 97 (2012).

Trial court did not abuse the court's discretion by denying a mother's motion for a new trial with regard to an order changing custody of the parties' one minor child to the father because the mother failed to produce newly discovered evidence, repeatedly interfered with the father's visitation, and the record established that the mother obtained a modification in another county under false pretenses; thus, the mother's credibility had been completely impeached. *Fifadara v. Goyal*, 318 Ga. App. 196, 733 S.E.2d 478 (2012).

Sole legal custody was properly awarded to the father of two young children, given that the mother shared her home with her boyfriend, encouraged her child to lie about vacationing with the boyfriend, made derogatory remarks about the father in the children's presence, and drank alcohol in the children's presence in violation of her probation. *Taylor v. Taylor*, 293 Ga. 615, 748 S.E.2d 873 (2013).

Trial court did not abuse the court's

discretion by modifying child custody by awarding the father primary custody under O.C.G.A. § 19-9-3(a)(3)(F), (O), (P) and (a)(4)(A) and (B) because the change of custody ruling was supported under the any evidence standard based on testimony from the father, paternal grandmother, and the guardian ad litem's recommendation, who recommended the change in custody to the father as well. *Kuehn v. Key*, 325 Ga. App. 512, 754 S.E.2d 103 (2014).

Evidence held insufficient to justify change. — Change in custody was not in the child's best interests or warranted by a change in circumstances under O.C.G.A. § 19-9-3(a) because even though the parent frequently left the child with a sitter until 10 p.m., this was due to the parent's job and classes to obtain a college degree; the sitter and teachers asserted that the child and parent got along well and that the child was thriving at school and in the child's extracurricular activities; and an investigation revealed that a mark on the child's back occurred while the child was playing with another child at the sitter's and that it was not caused by the parent or the sitter. *Lurry v. McCants*, 302 Ga. App. 184, 690 S.E.2d 496 (2010).

Trial court did not err in denying a mother's petition for modification of custody because the court applied the correct legal standard when the court concluded that it was not in the children's best interest to modify custody absent a material change in circumstance affecting their well-being; the mother failed to demonstrate that the house where the children lived was inadequate for their needs, that the children's welfare was materially affected by the living arrangements, or that the father's late shifts at work materially affected the children's welfare, and the father had an extensive family network available to the father. *Harris v. Williams*, 304 Ga. App. 390, 696 S.E.2d 131 (2010), overruled on other grounds, *Viskup v. Visкуп*, 291 Ga. 103, 727 S.E.2d 97 (2012).

Trial court abused the court's discretion by granting a mother's petition to change child custody because the court's findings that the mother had been denied visitation by the father on several occasions was unsupported by the evidence since the

mother only testified to one instance when visitation rights were thwarted by the father. *Blue v. Hemmans*, 327 Ga. App. 353, 759 S.E.2d 72 (2014).

Trial court did not err in finding that there was no change of circumstance justifying modification of child custody based on the mother's involvement with a boyfriend who had a conviction for sexual intercourse with a minor because the father knew of the relationship in March 2011, well before the parties entered into a settlement in June 2011; although the father's home was more pleasant and he was more financially stable, this did not warrant a change of custody. *Gordon v. Abrahams*, 330 Ga. App. 795, 769 S.E.2d 544 (2015).

Visitation Rights

Portion of custody award concerning visitation may be modified. — In any case in which judgment has been entered awarding custody of minor, on motion of any party or on motion of court, that portion of judgment concerning visitation rights between parties and their minor children may be subject to review and modification or alteration. *Tirado v. Shelnutt*, 159 Ga. App. 624, 284 S.E.2d 641 (1981).

Plaintiff ex-husband was correct that the due process clause of the Fourteenth Amendment protected a parent's fundamental right to participate in the care, custody, and management of their children, but he failed to show that O.C.G.A. § 19-9-3 violated his substantive due process rights because neither the U.S. Supreme Court nor the U.S. Court of Appeals for the Eleventh Circuit had held that a state had to impose a specific standard of proof for modification of visitation rights. *Gottschalk v. Gottschalk*, No. 10-11979, 2011 U.S. App. LEXIS 12222 (11th Cir. June 16, 2011) (Unpublished).

Elimination of right of first refusal. — Trial court was authorized to eliminate the right of first refusal based on the court's express findings that the provision was not in the child's best interest. *Horn v. Shepherd*, 292 Ga. 14, 732 S.E.2d 427 (2012).

Jurisdiction over custody issues includes visitation rights. — Court whose

jurisdiction over issues involving custody was first invoked had full authority to determine all such issues, including visitation rights. *Tirado v. Shelnutt*, 159 Ga. App. 624, 284 S.E.2d 641 (1981).

Court modification of visitation rights. — Court in which petition to change custody is brought may also modify visitation rights. *Tirado v. Shelnutt*, 159 Ga. App. 624, 284 S.E.2d 641 (1981).

Trial court erred in dismissing a father's contempt petition filed over a year after an earlier petition remained pending; under O.C.G.A. § 19-9-3(b), the trial court had the authority to modify visitation in the contempt proceeding, and relevant information concerning a child custody matter must be received up until the very time that the court rules. *Dennis v. Dennis*, 302 Ga. App. 791, 692 S.E.2d 47 (2010).

In a custody dispute, a trial court did not abuse the court's discretion in modifying a father's visitation rights, O.C.G.A. § 19-9-3(b), by eliminating custody and parenting time because the father's attempted voluntary relinquishment of visitation and other parental rights constituted a material change in condition. *Smith v. Curtis*, 316 Ga. App. 890, 730 S.E.2d 604 (2012).

Trial court did not abuse the court's discretion in denying the father's motion to modify visitation because there was substantial evidence of the father and the father's wife's continued failure to comply with the court's orders pertaining to their harassment and degradation of the mother despite the harm and detriment the degradation caused the child and the father refused to work with the child's psychologist or pay for another qualified psychologist in order to obtain additional or unsupervised visitation. *Vines v. Vines*, 292 Ga. 550, 739 S.E.2d 374 (2013).

Court in which contempt action is brought has authority to modify visitation rights. *Tirado v. Shelnutt*, 159 Ga. App. 624, 284 S.E.2d 641 (1981).

When judge may award specific visitation privileges. — Statute allowed trial judge, who had made award of permanent custody with reasonable visitation privileges, to provide specific visitation privileges once in a two-year period

Visitation Rights (Cont'd)

following the date of entry of such judgment. *Edwards v. Edwards*, 237 Ga. 779, 229 S.E.2d 632 (1976).

Modification by motion. — Any conflict between the provisions of O.C.G.A. §§ 19-9-3(b) and 19-19-1(b) with those of O.C.G.A. § 19-9-23, insofar as seeking modification of visitation rights by motion is concerned, is harmonized by holding that the former come into play only when jurisdiction and venue are also proper. *Bennett v. Wood*, 188 Ga. App. 630, 373 S.E.2d 645 (1988).

Inasmuch as the record shows that this divorce action terminated with the entry of a final judgment and decree; that the wife subsequently changed her residence to another county; and that the husband filed his motion to modify outside the term of court, the trial court erred in ruling on the husband's motion to modify visitation. *Ward v. Ward*, 194 Ga. App. 669, 391 S.E.2d 480 (1990).

Trial court did not err in modifying a visitation schedule because the father was afforded more than one opportunity to respond to the mother's motion for modification; the father waived any challenge to venue by failing to ever object to venue, or otherwise raise the issue, in the trial court. *Cross v. Ivester*, 315 Ga. App. 760, 728 S.E.2d 299 (2012).

Modification of visitation rights permissible in contempt proceeding without advance notice. — Modification to visitation could be made in a contempt proceeding as provided in O.C.G.A. § 19-9-3(b), and the wife was not required to be given notice and time to prepare an adequate response to a motion to modify child visitation because such notice was not required by § 19-9-3(b). *Weeks v. Weeks*, 324 Ga. App. 785, 751 S.E.2d 575 (2013).

Self-executing change in visitation improper. — Trial court's self-executing change in visitation provision in parties' divorce decree could not stand since it did not provide for a determination as to whether the visitation change was in the best interests of the parties' child and since it did not connect the triggering event to those best interests; the provision

simply provided for a change in the wife's visitation if she ever moved out of Georgia, without any further limitations as to time or other considerations. *Rumley-Miawama v. Miawama*, 284 Ga. 811, 671 S.E.2d 827 (2009).

Requiring bond for return of child is discretionary. — Trial judge is empowered to award custody to nonresident for one month each year, and to resident parent for other 11 months; and whether judge requires bond of nonresident for return of child is a matter solely in the judge's discretion. *Pruitt v. Butterfield*, 189 Ga. 593, 6 S.E.2d 786 (1940).

Visitation rights should not be made to depend upon payment of child support or alimony. *Price v. Dawkins*, 242 Ga. 41, 247 S.E.2d 844 (1978).

Payment of travel costs. — Requiring the father to pay some travel costs incurred by his child's out-of-state visits to the mother does not amount to the imposition of child support. *Stewart v. Stewart*, 245 Ga. App. 20, 537 S.E.2d 157 (2000).

Modification of child visitation costs permissible in contempt proceeding. — As the costs of exercising supervised visitation were directly associated with a former spouse's visitation privileges, under O.C.G.A. § 19-9-3(b), the trial court was empowered to increase the amount of visitation costs to be paid by the former spouse in a contempt proceeding brought by the other spouse. *Carlson v. Carlson*, 284 Ga. 143, 663 S.E.2d 673 (2008).

Modification of child visitation rights is matter of discretion with trial court and may be based upon existing circumstances even if they have not changed since prior award. *Tirado v. Shelnutt*, 159 Ga. App. 624, 284 S.E.2d 641 (1981).

Change in visitation rights is not dependent upon changed conditions. — When third party has been awarded permanent custody of child, a parent may obtain custody by showing change of conditions affecting welfare of child, but such parent may obtain increased visitation without necessity of showing such change of conditions. *Gazaway v. Brackett*, 241 Ga. 127, 244 S.E.2d 238 (1978); *Moore v. Moore*, 217 Ga. App. 148, 456 S.E.2d 742 (1995).

Trial judge is fully authorized to modify visitation rights without necessity of any showing of change in conditions. *Tirado v. Shelnutt*, 159 Ga. App. 624, 284 S.E.2d 641 (1981).

It was not error for a trial court to modify a father's visitation without finding a material change in circumstances because O.C.G.A. § 19-9-3(b) specifically allowed a modification in visitation without such a finding. *Gottschalk v. Gottschalk*, 311 Ga. App. 304, 715 S.E.2d 715 (2011).

Increased visitation did not amount to de facto change of custody.

— Increased visitation to a former wife did not amount to a de facto change of custody because the increased visitation did not exceed the time of custody allowed to the former husband; also, the provision allowing the wife to make decisions regarding the children's day-to-day care when the children were in the mother's custody did not amount to a de facto change in custody. *Blackmore v. Blackmore*, 311 Ga. App. 885, 717 S.E.2d 504 (2011).

Father's sexual impropriety towards daughter rendered increase in visitation rights error. — When evidence showed sexual impropriety of father towards daughter under 14 years old and daughter's dislike of father, it was error

for trial judge to increase father's visitation rights. *Ledford v. Bowers*, 248 Ga. 804, 286 S.E.2d 293 (1982).

Visitation with homosexual parent.

— Primary consideration in determining custody and visitation issues is not the sexual mores or behavior of the parent, but whether the child will somehow be harmed by the conduct of the parent. In re *R.E.W.*, 220 Ga. App. 861, 471 S.E.2d 6 (1996).

Fourteen year olds' election rights limited by 1986 amendment.

— Visitation is part of custody. Having made the wishes of a 14-year-old as to custody binding upon the court unless the parent chosen is unfit, the 1986 legislation could not have intended to preclude consideration of the child's wishes as to visitation. O.C.G.A. §§ 19-9-1(a) and 19-9-3(a) preserve the authority of the trial court to set visitation rights based upon the best interests of the child, but do not prohibit the court from using the wishes of a child over 14 years of age together with other factors as the basis for the court's decision. *Worley v. Whiddon*, 261 Ga. 218, 403 S.E.2d 799 (1991).

Judge's decision to increase visitation rights will not be reversed absent an abuse of discretion. *Gazaway v. Brackett*, 241 Ga. 127, 244 S.E.2d 238 (1978).

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Divorce and Separation, §§ 893, 894, 919. 59 Am. Jur. 2d, Parent and Child, § 38 et seq.

Am. Jur. Trials. — Relocation of Children by the Custodial Parent, 65 Am. Jur. Trials 127.

C.J.S. — 67A C.J.S., Parent and Child, §§ 63 et seq., 132 et seq., 146 et seq.

ALR. — Attempt to bastardize child as affecting right to custody of the child, 4 ALR 1119; 37 ALR 531.

Validity of agreement by parent to surrender custody of child in consideration of promise to leave property to child, 15 ALR 223.

Action between parents for the sole pur-

pose of determining custody of child as a proper remedy, 40 ALR 940.

Condition of health of child as consideration in awarding custody, 48 ALR 137.

Death of mother of child whose custody has been awarded to her or to third person by divorce decree as reviving father's common-law duty to support, or right to custody of, child, 128 ALR 989.

Jurisdiction acquired by court in divorce suit over custody and maintenance of child as excluding jurisdiction of other local courts, or as rendering its exercise improper, 146 ALR 1153.

Order in divorce or separation proceeding concerning removal of child from juris-

diction, and award of custody to nonresident, 154 ALR 552.

Extraterritorial effect of provision in decree of divorce as to custody of child, 160 ALR 400.

Custody of child as proper subject of declaratory action, 170 ALR 521.

Jurisdiction to award custody of child having legal domicile in another state, 4 ALR2d 7.

Nonresidence as affecting one's right to custody of child, 15 ALR2d 432.

Alienation of child's affections as affecting custody award, 32 ALR2d 1005.

Right to custody of child as affected by death of custodian appointed by divorce decree, 39 ALR2d 258.

Remarriage of parent as ground for modification of divorce decree as to custody of child, 43 ALR2d 363.

"Split," "divided," or "alternate" custody of children, 92 ALR2d 695.

Violation of custody or visitation provision of agreement or decree as affecting child support payment provision, and vice versa, 95 ALR2d 118.

Child's wishes as factor in awarding custody, 4 ALR3d 1396.

Award of custody of child where contest is between child's father and grandparent, 25 ALR3d 7.

Award of custody of child where contest is between child's grandparent and one other than the child's parent, 30 ALR3d 290.

Extraterritorial effect of valid award of custody of child of divorced parents, in absence of substantial change in circumstances, 35 ALR3d 520.

Noncustodial parent's rights as respects education of child, 36 ALR3d 1093.

Right of putative father to custody of illegitimate child, 45 ALR3d 216.

Right, in child custody proceedings, to cross-examine investigating officer whose report is used by court in its decision, 59 ALR3d 1337.

Modern status of maternal preference rule or presumption in child custody cases, 70 ALR3d 262.

Effect, in subsequent proceedings, of paternity findings or implications in divorce or annulment decree or in support or custody order made incidental thereto, 78 ALR3d 846.

Right to require psychiatric mental examination for party seeking to obtain or retain custody of child, 99 ALR3d 268.

Custodial parent's sexual relations with third person as justifying modification of child custody order, 100 ALR3d 625; 65 ALR5th 591.

Validity and effect, as between former spouses, of agreement releasing parent from payment of child support provided for in an earlier divorce decree, 100 ALR3d 1129.

Admissibility of social worker's expert testimony on child custody issues, 1 ALR4th 837.

Parent's physical disability or handicap as factor in custody award or proceedings, 3 ALR4th 1044.

Race as factor in child custody award or proceedings, 10 ALR4th 796.

Desire of child as to geographical location of residence or domicile as factor in awarding custody or terminating parental rights, 10 ALR4th 827.

Religion as factor in child custody and visitation cases, 22 ALR4th 971.

Interference by custodian of child with noncustodial parent's visitation rights as ground for change of custody, 28 ALR4th 9.

Court-authorized permanent or temporary removal of child by parent to foreign country, 30 ALR4th 548.

Visitation rights of homosexual or lesbian parent, 36 ALR4th 997.

Mother's status as "working mother" as factor in awarding child custody, 62 ALR4th 259.

Child custody: separating children by custody awards to different parents — post-1975 cases, 67 ALR4th 354.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A, 83 ALR4th 742.

Age of parent as factor in awarding custody, 34 ALR5th 57.

Mental health of contesting parent as factor in award of child custody, 53 ALR5th 375.

Initial award or denial of child custody to homosexual or lesbian parent, 62 ALR5th 591.

Custodial parent's relocation as grounds for change of custody, 70 ALR5th 377.

Restrictions on parent's child visitation rights based on parent's sexual conduct, 99 ALR5th 475.

Effect of parent's military service upon child custody, 21 ALR6th 577.

Parents' work schedules and associated dependent care issues as factors in child custody determinations, 26 ALR6th 331.

19-9-4. Investigation of abuse, neglect, or other acts which adversely affect health of child in custody disputes; cost.

(a) On motion of either party in any action or proceeding involving determination of the award of child custody between parents of the child, when such motion contains a specific recitation of actual abuse, neglect, or other overt acts which have adversely affected the health and welfare of the child, the judge may direct the appropriate family and children services agency or any other appropriate entity to investigate the home life and home environment of each of the parents. In any action or proceeding involving determination of the award of child custody between parents of the child when during such proceedings a specific recitation of actual abuse, neglect, or other overt acts which have adversely affected the health and welfare of the child has been made the judge shall also have authority on his or her own motion to order such an investigation if in the judge's opinion the investigation would be useful in determining placement or custody of the child. The judge may also direct either party to pay to the agency the reasonable cost, or any portion thereof, of the investigation. The report of the investigation will be made to the judge directing the investigation. Any report made at the direction of the judge shall be made available to either or both parties for a reasonable period of time prior to the proceedings at which any temporary or permanent custody is to be determined. Both parties shall have the right to confront and cross-examine the person or persons who conducted the investigation or compiled the report if adequate and legal notice is given.

(b) This Code section shall apply only with respect to actions or proceedings in which the issue of child custody is contested; and this Code section is not intended to alter or repeal Code Sections 49-5-40 through 49-5-44. (Ga. L. 1980, p. 1149, §§ 1, 2; Ga. L. 1982, p. 3, § 19; Ga. L. 1982, p. 1189, §§ 1, 2; Ga. L. 2007, p. 554, § 5/HB 369.)

Editor's notes. — Ga. L. 2007, p. 554, § 1/HB 369, not codified by the General Assembly, provides that: "The General Assembly of Georgia declares that it is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their

children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage or relationship."

Ga. L. 2007, p. 554, § 8/HB 369, not codified by the General Assembly, provides that the 2007 amendment shall ap-

ply to all child custody proceedings and modifications of child custody filed on or after January 1, 2008.

JUDICIAL DECISIONS

Report from county department of family and children services. — It is error for trial court to consider report from county Department of Family and Children Services to decide child custody, in absence of stipulation by both parties that court may do so, unless provisions of O.C.G.A. § 19-9-4 apply. *Miele v. Gregory*, 248 Ga. 93, 281 S.E.2d 565 (1981).

Making report available to parties is mandatory. — Provision in subsection (a) of O.C.G.A. § 19-9-4 for making report available to parties is mandatory. *Davis v. Davis*, 253 Ga. 73, 316 S.E.2d 455 (1984).

Failure to make report available requires reversal. — Trial court's failure to comply with mother's request to examine Department of Family and Children Services' report, prepared at the court's direction pursuant to subsection (a) of O.C.G.A. § 19-9-4, required reversal of the court's custody decree. *Davis v. Davis*, 253 Ga. 73, 316 S.E.2d 455 (1984).

Court's refusal to order a second investigation of allegations of child abuse on the part of the father was not an

abuse of discretion, after a prior investigation, which had been conducted at the request of the father, had failed to uncover evidence of any sexual misconduct toward the child and the mother made no effort to obtain a second investigation after the father had agreed to share the costs of the investigation. *Evans v. Stowe*, 181 Ga. App. 489, 352 S.E.2d 811 (1987).

Psychiatric examination. — In attempting to reach a determination regarding the best interest of the child, the superior court has the power, when the issue of child custody is contested, to compel either or both parents to submit to examination and evaluation by a court-appointed clinical psychologist or psychiatrist. The mental health of the parents is an inherent and vital part of their overall "state of health," within the meaning of O.C.G.A. § 19-9-4(a), and can be a critical factor in determining the best interest of the child. *Rowe v. Rowe*, 195 Ga. App. 493, 393 S.E.2d 750 (1990).

Cited in *Howard v. Fincher*, 161 Ga. App. 411, 288 S.E.2d 338 (1982).

RESEARCH REFERENCES

ALR. — Consideration of investigation by welfare agency or the like in making or modifying award as between parents of custody of children, 35 ALR2d 629.

Custodial parent's sexual relations with third person as justifying modification of child custody order, 100 ALR3d 625.

Admissibility of social worker's expert testimony on child custody issues, 1 ALR4th 837.

Admissibility at criminal prosecution of expert testimony on battering parent syndrome, 43 ALR4th 1203.

Tort liability of public authority for failure to remove parentally abused or neglected children from parents' custody, 60 ALR4th 942.

19-9-5. Custody agreements; ratification; supplementation.

(a) In all proceedings under this article between parents, it shall be expressly permissible for the parents of a child to present to the judge an agreement respecting any and all issues concerning custody of the child. As used in this Code section, the term "custody" shall include, without limitation, joint custody as such term is defined in Code Section

19-9-6. As used in this Code section, the term “custody” shall not include payment of child support.

(b) The judge shall ratify the agreement and make such agreement a part of the judge’s final judgment in the proceedings unless the judge makes specific written factual findings as a part of the final judgment that under the circumstances of the parents and the child in such agreement that the agreement would not be in the best interests of the child. The judge shall not refuse to ratify such agreement and to make such agreement a part of the final judgment based solely upon the parents’ choice to use joint custody as a part of such agreement.

(c) In his or her judgment, the judge may supplement the agreement on issues not covered by such agreement. (Code 1981, § 19-9-5, enacted by Ga. L. 1986, p. 1585, § 1; Ga. L. 1992, p. 2135, § 1; Ga. L. 2007, p. 554, § 5/HB 369; Ga. L. 2008, p. 324, § 19/SB 455.)

Editor’s notes. — Ga. L. 2007, p. 554, § 1/HB 369, not codified by the General Assembly, provides: “The General Assembly of Georgia declares that it is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage or relationship.”

Ga. L. 2007, p. 554, § 8/HB 369, not

codified by the General Assembly, provides that the 2007 amendment shall apply to all child custody proceedings and modifications of child custody filed on or after January 1, 2008.

Law reviews. — For annual survey of domestic relations law, see 58 Mercer L. Rev. 133 (2006).

For note, “Surrogate Mother Agreements in Georgia: Conflict and Accord with Statutory and Case Law,” see 4 Ga. St. U.L. Rev. 153 (1988). For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 243 (1992).

JUDICIAL DECISIONS

Support award not precluded by joint custody award. — Judgment awarding joint legal custody of a child does not preclude a monetary award of child support. *Hunt v. Carter*, 261 Ga. 259, 404 S.E.2d 121 (1991).

Consideration of postnuptial reconciliation agreement. — As a trial court did not base the court’s custody decision in the parties’ divorce action solely on their postnuptial reconciliation agreement pursuant to O.C.G.A. § 19-9-5(b), but instead the court found that the custody arrangement encompassed within the agreement was in the children’s best interests pursuant to the factors under O.C.G.A. § 19-9-3(a)(3)(A)-(Q), there was no abuse

of discretion in the custody award. *Spurlin v. Spurlin*, 289 Ga. 818, 716 S.E.2d 209 (2011).

Authority to conduct best interests analysis. — Trial court erroneously found that the court had no discretion to consider whether the parties’ agreement, voluntarily terminating the father’s parental rights under O.C.G.A. § 19-7-1 as part of the divorce settlement, was in the best interests of the child; the trial court, which had authority under O.C.G.A. § 19-9-5(b) to reject a custody agreement as being against the child’s best interests and which had authority under O.C.G.A. § 15-11-94(a) to ascertain whether a voluntary termination was in the child’s best interests, was to reject the agreement if it

was not in the child's best interests. Taylor v. Taylor, 280 Ga. 88, 623 S.E.2d 477 (2005).

Agreed upon modification to custody and visitation erroneously omitted. — Trial court erred in omitting the agreed upon modification to weekend custody and visitation in the court's final

order. Williams v. Williams, 295 Ga. 113, 757 S.E.2d 859 (2014).

Cited in Gould v. Gould, 240 Ga. App. 481, 523 S.E.2d 106 (1999); Petry v. Romo, 249 Ga. App. 99, 547 S.E.2d 736 (2001); Moore v. Moore-McKinney, 297 Ga. App. 703, 678 S.E.2d 152 (2009).

19-9-6. Definitions.

As used in this article, the term:

(1) "Armed forces" means the national guard and the reserve components of the armed forces, the United States army, navy, marine corps, coast guard, and air force.

(2) "Deploy" or "deployment" means military service in compliance with the military orders received by a member of the armed forces to report for combat operations, contingency operations, peacekeeping operations, a remote tour of duty, temporary duty, or other such military service for which a parent is required to report unaccompanied by family members. Deployment shall include the period during which a military parent remains subject to deployment orders and remains deployed on account of sickness, wounds, leave, or other lawful cause. Such term shall include mobilization.

(3) "Deploying parent" or "deployed parent" means a military parent who has been formally notified by military leadership that he or she will deploy or mobilize or who is currently deployed or mobilized.

(4) "Joint custody" means joint legal custody, joint physical custody, or both joint legal custody and joint physical custody. In making an order for joint custody, the judge may order joint legal custody without ordering joint physical custody.

(5) "Joint legal custody" means both parents have equal rights and responsibilities for major decisions concerning the child, including the child's education, health care, extracurricular activities, and religious training; provided, however, that the judge may designate one parent to have sole power to make certain decisions while both parents retain equal rights and responsibilities for other decisions.

(6) "Joint physical custody" means that physical custody is shared by the parents in such a way as to assure the child of substantially equal time and contact with both parents.

(7) "Military family care plan" means a plan that is periodically reviewed by a military parent's commander that provides for care of a military parent's child whenever his or her military duties prevent

such parent from providing care to his or her child and ensures that a military parent has made adequate and reasonable arrangements to provide for the needs and supervision of his or her child whenever a nondeploying parent is unable or unavailable to provide care in the military parent's absence.

(8) "Military parent" means a member of the armed forces who is a legal parent, adoptive parent, or guardian of a child under the age of 18, whose parental rights are established either by operation of law or the process of legitimation, and who has not had his or her parental rights terminated by a court of competent jurisdiction.

(9) "Mobilization" or "mobilize" means the call-up of the national guard and the reserve components of the armed forces to extended active duty service. Such term shall not include National Guard or Reserves component annual training, inactive duty days, drill weekends, or state active duty performed within the boundaries this state.

(10) "Nondeploying parent" means:

(A) A parent who is not a member of the armed forces; or

(B) A military parent who is currently not also a deploying parent.

(11) "Sole custody" means a person, including, but not limited to, a parent, has been awarded permanent custody of a child by a court order. Unless otherwise provided by court order, the person awarded sole custody of a child shall have the rights and responsibilities for major decisions concerning the child, including the child's education, health care, extracurricular activities, and religious training, and the noncustodial parent shall have the right to visitation or parenting time. A person who has not been awarded custody of a child by court order shall not be considered as the sole legal custodian while exercising visitation rights or parenting time.

(12) "State active duty" means the call-up by a governor for the performance of any military duty while serving within the boundaries of that state.

(13) "Temporary duty" means the assignment of a military parent to a geographic location outside of this state for a limited period of time to accomplish training or to assist in the performance of a military mission. (Code 1981, § 19-9-6, enacted by Ga. L. 1990, p. 1423, § 2; Ga. L. 2007, p. 554, § 5/HB 369; Ga. L. 2011, p. 274, § 4/SB 112.)

Editor's notes. — Ga. L. 2007, p. 554, § 1/HB 369, not codified by the General Assembly, provides: "The General Assembly of Georgia declares that it is the policy

of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their chil-

dren and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage or relationship.”

Ga. L. 2007, p. 554, § 8/HB 369, not codified by the General Assembly, provides that the 2007 amendment shall apply to all child custody proceedings and modifications of child custody filed on or after January 1, 2008.

Ga. L. 2011, p. 274, § 1/SB 112, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Military Parents Rights Act.’”

Law reviews. — For comment on *In re A.R.B.*, 209 Ga. App. 324, 433 S.E.2d 411 (1993), regarding redefinition of the best interests standard, see 11 Ga. St. U.L. Rev. 711 (1995).

JUDICIAL DECISIONS

Authority to modify custody not given. — O.C.G.A. § 19-9-6(2) does not grant a trial court the authority to modify child custody. *Daniel v. Daniel*, 250 Ga. App. 482, 552 S.E.2d 479 (2001).

Joint legal custody. — When the court awarded physical custody to the father in the court’s modification order and the father did not contest the award of joint legal custody, the trial court properly exercised the court’s authority in consideration of the best interests of the children to award joint legal custody to both parents. *Walker v. Walker*, 248 Ga. App. 177, 546 S.E.2d 315 (2001).

Joint custody must be considered if both parents are fit. — If the trial court determines that both parents are fit and equally capable of caring for the child, the court must consider joint custody but is not required to enter such an order unless the court specifically finds that to do so would be in the best interest of the child. *Baldwin v. Baldwin*, 265 Ga. 465, 458 S.E.2d 126 (1995).

Joint custody options not properly considered. — Trial court failed to give proper consideration to the joint custody options available under O.C.G.A. § 19-9-6 after both parents demonstrated equal ability to effectively care for and nurture the child. *In re A.R.B.*, 209 Ga. App. 324, 433 S.E.2d 411 (1993).

Support award not precluded by joint custody award. — Judgment awarding joint legal custody of a child does not preclude a monetary award of child support. *Hunt v. Carter*, 261 Ga. 259, 404 S.E.2d 121 (1991).

Joint custody with decision-making authority split. — Award of joint legal

custody designating the mother as the primary physical custodian with the sole power to make decisions concerning the children’s education, health, and religious training, and giving the father equal decision-making responsibility in other areas did not contravene O.C.G.A. § 19-9-6 or public policy. *Scott v. Scott*, 227 Ga. App. 346, 489 S.E.2d 117 (1997).

Because the language of the statute clearly vested in the trial court the discretion to decide which parent should be empowered to make final decisions when the parents were unable to agree, and the evidence showed on-going disagreements between the parents on the issues of education and extra-curricular activities, making it unlikely for the parties to come to agreement on those issues, and also showed that the husband played a greater role than the wife in decision-making regarding the children’s education and extra-curricular activities prior to the parties’ separation, the trial court’s designation of decision-making authority to the wife with regards to religion and health and to the husband with regard to education and extra-curricular activities was not an abuse of that discretion. *Frazier v. Frazier*, 280 Ga. 687, 631 S.E.2d 666 (2006).

Joint physical custody proper. — Trial court did not abuse the court’s discretion in awarding joint physical custody of a child because the trial court’s order found both the husband and the wife to be fit and proper, acknowledging that each parent had strengths and weaknesses; the trial court heard testimony concerning the husband’s relationship with his child, the financial payments he made while the

child and the wife were living with the wife's parents in another state, and the difficulty of visiting the infant when the child and the wife were living with the wife's parents. Furthermore, the order was made with the best interests of the child in mind because there was evidence that the child had a good relationship with each parent and that each parent had adequate housing for the child and could provide what the child needed; the trial court expressly found it was in the child's best interests that the husband and wife share joint physical custody on alternating weeks, and the Social Service Coordinator assigned to the case recommended to the trial court that the husband and wife share evenly-divided joint physical custody of the child. *Willis v. Willis*, 288 Ga. 577, 707 S.E.2d 344 (2010).

Modification of joint custody agreement. — In granting the mother's petition to change custody, the record contained ample evidence from which the trial court could determine that the father could not provide a stable home because he took the child from Georgia to Mary-

land in violation of the joint custody agreement without telling the mother, he suffered from bipolar personality disorder, and was hospitalized for suicidal ideation. The trial court made the court's custody determination based upon the best interest of the child. *Roberts v. Kinsey*, 308 Ga. App. 675, 708 S.E.2d 600 (2011).

Final decision making authority to one parent. — In a divorce action in which joint legal custody of the parties' two children was awarded, it was appropriate to grant final decision making authority to a former husband under O.C.G.A. § 19-9-6(2) as the primary physical custodian as there were issues on which both parents did not agree, such as where the children would attend school; however, the husband was required to take the former wife's views into consideration. *Rembert v. Rembert*, 285 Ga. 260, 674 S.E.2d 892 (2009).

Cited in *Weiss v. Varnadore*, 246 Ga. App. 654, 541 S.E.2d 448 (2000); *McCall v. McCall*, 246 Ga. App. 770, 542 S.E.2d 168 (2000).

19-9-7. Visitation by parent who has committed acts of family violence; conditional orders; confidentiality; joint counseling; conditions for supervised visitation.

(a) A judge may award visitation or parenting time to a parent who committed one or more acts involving family violence only if the judge finds that adequate provision for the safety of the child and the parent who is a victim of family violence can be made. In a visitation or parenting time order, a judge may:

- (1) Order an exchange of a child to occur in a protected setting;
- (2) Order visitation or parenting time supervised by another person or agency;
- (3) Order the perpetrator of family violence to attend and complete, to the satisfaction of the judge, a certified family violence intervention program for perpetrators as defined in Article 1A of Chapter 13 of this title as a condition of the visitation or parenting time;
- (4) Order the perpetrator of family violence to abstain from possession or consumption of alcohol, marijuana, or any Schedule I controlled substance listed in Code Section 16-13-25 during the

visitation or parenting time and for 24 hours preceding the visitation or parenting time;

(5) Order the perpetrator of family violence to pay a fee to defray the costs of supervised visitation or parenting time;

(6) Prohibit overnight visitation or parenting time;

(7) Require a bond from the perpetrator of family violence for the return and safety of the child; and

(8) Impose any other condition that is deemed necessary to provide for the safety of the child, the victim of family violence, or another family or household member.

(b) Whether or not visitation or parenting time is allowed, the judge may order the address of the child and the victim of family violence to be kept confidential.

(c) The judge shall not order an adult who is a victim of family violence to attend joint counseling with the perpetrator of family violence as a condition of receiving custody of a child or as a condition of visitation or parenting time.

(d) If a judge allows a family or household member to supervise visitation or parenting time, the judge shall establish conditions to be followed during visitation or parenting time. (Code 1981, § 19-9-7, enacted by Ga. L. 1995, p. 863, § 7; Ga. L. 2002, p. 1435, § 2; Ga. L. 2007, p. 554, § 5/HB 369.)

Editor's notes. — Ga. L. 2002, p. 1435, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Georgia's Family Violence Intervention Program Certification Act.'"

Ga. L. 2007, p. 554, § 1/HB 369, not codified by the General Assembly, provides: "The General Assembly of Georgia declares that it is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interests of their children and to encour-

age parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage or relationship."

Ga. L. 2007, p. 554, § 8/HB 369, not codified by the General Assembly, provides that the 2007 amendment shall apply to all child custody proceedings and modifications of child custody filed on or after January 1, 2008.

Law reviews. — For note on the 2002 amendment of this Code section, see 19 Ga. St. U.L. Rev. 142 (2002).

RESEARCH REFERENCES

ALR. — Construction and effect of statutes mandating consideration of, or creating presumptions regarding, domestic vi-

olence in awarding custody of children, 51 ALR5th 241.

ARTICLE 2

CHILD CUSTODY INTRASTATE JURISDICTION ACT

Law reviews. — For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982).

JUDICIAL DECISIONS

Editor’s notes. — For additional cases dealing with custody of children, see annotations under § 9-14-2, dealing with habeas corpus on account of detention of child, and under §§ 19-7-1 and 19-7-4, dealing with parental powers and loss of parental custody.

O.C.G.A. Art. 2, Ch. 9, T. 19 has as its general purpose the promotion of stability in the home environment and secure family relationships for the child of divorced parents, deterrence of abductions

and other unilateral removals of children, and facilitation of the enforcement of custody decrees. O.C.G.A. § 19-9-24 employs a “clean hands” doctrine to ensure these ends. *Stewart v. Stewart*, 160 Ga. App. 463, 287 S.E.2d 378 (1981).

Cited in *Neal v. Washington*, 158 Ga. App. 39, 279 S.E.2d 294 (1981); *Hutto v. Hutto*, 250 Ga. 116, 296 S.E.2d 549 (1982); *Thompson v. Thompson*, 241 Ga. App. 616, 526 S.E.2d 576 (1999).

19-9-20. Short title.

This article shall be known and may be cited as the “Georgia Child Custody Intrastate Jurisdiction Act of 1978.” (Ga. L. 1978, p. 1957, § 1.)

Law reviews. — For annual survey of domestic relations cases, see 57 Mercer L. Rev. 173 (2005).

JUDICIAL DECISIONS

Custody act not applicable. — Boyfriend, who had been appointed temporary guardian of child, was not the child’s “legal custodian” as that term was used in the Georgia Child Custody Intrastate Jurisdiction Act, O.C.G.A. § 19-9-20 et seq., and, thus, the provisions of the Act, including the Act’s venue provisions, did not apply; accordingly, the trial court erred in dismissing the grandmother’s petition for custody of the child on the ground that venue was not proper in the county where the mother was incarcerated but would have been proper where the temporary

guardian, the boyfriend, resided, as application of the general venue rules governing venue in civil cases, contained in the Georgia Constitution, showed that since the mother was a necessary party to the grandmother’s custody action, filing the action in the county where the mother was incarcerated was proper. *Gordon v. Gordon*, 269 Ga. App. 224, 603 S.E.2d 732 (2004).

Cited in *Upchurch v. Smith*, 281 Ga. 28, 635 S.E.2d 710 (2006); *Oglesby v. Deal*, 311 Ga. App. 622, 716 S.E.2d 749 (2011).

RESEARCH REFERENCES

ALR. — Extraterritorial effect of provision in decree of divorce as to custody of child, 20 ALR 815; 72 ALR 441; 116 ALR 1299; 160 ALR 400.

19-9-21. Purpose; construction.

(a) The general purposes of this article are to:

(1) Avoid jurisdictional competition and conflict by courts within this state in matters of child custody, which have in the past resulted in the shifting of children from county to county with harmful effects on their well-being;

(2) Promote cooperation by the courts of this state, to the end that a custody decree is rendered by the court which can best decide the case in the interest of the child;

(3) Assure that litigation concerning the custody of a child ordinarily takes place in the court with which the child and his family have the closest connection and where significant evidence concerning the care, protection, training, and personal relationships of the child is most readily available and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another court of this state;

(4) Discourage continuing controversies over child custody, in the interest of greatest stability of home environment and of secure family relationships for the child;

(5) Deter abductions and other unilateral removals of children undertaken to obtain custody awards;

(6) Avoid relitigation of custody decisions of other courts in this state insofar as is feasible;

(7) Facilitate the enforcement of custody decrees;

(8) Make uniform the practice and procedure of the courts of this state in child custody matters.

(b) This article shall be construed to promote the general purposes stated in subsection (a) of this Code section. (Ga. L. 1978, p. 1957, § 2.)

JUDICIAL DECISIONS

Failure to give res judicata effect to fact. — It is an abuse of discretion for trial judge to fail to give res judicata effect to adjudication of specific factual issues raised between parties in previous proceeding which resulted in award of visitation rights. *Tirado v. Shelnutt*, 159 Ga. App. 624, 284 S.E.2d 641 (1981).

Cited in *Hutto v. Hutto*, 250 Ga. 116, 296 S.E.2d 549 (1982); *DeKalb County Dep't of Family & Children Servs. v. Queen*, 252 Ga. 274, 312 S.E.2d 800 (1984); *Upchurch v. Smith*, 281 Ga. 28, 635 S.E.2d 710 (2006).

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Divorce and Separation, §§ 881, 882. 39 Am. Jur. 2d, Guardian and Ward, §§ 60 et seq. 39 Am. Jur. 2d, Habeas Corpus, §§ 84, 88, 107, 119, 135, 136.

C.J.S. — 67A C.J.S., Parent and Child, §§ 63 et seq., 83, 92 et seq., 139, 140.

19-9-22. Definitions.

As used in this article, the term:

(1) “Custody” includes visitation rights.

(2) “Legal custodian” means a person, including, but not limited to, a parent, who has been awarded permanent custody of a child by a court order. A person who has not been awarded custody of a child by court order shall not be considered as the legal custodian while exercising visitation rights. Where custody of a child is shared by two or more persons or where the time of visitation exceeds the time of custody, that person who has the majority of time of custody or visitation shall be the legal custodian.

(3) “Physical custodian” means a person, including, but not limited to, a parent, who is not the “legal custodian” of a child but who has physical custody of the child. (Ga. L. 1978, p. 1957, § 3.)

Law reviews. — For survey article on domestic relations cases for the period from June 1, 2002 through May 31, 2003,

see 55 Mercer L. Rev. 223 (2003). For annual survey of domestic relations cases, see 57 Mercer L. Rev. 173 (2005).

JUDICIAL DECISIONS

“Legal guardian.” — Grandmother was not a “legal guardian” of a child within the meaning of O.C.G.A. § 19-9-22 or O.C.G.A. § 15-11-13. *Stills v. Johnson*, 272 Ga. 645, 533 S.E.2d 695 (2000).

Change in visitation is form of change in child custody. *Tirado v. Shelnutt*, 159 Ga. App. 624, 284 S.E.2d 641 (1981).

When the mother had legal custody, it was error for the trial court to indirectly effect a change in custody by modifying a visitation schedule so that the father was given more custody time than the mother. *Kennedy v. Adams*, 218 Ga. App. 120, 460 S.E.2d 540 (1995).

It was not error for a trial court to order a custody evaluation in a visitation dis-

pute because: (1) O.C.G.A. § 19-9-22(1) included visitation in the definition of “custody”; and (2) O.C.G.A. § 19-9-3(a)(7) authorized the court to order an evaluation. *Gottschalk v. Gottschalk*, 311 Ga. App. 304, 715 S.E.2d 715 (2011).

Cited in *Seymour v. Seymour*, 156 Ga. App. 293, 274 S.E.2d 690 (1980); *Pruitt v. Hooks*, 163 Ga. App. 892, 296 S.E.2d 193 (1982); *DeKalb County Dep’t of Family & Children Servs. v. Queen*, 252 Ga. 274, 312 S.E.2d 800 (1984); *In re M.M.A.*, 174 Ga. App. 898, 332 S.E.2d 39 (1985); *Bullington v. Bullington*, 181 Ga. App. 256, 351 S.E.2d 700 (1986); *Alvarez v. Sills*, 258 Ga. 18, 365 S.E.2d 107 (1988); *Martin v. Buglioli*, 185 Ga. App. 722, 365 S.E.2d 866 (1988); *Oglesby v. Deal*, 311

Ga. App. 622, 716 S.E.2d 749 (2011);
Smith v. Curtis, 316 Ga. App. 890, 730
S.E.2d 604 (2012).

RESEARCH REFERENCES

C.J.S. — 2 C.J.S., Adoption of Persons, §§ 51, 52. 67A C.J.S., Parent and Child, § 47. 39 C.J.S., Guardian and Ward, §§ 167, 168.

19-9-23. Actions to obtain change of legal custody; how and where brought; use of certain complaints prohibited.

(a) Except as otherwise provided in this Code section, after a court has determined who is to be the legal custodian of a child, any complaint seeking to obtain a change of legal custody of the child shall be brought as a separate action in the county of residence of the legal custodian of the child.

(b) A complaint by the legal custodian seeking a change of legal custody or visitation rights shall be brought as a separate action in compliance with Article VI, Section II, Paragraph VI of the Constitution of this state.

(c) No complaint specified in subsection (a) or (b) of this Code section shall be made:

(1) As a counterclaim or in any other manner in response to a petition for a writ of habeas corpus seeking to enforce a child custody order; or

(2) In response to any other action or motion seeking to enforce a child custody order.

(d) The use of a complaint in the nature of habeas corpus seeking a change of child custody is prohibited. (Ga. L. 1978, p. 1957, § 4; Ga. L. 1983, p. 3, § 52.)

Cross references. — Power of court in proceeding on writ of habeas corpus sought on account of detention of spouse or child, § 9-14-2.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1985, “maner” was changed to “manner” in paragraph (c)(1).

Law reviews. — For article surveying

developments in Georgia domestic relations law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 109 (1981). For annual survey of domestic relations cases, see 57 Mercer L. Rev. 173 (2005). For annual survey on domestic relations, see 65 Mercer L. Rev. 107 (2013).

JUDICIAL DECISIONS

Plain meaning of O.C.G.A. § 19-9-23(a) is that an action by the noncustodial parent to modify visitation

with a minor child must be brought in the county of residence of the custodial parent. Bennett v. Wood, 188 Ga. App. 630,

373 S.E.2d 645 (1988); *Rogers v. Baudet*, 215 Ga. App. 214, 449 S.E.2d 900 (1994).

Custody can only be relitigated where legal custodian resides. — Georgia courts will refuse to provide forum for relitigating custody except where legal custodian resides. *Yearta v. Scroggins*, 245 Ga. 831, 268 S.E.2d 151 (1980).

As a matter of public policy, Georgia courts refuse to provide forum in Georgia for relitigating custody when noncustodial parent resident in Georgia has improperly removed child from physical custody of custodial parent who resides in another state. *Etzion v. Evans*, 247 Ga. 390, 276 S.E.2d 577 (1981).

Trial court erred by granting a parent's complaint for modification of child custody and support and changing custody, which was filed in that parent's county of residence, as that county was not the jurisdiction wherein the issue of custody and support was originally litigated and the opposing parent never waived the challenge to the jurisdiction of the trial court via a pro se letter, which merely acknowledged receipt of the complaint; as a result, the judgment granting the change of custody was reversed and the case was remanded to the trial court with directions for the trial court to transfer the case to the trial court of the proper county. *Hatch v. Hatch*, 287 Ga. App. 832, 652 S.E.2d 874 (2007).

Jurisdiction where county services department is legal custodian. — When the legal custodian of a child is a county Department of Family and Children Services, any action seeking a change in custody is to be brought in that county. Any other county, including the county of residence of the child, is without jurisdiction to grant any relief involving custody including a writ of habeas corpus. *DeKalb County Dep't of Family & Children Servs. v. Queen*, 252 Ga. 274, 312 S.E.2d 800 (1984).

Juvenile court did not retain jurisdiction. — Although a great aunt and great step-uncle argued that the trial court erred in exercising subject matter jurisdiction in a custody matter at a time when the juvenile court had exclusive original jurisdiction, there was no order of

the superior court transferring the petition to the juvenile court, and the jurisdiction obtained during an original deprivation proceeding did not serve to retain such jurisdiction; therefore, the juvenile court did not retain jurisdiction. The complaint for permanent custody filed by the grandmother and the step-grandfather was not in the nature of a deprivation petition. *Wiepert v. Stover*, 298 Ga. App. 683, 680 S.E.2d 707 (2009), overruled on other grounds, *Artson, LLC v. Hudson*, 322 Ga. App. 859, 747 S.E.2d 68 (2013) (decided under former O.C.G.A. § 15-11-28).

Jurisdiction to consider custody modification petition and contempt motion together. — In the absence of evidence that the husband objected to the trial court's decision to consider the contempt motion together with the custody petition, his consent was inferred. Further, because the custody petition was filed as a separate action in the husband's county, the requirements and purpose of O.C.G.A. § 19-9-23 were satisfied. *Saravia v. Mendoza*, 303 Ga. App. 758, 695 S.E.2d 47 (2010).

Jurisdiction for modification of divorce decree. — Georgia Court of Appeals finds it necessary in the context of divorce and alimony cases to depart from the general rule that a contempt action must be brought in the offended court, thus, it now holds that when a superior court other than the superior court rendering the original divorce decree acquires jurisdiction and venue to modify that decree, it likewise possesses the jurisdiction and venue to entertain a counterclaim alleging the plaintiff is in contempt of the original decree. *Colbert v. Colbert*, 321 Ga. App. 841, 743 S.E.2d 505 (2013).

Trial court properly acquired jurisdiction to modify a divorce decree, independent of the contemporaneous motion for contempt, because the mother, a nonresident, voluntarily instituted the suit in the jurisdiction of the trial court; therefore, the mother submitted to the court's jurisdiction for all purposes. *Colbert v. Colbert*, 321 Ga. App. 841, 743 S.E.2d 505 (2013).

Litigation of custody when temporary guardian appointed. — Boyfriend, who had been appointed temporary

guardian of the child, was not the child's "legal custodian" as that term was used in the Georgia Child Custody Intrastate Jurisdiction Act, O.C.G.A. § 19-9-20 et seq., and, thus, the provisions of the Act, including the Act's venue provisions, did not apply; accordingly, the trial court erred in dismissing the grandmother's petition for custody of the child on the ground that venue was not proper in the county where the mother was incarcerated but would have been proper where the temporary guardian, the boyfriend, resided, as application of the general venue rules governing venue in civil cases, contained in the Georgia Constitution, showed that since the mother was a necessary party to the grandmother's custody action, filing the action in the county where the mother was incarcerated was proper. *Gordon v. Gordon*, 269 Ga. App. 224, 603 S.E.2d 732 (2004).

Waiver of challenge to venue. — In an action to establish paternity, the mother waived any challenge to venue when she consented to an adjudication of custody in her complaint and made no objection to venue in the trial court until she apparently raised it during closing argument. *Ganny v. Ganny*, 238 Ga. App. 123, 518 S.E.2d 148 (1999).

Father waived defense to lack of venue in mother's counterclaim for modification of child support by failing to file a motion to dismiss in a timely and expeditious manner. *Houston v. Brown*, 212 Ga. App. 834, 443 S.E.2d 3 (1994).

Venue shown. — Mother's petition for modification of custody was properly filed in and decided by the Superior Court of Cherokee County because there was evidence that supported the superior court's determination that the father was a resident of Cherokee County when the mother filed her modification petition; the father was served at his Cherokee County apartment, and the superior court orally ruled that while the father had the intent to return to another county, the father was a resident of Cherokee County until the father's physical presence changed. *Viskup v. Viskup*, 291 Ga. 103, 727 S.E.2d 97 (2012).

Motion filed in proper county. — Motion for a change in custody was not

filed in the wrong county as the wife originally lived in the county in which the action was initiated, the wife moved to another county while the case was pending, and the wife waived any personal jurisdiction and venue defenses by entering into a consent order regarding custody and waiting many months before asserting the defense. *Andersen v. Farrington*, 291 Ga. 775, 731 S.E.2d 351 (2012).

Habeas corpus. — O.C.G.A. § 19-9-23(d) governs the situation where a party is seeking to change legal custody from someone who has permanent custody by court order and is not applicable when the mother who has permanent custody seeks the return of her children from a person to whom she has given temporary custody. *Alvarez v. Sills*, 258 Ga. 18, 365 S.E.2d 107 (1988).

"Action or motion seeking to enforce child custody order." — Complaint for modification of support is not an "action or motion seeking to enforce a child custody order" under O.C.G.A. § 19-9-23(c)(2). *Dixon v. Dixon*, 183 Ga. App. 756, 360 S.E.2d 8, cert. denied, 183 Ga. App. 905, 360 S.E.2d 8 (1987).

Counterclaim for change of custody. — Trial court erred in entertaining a counterclaim for a change of custody in the county of legal residence of the noncustodial parent even though the custodial parent had brought her action for a change of visitation rights in the county of residence of the noncustodial parent. *Jones v. Jones*, 178 Ga. App. 794, 344 S.E.2d 677 (1986), aff'd, 256 Ga. 742, 352 S.E.2d 754 (1987).

When the custodial mother sued the father in his county of residence for modification of child support, the father, in filing a counterclaim seeking to change custody, violated two provisions of O.C.G.A. § 19-9-23(a): (1) by failing to bring a separate action to have custody changed; and (2) by failing to bring such an action in the county of residence of the legal custodian of the child. *Wilson v. Baldwin*, 239 Ga. App. 327, 519 S.E.2d 251 (1999); *Roach v. Kapur*, 240 Ga. App. 558, 524 S.E.2d 246 (1999), aff'd, 272 Ga. 767, 534 S.E.2d 420 (2000).

Custodial mother did not waive the mandatory provisions of subsections (a)

and (c) of O.C.G.A. § 19-9-23 by the consent transfer of her suit for contempt, including her claim for a change in custody to the father's county of residence. *Kapur v. Roach*, 272 Ga. 767, 534 S.E.2d 420 (2000).

Trial court erred in granting a change of primary physical custody to a mother, based on the mother's modification of custody counterclaim, as the father's petition sought only a clarification as to the days that the father was to have custody under the parties' joint custody arrangement, as well as an order awarding the father child support, and accordingly, the mother could only obtain such relief by way of a separate action pursuant to O.C.G.A. § 19-9-23; the fact that the parties disagreed over whether the child should be educated at a public school or at a private school did not constitute a material change of circumstances that affected the child's welfare, and accordingly, there was no justification for a change of custody. *Terry v. Garibaldi*, 274 Ga. App. 405, 618 S.E.2d 6 (2005).

Under the plain language of O.C.G.A. § 19-9-23, the trial court erred in denying a motion to dismiss a parent's counterclaim seeking a change in physical custody and in finding that the evidence was sufficient to support the custody determination. *Seeley v. Seeley*, 282 Ga. App. 394, 638 S.E.2d 837 (2006).

Because a change of custody could not be asserted as a counterclaim, pursuant to O.C.G.A. § 19-9-23, the trial court erred in denying a father's motion to dismiss the same asserted by a mother, and the father's failure to raise the matter as a defense did not act as a waiver as he filed no response to the counterclaim; moreover, the fact that the court was mistaken in dismissing the mother's original Fulton County action did not excuse the mother from appealing that ruling nor did it authorize the mother to pursue the claim as a counterclaim, especially when the statute and case law were so definitive that such a counterclaim was simply not permitted. *Bailey v. Bailey*, 283 Ga. App. 361, 641 S.E.2d 580 (2007).

Custody award was affirmed because even if the father's decision to file a petition for change of custody was predicated

on the mother's successful petition for habeas corpus, the father's petition was not a forbidden "response" to the mother's petition for purposes of O.C.G.A. § 19-9-23(c)(1). *Alberti v. Alberti*, 320 Ga. App. 724, 741 S.E.2d 179 (2013).

Counterclaim seeking a change of custody in an action brought by the custodial parent in the county of the noncustodial parent's residence is improper because it is not a separate action and it is not brought in the county of the custodial parent's residence. The Supreme Court of Georgia has explained that O.C.G.A. § 19-9-23 has been enacted by the Georgia legislature to curtail the practice of allowing the noncustodial parent to relitigate custody in the noncustodial parent's own jurisdiction. *Colbert v. Colbert*, 321 Ga. App. 841, 743 S.E.2d 505 (2013).

Seeking change of custody in counterclaim. — Father's petition for change of custody in counterclaim to mother's petition to enforce custody was not proper. *Pruitt v. Hooks*, 163 Ga. App. 892, 296 S.E.2d 193 (1982).

Any action for a change of legal custody shall be brought as a separate action in the county of residence of the legal custodian of the child, and the trial court cannot entertain a counterclaim for a change of custody in the county of legal residence of the non-custodial parent. *Bullington v. Bullington*, 181 Ga. App. 256, 351 S.E.2d 700 (1986).

Complaint seeking a change of legal custody of a child may not be brought in response to any action or motion to enforce a child custody order so when a wife has filed a motion for contempt against her divorced husband for nonpayment of child support, that portion of the order granting the husband's counterclaim for a change in custody was reversed. *Hammontree v. Hammontree*, 186 Ga. App. 819, 368 S.E.2d 576 (1988).

Father did not seek to change custody by means of a counterclaim, contrary to the provisions of O.C.G.A. § 19-9-23(a) and (c), because the record showed that he filed a separate petition seeking modification of custody, which was not responsive to the mother's action to domesticate a foreign judgment, particularly as the actions, which were filed almost simultane-

ously, bore different case numbers. *Lynch v. Horton*, 302 Ga. App. 597, 692 S.E.2d 34 (2010), cert. denied, U.S. , 131 S. Ct. 2447, 179 L. Ed. 2d 1210 (2011).

Modification of custody rights in contempt proceeding not authorized.

— Trial court exceeded the court's authority by entering an order within the context of a contempt proceeding which had the effect of modifying custody. *McCall v. McCall*, 246 Ga. App. 770, 542 S.E.2d 168 (2000).

Trial court properly held a parent in contempt in a post-divorce matter as the parent acknowledged that the parent refused to return the parties' children to the custodial parent after summer visitation and helped the children obtain legal counsel to file a modification of custody proceeding which was prohibited by prior trial court orders. Further, the custodial parent properly filed the contempt petition in the county wherein that parent resided. Because the custodial parent was successful in having the other parent found in contempt, the custodial parent was properly awarded attorney fees. *Brochin v. Brochin*, 294 Ga. App. 406, 669 S.E.2d 203 (2008).

When the father violated the joint custody agreement incorporated in the divorce decree by taking the child to Maryland and refusing to return the child to Georgia, the trial court entered an ex parte emergency order in the contempt action. Because the trial court issued a final order modifying custody in a separate action as required by O.C.G.A. § 19-9-23, the final order rendered any issues regarding the validity of the temporary order moot. *Roberts v. Kinsey*, 308 Ga. App. 675, 708 S.E.2d 600 (2011).

There was valid waiver of jurisdiction when the legal custodian of the minor children moved from one county to another before the court entered the court's first order regarding custody, although the noncustodial parent, who was the subject of the custodian's contempt proceeding, petitioned in the custodian's case to modify custody; the matters which could have properly been considered by the trial court were not even raised by the custodial parent until more than six months after she had consented in two

orders modifying custody and after the trial court had found that emergency action was required in order to protect the best interests of the minor children of the parties. *Daust v. Daust*, 204 Ga. App. 29, 418 S.E.2d 409 (1992).

Deprivation petition. — Juvenile court did not retain jurisdiction to hear grandparents' petition for permanent custody after determining that the mother's four children were deprived since the grandparents' complaint for permanent custody was not in the nature of a deprivation petition and did not allege that they should be granted permanent custody of the children on the basis that the children were deprived. *In re C.C.*, 193 Ga. App. 120, 387 S.E.2d 46 (1989).

Modification of visitation rights. — Any conflict between the provisions of O.C.G.A. §§ 19-9-1(b) and 19-9-3(b) with those of O.C.G.A. § 19-9-23, insofar as seeking modification of visitation rights by motion is concerned, is harmonized by holding that the former come into play only when jurisdiction and venue are also proper. *Bennett v. Wood*, 188 Ga. App. 630, 373 S.E.2d 645 (1988).

Inasmuch as the record shows that this divorce action terminated with the entry of a final judgment and decree; that the wife subsequently changed her residence to another county; and that the husband filed his motion to modify outside the term of court, the trial court erred in ruling on the husband's motion to modify visitation. *Ward v. Ward*, 194 Ga. App. 669, 391 S.E.2d 480 (1990).

Although a trial court may modify, sua sponte, visitation under certain circumstances pursuant to O.C.G.A. §§ 19-9-1(b) and 19-9-3(b), those provisions "come into play only when jurisdiction and venue are also proper." *Rogers v. Baudet*, 215 Ga. App. 214, 449 S.E.2d 900 (1994).

Action not separate or in proper county. — Mother's oral motion for change in custody failed to meet the requirements of O.C.G.A. § 19-9-23 in two respects; the mother did not seek a change in custody in a separate action, but rather in response to the father's petition for contempt against the mother, and the mother did not seek a change in custody in the county in which the father lived as

required by § 19-9-23(a) and (b). *Hammonds v. Parks*, 319 Ga. App. 792, 735 S.E.2d 801 (2012).

Appeal moot when visitation restored. — In a post-divorce proceeding, the appellate court dismissed a father's appeal of the trial court's rulings with regard to the writ for habeas corpus filed seeking to enforce visitation rights because the appeal was moot since the father's visitation was restored. *Higdon v. Higdon*, 321 Ga. App. 260, 739 S.E.2d 498 (2013).

Cited in *Munday v. Munday*, 243 Ga. 863, 257 S.E.2d 282 (1979); *Lanning v.*

Lanning, 151 Ga. App. 648, 260 S.E.2d 764 (1979); *Munday v. Munday*, 152 Ga. App. 232, 262 S.E.2d 543 (1979); *Austin v. Austin*, 245 Ga. 487, 265 S.E.2d 788 (1980); *Seymour v. Seymour*, 156 Ga. App. 293, 274 S.E.2d 690 (1980); *Hutto v. Hutto*, 250 Ga. 116, 296 S.E.2d 549 (1982); *In re D.N.M.*, 193 Ga. App. 812, 389 S.E.2d 336 (1989); *Kemp v. Sharp*, 261 Ga. 600, 409 S.E.2d 204 (1991); *Upchurch v. Smith*, 281 Ga. 28, 635 S.E.2d 710 (2006); *Taylor v. Curl*, 298 Ga. App. 45, 679 S.E.2d 80 (2009); *Oglesby v. Deal*, 311 Ga. App. 622, 716 S.E.2d 749 (2011).

RESEARCH REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d, Adoption, §§ 107, 113.

C.J.S. — 15A C.J.S., Conflict of Laws, § 52 et seq. 39 C.J.S., Habeas Corpus, §§ 6, 7, 124 et seq. 39 C.J.S., Guardian and Ward, § 58. 67A C.J.S., Parent and Child, § 128 et seq.

ALR. — Award of custody of child where contest is between child's mother and grandparent, 29 ALR3d 366.

Right to require psychiatric or mental examination for party seeking to obtain or retain custody of child, 99 ALR3d 268.

Religion as factor in child custody and visitation cases, 22 ALR4th 971.

Interference by custodian of child with noncustodial parent's visitation rights as ground for change of custody, 28 ALR4th 9.

19-9-24. Actions by physical or legal custodian not permitted in certain instances.

(a) A physical custodian shall not be allowed to maintain against the legal custodian any action for divorce, alimony, child custody, change of alimony, change of child custody, or change of visitation rights or any application for contempt of court so long as custody of the child is withheld from the legal custodian in violation of the custody order.

(b) A legal custodian shall not be allowed to maintain any action for divorce, alimony, child custody, change of alimony, change of child custody, or change of visitation rights or any application for contempt of court so long as visitation rights are withheld in violation of the custody order. (Ga. L. 1978, p. 1957, § 5.)

JUDICIAL DECISIONS

O.C.G.A. § 19-9-24 employs "clean hands" doctrine to ensure that ends of that section are met. *Stewart v. Stewart*, 160 Ga. App. 463, 287 S.E.2d 378 (1981).

Conduct of custodian cannot deprive child of right to support any more than custodian can waive support

for child or contract support away. *Stewart v. Stewart*, 160 Ga. App. 463, 287 S.E.2d 378 (1981).

If O.C.G.A. § 19-9-24 had been intended to permit parents by their own action to forfeit the child's right to support rather than merely their own, and had

been intended to mean that actions of third party will dissolve the parent's duty to support the child, the legislature would have been very careful to say so. *Stewart v. Stewart*, 160 Ga. App. 463, 287 S.E.2d 378 (1981).

Clear object in prohibition against maintenance of "unclean" contempt actions is to prevent any action for enforcement of such orders as are mentioned in O.C.G.A. § 19-9-24, as otherwise this section would be virtually and ultimately useless in promoting the statute's purpose. *Stewart v. Stewart*, 160 Ga. App. 463, 287 S.E.2d 378 (1981).

Garnishment proceeding may fall within proscription of section. — When used to collect alimony, or other awards which constitute alimony, a garnishment proceeding is no more than an action for enforcement of such awards and thus is within proscription of "any action for alimony, etc." provided in O.C.G.A. § 19-9-24. *Stewart v. Stewart*, 160 Ga. App. 463, 287 S.E.2d 378 (1981).

Garnishment as means of enforcing domestic monetary award. — As means of enforcing domestic monetary award, a garnishment action is as appropriate as a contempt action. *Stewart v. Stewart*, 160 Ga. App. 463, 287 S.E.2d 378 (1981).

Garnishment proceeding not within section's proscription. — Garnishment proceeding for enforcement of child support award is not included among actions listed by O.C.G.A. § 19-9-24 which may not be maintained by a legal custodian who is withholding visitation rights in violation of a court order. Child support is the right of the child and not of the child's custodian; neither wife nor civil courts can take away this right that inheres expressly in the children. *Stewart v. Stewart*, 160 Ga. App. 463, 287 S.E.2d 378 (1981).

Dismissal of claims following withholding of visitation. — Having found at a hearing that a custodial parent had withheld visitation, a trial court did not err when, pursuant to O.C.G.A. § 19-9-24(b), the court dismissed the contempt, visitation, and custody portions of

the custodial parent's petition and, consequently, did not permit the custodial parent to present evidence on the merits of the custodial parent's dismissed claims. *Avren v. Garten*, 289 Ga. 186, 710 S.E.2d 130 (2011).

Court justified in changing custody only upon extreme emergency. — To authorize the trial court to exercise the court's authority in a case where the court's authority is restricted by O.C.G.A. Art. 2, Ch. 9, T. 19, there must be an extreme emergency justifying retrieval of the child by the noncustodial party. *Hutto v. Hutto*, 250 Ga. 116, 296 S.E.2d 549 (1982).

No jurisdiction over custody action. — Trial court violated the law and public policy of this state by assuming jurisdiction of an action for modification of custody brought by father who was not the legal custodian and had no right to retain physical custody once the mother as legal custodian demanded return of the child. *Lightfoot v. Lightfoot*, 210 Ga. App. 400, 436 S.E.2d 700 (1993).

Court lacked authority to change custody in habeas corpus proceeding. — In habeas corpus proceeding by legal custodian seeking return of child to her custody, the trial court was without authority to allow evidence to be presented by physical custodian as to the legal custodian's fitness and in ordering a change of custody. *Hutto v. Hutto*, 250 Ga. 116, 296 S.E.2d 549 (1982).

No application of statute when no change in custody requested. — O.C.G.A. § 19-9-24, precluding a change of custody if custody was being withheld from the legal custodian, did not apply because there was no evidence that the husband had asked for the children, and the wife had offered to let them go for visitation at Thanksgiving if the children did not ride with the husband's brother, who had hit one of the children. *Saravia v. Mendoza*, 303 Ga. App. 758, 695 S.E.2d 47 (2010).

Cited in *Bentley v. McSwain*, 153 Ga. App. 451, 265 S.E.2d 360 (1980); *Looney v. Looney*, 183 Ga. App. 233, 358 S.E.2d 642 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d, Contempt, §§ 3, 16. 24A Am. Jur. 2d, Divorce and Separation, §§ 879, 880, 885, 899 et seq.

C.J.S. — 17 C.J.S., Contempt, § 23. 39 C.J.S., Guardian and Ward, §§ 80, 81. 617 C.J.S., Parent and Child, §§ 241, 242.

ALR. — Removal by custodial parents of child from jurisdiction in violation of court order as justifying termination, suspension, or reduction of child support payments, 8 ALR4th 1231.

ARTICLE 3

UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

Editor's notes. — For additional cases dealing with custody of children, see annotations under § 9-14-2, dealing with habeas corpus on account of detention of child, and under §§ 19-7-1 and 19-7-4, dealing with parental powers and loss of parental custody.

Ga. L. 2001, p. 129, § 1, effective July 1, 2001, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of Code Sections 19-9-40 through 19-9-64, relating to the Uniform Child Custody Jurisdiction Act, and was based on Code 1933, §§ 74-501 through 74-525, enacted by Ga. L. 1978, p. 258, § 1; Ga. L. 1988, p. 1408, § 1.

Law reviews. — For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For article surveying developments in Georgia domestic relations law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 109 (1981). For article, "Enforcing the Full Faith and Credit Clause: Congress Legislates Finality for Child Custody Decrees," see 1 Ga. St. U.L. Rev. 157 (1985). For article, "Child Custody—Jurisdiction and Procedure," see 35 Emory L.J. 291 (1986). For article, "Domestic Relations Law," see 53 Mercer L. Rev. 265 (2001).

For note, "The UCCJA: Coming of Age," see 34 Mercer L. Rev. 861 (1983).

JUDICIAL DECISIONS

Editor's notes. — Some of the decisions cited below were decided under the Uniform Child Custody Jurisdiction Act, former Code 1933, §§ 74-501 through 74-525, subsequently codified as §§ 19-9-40 through 19-9-64.

Applicability of article. — Former Uniform Child Custody Jurisdiction Act was applicable only to states, territories, or possessions of the United States, the Commonwealth of Puerto Rico, and the District of Columbia. *Richardson v. Richardson*, 257 Ga. 101, 355 S.E.2d 664 (1987) (decided under former Uniform Child Custody Jurisdiction Act).

Among the primary purposes of the former Uniform Child Custody Jurisdiction Act was to avoid overlapping adjudication and to prevent judgment races. *Webb v. Webb*, 245 Ga. 650, 266 S.E.2d

463 (1980), cert. dismissed, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981) (decided under former Uniform Child Custody Jurisdiction Act).

Georgia will recognize and enforce custody modifications of other states if proceedings were in accordance with the provisions of the former Uniform Child Custody Jurisdiction Act. *Brenner v. Cavin*, 163 Ga. App. 694, 295 S.E.2d 135 (1982) (decided under former Uniform Child Custody Jurisdiction Act).

Out of state judgment did not have to be followed as to tax exemption after custody award changed. — Because there was reasonable evidence of changed circumstances which supported the trial court's award of physical custody of the children to the mother, the court was not bound by the prior ruling of a

Wyoming court with respect to the dependency exemption; thus, the court did not err in finding that the parent who was awarded physical custody of the children,

the mother, was entitled to claim the dependency exemptions for the three children. *Blumenshine v. Hall*, 329 Ga. App. 449, 765 S.E.2d 647 (2014).

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, §§ 868, 874. 39 Am. Jur. 2d, Habeas Corpus, §§ 95 et seq., 107. 59 Am. Jur. 2d, Parent and Child, § 26 et seq.

C.J.S. — 27C C.J.S., Divorce, §§ 611, 612. 39 C.J.S., Habeas Corpus, § 241 et seq. 43 C.J.S., Infants, § 10 et seq. 67A C.J.S., Parent and Child, § 94 et seq.

U.L.A. — Uniform Child Custody Jurisdiction Act (U.L.A.) § 1.

ALR. — Validity, construction, and application of Uniform Child Custody Jurisdiction Act, 96 ALR3d 968; 78 ALR4th 1028.

Recognition and enforcement of out-of-state custody decree under § 13 of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(a), 40 ALR5th 227.

PART 1

GENERAL PROVISIONS

19-9-40. Short title.

This article may be cited as the “Uniform Child Custody Jurisdiction and Enforcement Act.” (Code 1981, § 19-9-40, enacted by Ga. L. 2001, p. 129, § 1.)

Law reviews. — For annual survey of domestic relations law, see 58 Mercer L. Rev. 133 (2006). For survey article on domestic relations law, see 59 Mercer L. Rev. 139 (2007).

For note on the 2001 amendments to O.C.G.A. §§ 19-9-40 to 19-9-51, see 18 Ga. St. U.L. Rev. 58 (2001).

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the statutory provisions, annotations decided under the Uniform Child Custody Jurisdiction Act, former Code 1933, §§ 74-501 through 74-525, subsequently codified as §§ 19-9-40 through 19-9-64, are included in the annotations for this Code section.

Article to be considered in pari materia with applicable legislation. — Former Uniform Child Custody Jurisdiction Act does not expressly repeal any particular provisions of the Civil Practice Act, nor existing statutory provisions covering divorce, custody, alimony, and child support procedures, and must be consid-

ered in pari materia with other applicable provisions of law. *Gambrell v. Gambrell*, 246 Ga. 516, 272 S.E.2d 70 (1980) (decided under former Code 1933, § 74-510).

Effective date. — Effective July 1, 2001, the Uniform Child Custody Jurisdiction Act was replaced by the Uniform Child Custody Jurisdiction and Enforcement Act, O.C.G.A. § 19-9-40 et seq. *Edwards v. Edwards*, 254 Ga. App. 849, 563 S.E.2d 888 (2002).

Parental Kidnapping Prevention Act, 28 U.S.C. § 1738 et seq., applies in all interstate child custody disputes, not only when a child was abducted by a parent and removed to another state. Wil-

son v. Gouse, 263 Ga. 887, 441 S.E.2d 57 (1994) (decided under former Uniform Child Custody Jurisdiction Act).

Modification of out-of-state decree. — Ohio court which entered the initial custody decree no longer had jurisdiction over the subject matter of the modification action; thus, Georgia was free under § 1738A(f) of the Parental Kidnapping Prevention Act (28 U.S.C. § 1738A(f)) to modify the Ohio custody order and was correct when it initially assumed jurisdiction to do so. *Wilson v. Gouse*, 263 Ga. 887, 441 S.E.2d 57 (1994) (decided under former Uniform Child Custody Jurisdiction Act).

No abuse of discretion in declining jurisdiction. — Trial court did not abuse

the court's discretion by declining to exercise jurisdiction in a child custody case under O.C.G.A. § 19-9-67(b) because the children lived in Texas, the witnesses, such as the children's teachers and health care providers were in Texas, and the trial court determined that the case could be more expeditiously resolved there. *Odion v. Odion*, 325 Ga. App. 733, 754 S.E.2d 778 (2014).

Cited in *Edmondson v. Gilmore*, 251 Ga. App. 776, 554 S.E.2d 742 (2001); *Jones v. Van Horn*, 283 Ga. App. 144, 640 S.E.2d 712 (2006); *Black v. Black*, 292 Ga. 691, 740 S.E.2d 613 (2013).

RESEARCH REFERENCES

U.L.A. — Uniform Child Custody Jurisdiction Act (U.L.A.) § 26.

ALR. — Applicability of Uniform Child Custody Jurisdiction Act (UCCJA) to temporary custody orders, 81 ALR4th 1101.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A, 83 ALR4th 742.

Child custody and visitation rights of person infected with AIDS, 86 ALR4th 211.

Home state jurisdiction of court under § 3(a)(1) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(A), 6 ALR5th 1.

Default jurisdiction of court under

§ 3(a)(4) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(D), 6 ALR5th 69.

Abandonment jurisdiction of court under §§ 3(a)(3)(i) and 14(a) of Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act, 28 USCA §§ 1738A(c)(2)(C)(i) and 1738A(f), notwithstanding existence of prior valid custody decree rendered by second state, 78 ALR5th 465.

Applicability and application of Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to international child custody and support actions, 66 ALR6th 269.

Construction and application of International Child Abduction Remedies Act (42 USCS § 11601 et seq.), 125 ALR Fed. 217.

19-9-41. Definitions.

In this article:

(1) "Abandoned" means left without provision for reasonable and necessary care or supervision.

(2) "Child" means an individual who has not attained 18 years of age.

(3) "Child custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody,

or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligations of an individual.

(4) "Child custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from family violence, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under Part 3 of this article.

(5) "Commencement" means the filing of the first pleading in a proceeding.

(6) "Court" means an entity authorized under the law of a state to establish, enforce, or modify a child custody determination.

(7) "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

(8) "Initial determination" means the first child custody determination concerning a particular child.

(9) "Issuing court" means the court that makes a child custody determination for which enforcement is sought under this article.

(10) "Issuing state" means the state in which a child custody determination is made.

(11) "Modification" means a child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.

(12) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(13) "Person acting as a parent" means a person, other than a parent, who:

(A) Has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary

absence, within one year immediately before the commencement of a child custody proceeding; and

(B) Has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

(14) "Physical custody" means the physical care and supervision of a child.

(15) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(16) "Tribe" means an Indian tribe or band or Alaskan Native village which is recognized by federal law or formally acknowledged by a state.

(17) "Warrant" means an order issued by a court authorizing law enforcement officers to take physical custody of a child. (Code 1981, § 19-9-41, enacted by Ga. L. 2001, p. 129, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under the Uniform Child Custody Jurisdiction Act, former Code 1933, §§ 74-501 through 74-525, subsequently codified as §§ 19-9-40 through 19-9-64, are included in the annotations for this Code section.

"Home state," for all purposes which former Chapter 9 was designed to govern, did not mean the residence or domicile of the parent having legal custody. Rather, "home state", for purposes of former § 19-9-43, meant the place where the child lived or had recently lived and where the child would presumably still be living had the child not been surreptitiously removed therefrom. *Harper v. Landers*, 180 Ga. App. 154, 348 S.E.2d 698 (1986) (decided under former §§ 19-9-42 and 19-9-43).

The facts of the instant case fit squarely within former § 19-9-43(a)(1) and (2), since it was undisputed that the children lived in Paulding County, Georgia, with their mother and their grandmother who, both during her daughter's times of disability and after her death, "acted as a parent" to the minor children, giving them emotional and financial support and it is

also undisputed that the grandmother's petition was filed July 30, 1985, and that the father was personally served in Melbourne, Florida, on September 21, 1985, both dates being less than six months after May 24, 1985, when the children were removed from Georgia. Thus, at the initiation of the action, Georgia was the children's "home state," as defined in former paragraph (5) of § 19-9-42. *Harper v. Landers*, 180 Ga. App. 154, 348 S.E.2d 698 (1986) (decided under former §§ 19-9-42 and 19-9-43).

First parent took the parties' child from Georgia to South Carolina and filed a custody action there. As the child had lived with the second parent in Georgia for at least six consecutive months immediately before the second parent commenced a child custody proceeding there, pursuant to O.C.G.A. § 19-9-41, Georgia was the child's "home state" and the Georgia trial court thus had jurisdiction under O.C.G.A. § 19-9-61(a)(1) to grant the second parent temporary custody. *Croft v. Croft*, 298 Ga. App. 303, 680 S.E.2d 150 (2009).

Trial court erred in dismissing a husband's divorce complaint on the ground that jurisdiction was properly with the

Italian court because the trial court had jurisdiction to make the initial custody determination under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), O.C.G.A. § 19-9-61(a) and (b), and no other court did since Georgia was the only state, including Italy, that could qualify as the “home state” of the parties’ child pursuant to the UCCJEA, O.C.G.A. § 19-9-41(7), at the time either the Italian custody proceeding or the Georgia proceeding was commenced and at the time the trial court entered the court’s initial child custody order; under the UCCJEA, the jurisdictional inquiry entered into by the Italian court was insufficient because the Italian court undertook no analysis of the home state of the child or of any other factors that could be considered a substitute for such but simply found that the prerequisites for jurisdiction over a divorce action were met. *Bellew v. Larese*, 288 Ga. 495, 706 S.E.2d 78 (2011).

Trial court did not abuse the court’s discretion by denying a wife’s motion to stay the Georgia divorce proceeding commenced by the husband in lieu of the State of New York proceeding the wife filed because the record showed that the wife and children had lived in Georgia with the husband since 2000 and continued to live in Georgia until sometime after the couple filed their respective petitions for divorce; thus, Georgia was the home state of the children for the purposes of the Uniform Child Custody Jurisdiction and Enforcement Act, O.C.G.A. § 19-9-40 et seq., and New York was not. *Black v. Black*, 292 Ga. 691, 740 S.E.2d 613 (2013).

“Home state” means physical presence without regard to legal residence; thus, when the mother lived in Illinois and the child lived with her there continuously from at least May 1979, until December 1980, except for a two-week absence to go to Georgia in July 1980, where she married her present husband, Illinois was the child’s “home state,” and since the father commenced custody proceeding in May 1981, less than six months after the mother removed the child to Georgia in December 1980, Illinois trial court had jurisdiction to determine the custody of the child. *Brenner v. Cavin*, 163

Ga. App. 694, 295 S.E.2d 135 (1982) (decided under former Code 1933, §§ 74-503 and 74-504).

“Home state” not a bar to finding personal jurisdiction. — Father petitioning for modification of custody and visitation rights cannot contest personal jurisdiction in a counterclaim by mother to modify child support despite “home state” requirement. *Yount v. Mulle*, 266 Ga. 729, 470 S.E.2d 647 (1996) (decided under former Uniform Child Custody Jurisdiction Act).

“State” defined. — For purposes of the former Georgia Uniform Child Custody Jurisdiction Act, specifically former O.C.G.A. § 19-9-42(10), the Commonwealth of the Bahamas constitutes a state. *Edwards v. Edwards*, 254 Ga. App. 849, 563 S.E.2d 888 (2002).

“Custody proceeding.” — Former Uniform Child Custody Jurisdiction Act applied to adoption proceedings even before the 1988 amendment of former paragraph (3) of § 19-9-42 which added such proceedings to the list of matters included within the term “custody proceeding.” *Gainey v. Olivo*, 258 Ga. 640, 373 S.E.2d 4 (1988) (decided under former § 19-9-42).

Because the Georgia superior court had exclusive and continuing subject matter jurisdiction over the grandparents’ modification of custody action, as there was no evidence to suggest that the initial 2001 custody determination was not made consistent with O.C.G.A. § 19-9-61, even without personal jurisdiction over the child’s parent, the custody determination entered by the superior court was upheld on appeal; moreover, visitation was considered a custody issue under the Uniform Child Custody Jurisdiction Enforcement Act, O.C.G.A. § 19-9-41(3). *Daniels v. Barnes*, 289 Ga. App. 897, 658 S.E.2d 472 (2008).

Res judicata did not bar custody petition. — Since a previous visitation order related to the grandparent’s right to visitation, not custody, and the legal issues to be decided varied, the trial court properly determined that res judicata did not bar the grandparents’ petition for custody under the Uniform Child Jurisdiction and Custody Act, O.C.G.A. § 19-9-40 et seq.; the Act does not provide that the

judgment is conclusive as to all issues which could have been put in issue. *Scott v. Scott*, 311 Ga. App. 726, 716 S.E.2d 809 (2011).
Cited in *Upchurch v. Smith*, 281 Ga. 28,

635 S.E.2d 710 (2006); *Jones v. Van Horn*, 283 Ga. App. 144, 640 S.E.2d 712 (2006); *Zinkhan v. Bruce*, 305 Ga. App. 510, 699 S.E.2d 833 (2010); *Oglesby v. Deal*, 311 Ga. App. 622, 716 S.E.2d 749 (2011).

RESEARCH REFERENCES

Am. Jur. 2d. — 39 Am. Jur. 2d, Habeas Corpus, §§ 95 et seq., 107. 59 Am. Jur. 2d, Parent and Child, § 26 et seq.
C.J.S. — 39 C.J.S., Habeas Corpus, § 241 et seq. 43 C.J.S., Infants, § 10 et seq. 67A C.J.S., Parent and Child, § 94 et seq.
U.L.A. — Uniform Child Custody Jurisdiction Act (U.L.A.) § 2.
ALR. — What types of proceedings or

determinations are governed by the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 78 ALR4th 1028.
Home state jurisdiction of court under § 3(a)(1) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(A), 6 ALR5th 1.

19-9-42. Article inapplicable to adoptions or authorizations for emergency care.

This article does not govern an adoption proceeding or a proceeding pertaining to the authorization of emergency medical care for a child. (Code 1981, § 19-9-42, enacted by Ga. L. 2001, p. 129, § 1.)

JUDICIAL DECISIONS

UCCJEA does not govern adoption proceedings. — Trial court did not err in exercising jurisdiction in a petition for adoption because the Georgia Uniform Child Custody Jurisdiction Enforcement

Act (UCCJEA), O.C.G.A. § 19-9-40 et seq., did not govern adoption proceedings. *Barr v. Gregor*, 316 Ga. App. 269, 728 S.E.2d 868 (2012).

19-9-43. Proceeding pertaining to Indian child exempted from article.

(a) A child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C. Section 1901 et seq., is not subject to this article to the extent that it is governed by the Indian Child Welfare Act.

(b) A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying this part and Part 2 of this article.

(c) A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this article must be recognized and enforced under Part 3 of this article. (Code 1981, § 19-9-43, enacted by Ga. L. 2001, p. 129, § 1.)

Cross references. — Legitimate American Indian tribes, § 44-12-300 et seq.

RESEARCH REFERENCES

ALR. — Construction and application of Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C.A. §§ 1901 et seq.) upon child custody determinations, 89 ALR5th 195.

19-9-44. Child custody determinations of foreign country.

(a) A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying this part and Part 2 of this article.

(b) Except as otherwise provided in subsection (c) of this Code section, a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this article must be recognized and enforced under Part 3 of this article.

(c) A court of this state need not apply this article if the child custody law of a foreign country violates fundamental principles of human rights. (Code 1981, § 19-9-44, enacted by Ga. L. 2001, p. 129, § 1.)

Law reviews. — For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under the Uniform Child Custody Jurisdiction Act, former Code 1933, §§ 74-501 through 74-525, subsequently codified as §§ 19-9-40 through 19-9-64, are included in the annotations for this Code section.

No jurisdiction over person residing in foreign country. — Former Uniform Child Custody Jurisdiction Act cannot be the basis for jurisdiction over person residing in foreign country. *Binns v. Smith*, 251 Ga. 861, 310 S.E.2d 225 (1984) (decided under former Uniform Child Custody Jurisdiction Act).

Georgia trial court had jurisdiction. — Trial court erred in dismissing a husband's divorce complaint on the ground that jurisdiction was properly with the Italian court because the trial

court had jurisdiction to make the initial custody determination under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), O.C.G.A. § 19-9-61(a) and (b), and no other court did since Georgia was the only state, including Italy, that could qualify as the "home state" of the parties' child pursuant to the UCCJEA, O.C.G.A. § 19-9-41(7), at the time either the Italian custody proceeding or the Georgia proceeding was commenced and at the time the trial court entered the court's initial child custody order; under the UCCJEA, the jurisdictional inquiry entered into by the Italian court was insufficient because the Italian court undertook no analysis of the home state of the child or of any other factors that could be considered a substitute for such but simply found that the prerequisites for jurisdiction over a divorce action

were met. *Bellew v. Larese*, 288 Ga. 495, 706 S.E.2d 78 (2011).

RESEARCH REFERENCES

ALR. — Applicability and application of Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to interna-

tional child custody and support actions, 66 ALR6th 269.

19-9-45. Binding authority of child custody determination.

A child custody determination made by a court of this state that had jurisdiction under this article binds all persons who have been served in accordance with the laws of this state or notified in accordance with Code Section 19-9-47 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified. (Code 1981, § 19-9-45, enacted by Ga. L. 2001, p. 129, § 1.)

Law reviews. — For annual survey on domestic relations law, see 64 Mercer L. Rev. 121 (2012).

JUDICIAL DECISIONS

Res judicata did not bar custody petition. — Since a previous visitation order related to the grandparent's right to visitation, not custody, and the legal issues to be decided varied, the trial court properly determined that res judicata did not bar the grandparents' petition for custody under the Uniform Child Jurisdiction and Custody Act, O.C.G.A. § 19-9-40 et

seq.; the Act does not provide that the judgment is conclusive as to all issues which could have been put in issue. *Scott v. Scott*, 311 Ga. App. 726, 716 S.E.2d 809 (2011).

Cited in *Daniels v. Barnes*, 289 Ga. App. 897, 658 S.E.2d 472 (2008); *Hall v. Wellborn*, 295 Ga. App. 884, 673 S.E.2d 341 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 39 Am. Jur. 2d, Habeas Corpus, §§ 119, 135.

C.J.S. — 27C C.J.S., Divorce, §§ 637 et seq., 648 et seq. 39A C.J.S., Habeas Corpus, §§ 273, 344 et seq., 376. 67A C.J.S., Parent and Child, §§ 95, 96.

U.L.A. — Uniform Child Custody Jurisdiction Act (U.L.A.) § 4.

ALR. — Right of parent to notice and hearing before being deprived of custody of child, 76 ALR 242.

Award of custody of child where contest is between child's mother and grandparent, 29 ALR3d 366.

Divorce: necessity of notice of application for temporary custody of child, 31 ALR3d 1378.

Right, in child custody proceedings, to cross-examine investigating officer whose report is used by court in its decision, 59 ALR3d 1337.

Necessity of requiring presence in court of both parties in proceedings relating to custody or visitation of children, 15 ALR4th 864.

19-9-46. Priority given question of existence or exercise of jurisdiction.

If a question of existence or exercise of jurisdiction under this article is raised in a child custody proceeding, the question, upon request of a party, must be given priority on the calendar and handled expeditiously. (Code 1981, § 19-9-46, enacted by Ga. L. 2001, p. 129, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under the Uniform Child Custody Jurisdiction Act, former Code 1933, §§ 74-501 through 74-525, subsequently codified as §§ 19-9-40 through 19-9-64, are included in the annotations for this Code section.

Inquiry into jurisdiction. — Because the parties' Texas divorce action had been

abated due to an earlier Mexican divorce, there was no action pending in Texas; therefore, the trial court did not have to inquire into the court's jurisdiction under the former Uniform Child Custody Jurisdiction Act, O.C.G.A. § 19-9-40 et seq. *Baca v. Baca*, 256 Ga. App. 514, 568 S.E.2d 746 (2002) (decided under former Code Section 19-9-40 et seq.).

19-9-47. Notice and proof of service on persons outside the state.

(a) Notice required for the exercise of jurisdiction when a person is outside this state may be given in a manner prescribed by the law of this state for service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective.

(b) Proof of service may be made in the manner prescribed by the law of this state or by the law of the state in which the service is made.

(c) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court. (Code 1981, § 19-9-47, enacted by Ga. L. 2001, p. 129, § 1.)

Cross references. — Grounds for exercise of personal jurisdiction over nonres-

idents generally, § 9-10-91. Service of process generally, § 9-11-4.

JUDICIAL DECISIONS

Personal service on parent in foreign state. — After the first parent took the parties' child from Georgia to South Carolina, the second parent filed a custody action in Georgia. Personal service of the complaint on the first parent in South

Carolina was sufficient to confer jurisdiction under South Carolina R. Civ. P. 4(d)(1), and hence, was sufficient under O.C.G.A. § 19-9-47 as well. *Croft v. Croft*, 298 Ga. App. 303, 680 S.E.2d 150 (2009).

RESEARCH REFERENCES

Am. Jur. 2d. — 39 Am. Jur. 2d, Habeas Corpus, §§ 119, 123, 135.

C.J.S. — 27C C.J.S., Divorce, §§ 637 et seq., 648 et seq. 39A C.J.S., Habeas Corpus, §§ 273, 344 et seq., 376. 67A C.J.S., Parent and Child, § 95 et seq.

U.L.A. — Uniform Child Custody Jurisdiction Act (U.L.A.) § 5.

ALR. — Right of parent to notice and hearing before being deprived of custody of child, 76 ALR 242.

19-9-48. Personal jurisdiction not obtained in other matters; service of process.

(a) A party to a child custody proceeding, including a modification proceeding, or a petitioner or respondent in a proceeding to enforce or register a child custody determination is not subject to personal jurisdiction in this state for another proceeding or purpose solely by reason of having participated, or of having been physically present for the purpose of participating, in the proceeding.

(b) A person who is subject to personal jurisdiction in this state on a basis other than physical presence is not immune from service of process in this state. A party present in this state who is subject to the jurisdiction of another state is not immune from service of process allowable under the laws of that state.

(c) The immunity granted by subsection (a) of this Code section does not extend to civil litigation based on acts unrelated to the participation in a proceeding under this article committed by an individual while present in this state. (Code 1981, § 19-9-48, enacted by Ga. L. 2001, p. 129, § 1.)

19-9-49. Communication between court of this state and other states; “record” defined.

(a) A court of this state may communicate with a court in another state concerning a proceeding arising under this article and concerning any proceeding or court order in another state relating to family violence. A court of this state may consult any state or national registry of court orders relating to family violence with regard to any party.

(b) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

(c) Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.

(d) Except as otherwise provided in subsection (c) of this Code section, a record must be made of any communication under this Code

section. The parties must be informed promptly of the communication and granted access to the record.

(e) For the purposes of this Code section, “record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. (Code 1981, § 19-9-49, enacted by Ga. L. 2001, p. 129, § 1.)

Cross references. — Electronic records and signatures, T. 10, C. 12.

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the statutory provisions, annotations decided under the Uniform Child Custody Jurisdiction Act, former Code 1933, §§ 74-501 through 74-525, subsequently codified as §§ 19-9-40 through 19-9-64, are included in the annotations for this Code section.

Informational requirements were

necessary to effective functioning of former Code 1933, § 74-507. *Youmans v. Youmans*, 247 Ga. 529, 276 S.E.2d 837 (1981) (decided under former Uniform Child Custody Jurisdiction Act).

Cited in *In re C.C.B.*, 164 Ga. App. 3, 296 S.E.2d 198 (1982); *Osgood v. Dent*, 167 Ga. App. 406, 306 S.E.2d 698 (1983).

RESEARCH REFERENCES

Am. Jur. 2d. — 39 Am. Jur. 2d, Habeas Corpus, § 83 et seq. 59 Am. Jur. 2d, Parent and Child, § 10.

C.J.S. — 27C C.J.S., Divorce, § 637 et seq. 39 C.J.S., Habeas Corpus, § 161 et seq. 67A C.J.S., Parent and Child, § 106 et seq.

U.L.A. — Uniform Child Custody Jurisdiction Act (U.L.A.) § 9.

ALR. — Necessity of requiring presence in court of both parties in proceedings relating to custody or visitation of children, 15 ALR4th 864.

19-9-50. Testimony by deposition; electronic deposition; evidence transmitted by technological means not to be excluded.

(a) In addition to other procedures available to a party, a party to a child custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

(b) A court of this state may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this state shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(c) Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission. (Code 1981, § 19-9-50, enacted by Ga. L. 2001, p. 129, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 24 Am. Jur. 2d, Divorce and Separation, §§ 900, 901, 904, 919 et seq. 39 Am. Jur. 2d, Habeas Corpus, §§ 106, 107.

seq., 648 et seq. 39A C.J.S., Habeas Corpus, § 283 et seq. 67A C.J.S., Parent and Child, § 97.

C.J.S. — 27C C.J.S., Divorce, §§ 637 et

U.L.A. — Uniform Child Custody Jurisdiction Act (U.L.A.) § 10.

19-9-51. Hearings and studies in another state; costs.

(a) A court of this state may request the appropriate court of another state to:

- (1) Hold an evidentiary hearing;
- (2) Order a person to produce or give evidence pursuant to procedures of that state;
- (3) Order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;
- (4) Forward to the court of this state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented, and any evaluation prepared in compliance with the request; and
- (5) Order a party to a child custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

(b) Upon request of a court of another state, a court of this state may hold a hearing or enter an order described in subsection (a) of this Code section.

(c) Travel and other necessary and reasonable expenses incurred under subsections (a) and (b) of this Code section may be assessed against the parties according to the law of this state.

(d) A court of this state shall preserve the pleadings, orders, decrees, records of hearings, evaluations, and other pertinent records with respect to a child custody proceeding until the child attains 18 years of age. Upon appropriate request by a court or law enforcement official of another state, the court shall forward a certified copy of those records. (Code 1981, § 19-9-51, enacted by Ga. L. 2001, p. 129, § 1.)

JUDICIAL DECISIONS

Cited in *Harvey v. Harvey*, 244 Ga. 199, 259 S.E.2d 456 (1979).

RESEARCH REFERENCES

Am. Jur. 2d. — 39 Am. Jur. 2d, Habeas Corpus, §§ 119, 135.

C.J.S. — 27C C.J.S., Divorce, §§ 637 et seq., 756 et seq. 39A C.J.S., Habeas Corpus, § 344 et seq. 67A C.J.S., Parent and Child, § 97.

U.L.A. — Uniform Child Custody Jurisdiction Act (U.L.A.) § 11.

ALR. — Necessity of requiring presence in court of both parties in proceedings relating to custody or visitation of children, 15 ALR4th 864.

19-9-52 through 19-9-60.

Repealed by Ga. L. 2001, p. 129, § 1, effective April 7, 2001.

Editor's notes. — Code Sections 19-9-52 through 19-9-60, relating to custody decrees generally, were based on

Code 1933, §§ 74-513 through 74-521, enacted by Ga. L. 1978, p. 258, § 1.

PART 2

JURISDICTION

Law reviews. — For article, "Domestic Relations Law," see 53 Mercer L. Rev. 265 (2001).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under the Uniform Child Custody Jurisdiction Act, former Code 1933, §§ 74-501 through 74-525, subsequently codified as §§ 19-9-40 through 19-9-64, are included in the annotations for this Code section.

Where custody proceedings should take place. — Custody proceedings should take place in state with which child and family have closest connections. *Graham v. Hajosy*, 159 Ga. App. 466, 283 S.E.2d 683 (1981) (decided under former Uniform Child Custody Jurisdiction Act).

Jurisdiction under Parental Kidnapping Prevention Act (28 U.S.C. § 1738A). — In a proceeding to modify child custody provisions of a foreign divorce decree, even though Georgia was the home state of the minor children, the trial

court erred in modifying the decree when, pursuant to the Parental Kidnapping Prevention Act (28 U.S.C. § 1738A), the court failed to address whether the court that originally entered the decree had lost or declined to exercise jurisdiction. *Henderson v. Justice*, 223 Ga. App. 591, 478 S.E.2d 434 (1996) (decided under former Uniform Child Custody Jurisdiction Act).

In a proceeding to modify visitation rights of the father, a Louisiana resident, even though the trial court clearly had jurisdiction to modify the Louisiana judgment because Georgia was the children's home state at the time the modification petition was filed, the court erred in issuing a modification order because Louisiana retained continuing jurisdiction over the case. *Bonar v. Bonar*, 246 Ga. App. 11, 539 S.E.2d 521 (2000) (decided under former Uniform Child Custody Jurisdiction Act).

Jurisdiction under Full Faith and Credit for Child Support Order Act.

— Because a court of this state has continuing, exclusive jurisdiction over the last child support order entered consistent with the Full Faith and Credit for Child Support Order Act, 28 U.S.C. § 1738B, the trial court erred by declining to exercise jurisdiction over the appellee's petition to modify child support. *Early v. Early*, 269 Ga. 415, 499 S.E.2d 329 (1998) (decided under former Uniform Child Custody Jurisdiction Act).

Jurisdictional standards of this article. — Jurisdictional provisions of the former Uniform Child Custody Jurisdiction Act do not apply in the international arena so as to confer jurisdiction upon an international tribunal or limit the exercise of otherwise proper jurisdiction in the state because of pending international proceedings. *Goldstein v. Goldstein*, 229 Ga. App. 862, 494 S.E.2d 745 (1997) (decided under former Uniform Child Custody Jurisdiction Act).

Construed with § 9-10-91(5). — Jurisdiction for modification of child custody matters, which include visitation, is in the home state of the child. Former § 9-10-91(5), the "domestic-relations long arm statute", applies by its own terms only to actions involving alimony, child support, and division of property. *Kemp v. Sharp*, 261 Ga. 600, 409 S.E.2d 204 (1991) (decided under former Uniform Child Custody Jurisdiction Act).

Minimum nexus between court and child that must exist before court's award of child's custody should carry any authority is that court should be in position to adequately inform itself regarding the needs and desires of the child, and of what is in the child's best interest. *Goldfarb v. Goldfarb*, 246 Ga. 24, 268 S.E.2d 648 (1980) (decided under former Uniform Child Custody Jurisdiction Act).

Interested state with requisite nexus may determine custody. — Former § 19-9-43 allowed interested state with requisite nexus with subject of child custody suit to hear action and make determination. *Goldfarb v. Goldfarb*, 246 Ga. 24, 268 S.E.2d 648 (1980) (decided under former Uniform Child Custody Jurisdiction Act).

Georgia courts will recognize and enforce other state's modifications in accordance with former Uniform Child Custody and Jurisdiction Act. *Yearta v. Scroggins*, 245 Ga. 831, 268 S.E.2d 151 (1980) (decided under former Uniform Child Custody Jurisdiction Act).

Enforcement of custody provisions of Georgia divorce judgment. — Georgia court which issued a divorce judgment that has not been modified by a court of another state with jurisdiction to do so may hear a Georgia-resident, non-custodial parent's allegations of contumacious conduct leveled against the nonresident custodial parent; a Georgia court has the statutory power to compel obedience to its judgments, as well as the inherent power to enforce its orders through contempt proceedings, and the Uniform Child Custody Jurisdiction Act does not provide the exclusive means by which a party may seek enforcement of the custody provisions of a Georgia judgment. *Dyer v. Surratt*, 266 Ga. 220, 466 S.E.2d 584 (1996) (decided under former Uniform Child Custody Jurisdiction Act).

Parent wishing to change custody must proceed in proper jurisdiction. — If it is in child's best interest that child custody be changed, noncustodial parent must, instead of snatching child, seek change of custody where jurisdiction lies. *Etzion v. Evans*, 247 Ga. 390, 276 S.E.2d 577 (1981) (decided under former Uniform Child Custody Jurisdiction Act).

Florida court's award of custody to the father was not entitled to recognition in Georgia since the Florida court assumed jurisdiction over issues of child custody in disregard of the requirement imposed by former § 19-9-46(c) and since Georgia was the home state of the children at the time of the Florida court's action. *Thompson v. Thompson*, 241 Ga. App. 616, 526 S.E.2d 576 (1999) (decided under former Uniform Child Custody Jurisdiction Act).

When Georgia courts will relitigate custody. — Courts of Georgia will refuse to relitigate custody except where legal custodian resides. *Yearta v. Scroggins*, 245 Ga. 831, 268 S.E.2d 151 (1980) (decided under former Uniform Child Custody Jurisdiction Act).

When Georgia courts will not relitigate custody. — As a matter of

public policy, Georgia courts refuse to provide forum in Georgia for relitigating custody when noncustodial parent resident in Georgia has improperly removed child from physical custody of custodial parent who resides in another state. *Bishop v. Bishop*, 247 Ga. 56, 273 S.E.2d 394 (1981); *Etzion v. Evans*, 247 Ga. 390, 276 S.E.2d 577 (1981) (decided under former Uniform Child Custody Jurisdiction Act).

Effect of modification proceeding in another state upon Georgia jurisdiction. — Former Uniform Child Custody Jurisdiction Act did not destroy the jurisdiction of a Georgia court to hear contempt proceedings filed by a Georgia-resident, noncustodial mother against an Ohio-resident, custodial father for his breach of the visitation provisions of Georgia court's child custody decree solely because an Ohio court previously had accepted jurisdiction of visitation modification proceedings filed by father where the Ohio court had not entered an order modifying the visitation provisions of the Georgia court's decree. *Daily v. Dombroski*, 250 Ga. 236, 297 S.E.2d 246 (1982) (decided under former Uniform Child Custody Jurisdiction Act).

Petition for contempt for denial of visitation rights clearly came within the purview of former Uniform Child Custody Jurisdiction Act. *Paul v. Paul*, 184 Ga. App. 217, 361 S.E.2d 221 (1987) (decided under former Uniform Child Custody Jurisdiction Act).

Resident parent illegally retaining custody. — When the mother, a Florida resident, was the custodial parent, and the father, a Georgia resident, illegally retained custody of the minor child after a visitation period granted by the custodial parent, the trial court should have refused jurisdiction pursuant to the provisions providing that a court of this state, competent to decide child custody, has jurisdiction to make such determination only if Georgia is the home state of the child at the time of commencement of the proceeding, or has been the child's home state within six months before commencement of the proceeding. *Craighead v. Davis*, 162 Ga. App. 145, 290 S.E.2d 358 (1982) (decided under former Uniform Child Custody Jurisdiction Act).

"Home state," for all purposes which the former Uniform Child Custody Jurisdiction Act was designed to govern, did not mean the residence or domicile of the parent having legal custody. Rather, "home state," for purposes of former § 19-9-43, means the place where the child lived or had recently lived and where the child would presumably still be living had the child not been surreptitiously removed therefrom. *Harper v. Landers*, 180 Ga. App. 154, 348 S.E.2d 698 (1986) (decided under former Uniform Child Custody Jurisdiction Act).

Facts of the instant case fit squarely within paragraphs (a)(1) and (2) of former § 19-9-43, since it was undisputed that the children lived in Paulding County, Georgia, with their mother and their grandmother, who both during her daughter's times of disability and after her death "acted as a parent" to the minor children, giving them emotional and financial support and it was also undisputed that the grandmother's petition was filed July 30, 1985, and that the father was personally served in Melbourne, Florida, on September 21, 1985, both dates being less than six months after May 24, 1985, when the children were removed from Georgia. Thus, at the initiation of the action, Georgia was the children's "home state," as defined in the controlling statute, former § 19-9-42(5). *Harper v. Landers*, 180 Ga. App. 154, 348 S.E.2d 698 (1986) (decided under former Uniform Child Custody Jurisdiction Act).

Assertion that Georgia did not have jurisdiction because Ohio was the home state of all the parties' children at the time of the divorce, and continued to be the home state of the two older children of the parties, was not pertinent to the question since the term "home state" refers to the home of the child for at least six months prior to the action. *Gouse v. Wilson*, 207 Ga. App. 574, 428 S.E.2d 571 (1993), *aff'd*, 263 Ga. 887, 441 S.E.2d 57 (1994) (decided under former Uniform Child Custody Jurisdiction Act).

Since a child had resided in Georgia with the custodial parent for a number of years giving the Georgia court authority to exercise home state jurisdiction, the "appropriate forum" jurisdiction was not

conferred upon the Tennessee court such as would preclude the Georgia court from exercising jurisdiction to modify the custody decree ordered under the Tennessee divorce decree. *Mulle v. Yount*, 211 Ga. App. 584, 440 S.E.2d 210 (1993) (decided under former Uniform Child Custody Jurisdiction Act).

“Home state” means physical presence without regard to legal residence; thus, when the mother lived in Illinois and the child lived with her there continuously from at least May 1979, until December 1980, except for a two-week absence to go to Georgia in July 1980, where she married her present husband, Illinois was the child’s “home state,” and since the father commenced custody proceeding in May 1981, less than six months after the mother removed the child to Georgia in December 1980, the Illinois trial court had jurisdiction to determine the custody of the child. *Brenner v. Cavin*, 163 Ga. App. 694, 295 S.E.2d 135 (1982) (decided under former Uniform Child Custody Jurisdiction Act).

Attempt to predetermine “home state.” — Jurisdiction of interstate custody disputes is controlled in this state by the former Uniform Child Custody Jurisdiction Act (UCCJA). An attempt to predetermine the “home state” is a circumvention of the UCCJA, and is an attempt to deprive this state of the state’s lawful jurisdiction of the citizens according to the Act. *Gouse v. Wilson*, 207 Ga. App. 574, 428 S.E.2d 571 (1993) (decided under former Uniform Child Custody Jurisdiction Act).

Jurisdiction where another state has jurisdiction. — When it appears that another state has jurisdiction of case under paragraph (a)(1) or (a)(2) of former § 19-9-43, Georgia courts do not have such jurisdiction unless the children are abandoned or an emergency exists which would justify assumption of jurisdiction by this state. *Douse v. Douse*, 157 Ga. App. 524, 277 S.E.2d 807 (1981) (decided under former Uniform Child Custody Jurisdiction Act).

Attempt to retain jurisdiction by stipulation in decree. — Ohio court’s attempt to retain jurisdiction of the matter of child custody by so stipulating in its

divorce decree was a nullity, even though it is based on the agreement of the parties. *Gouse v. Wilson*, 207 Ga. App. 574, 428 S.E.2d 571 (1993) (decided under former Uniform Child Custody Jurisdiction Act).

Determining jurisdiction when emergency is claimed. — When a petitioner seeking modification of an out-of-state custody decree alleges that the child is in need of emergency protection, the trial court was authorized under subparagraph (a)(3)(B) of former § 19-9-43 to take temporary jurisdiction and even to make an award of temporary custody. Under the relevant statutory provisions, however, the court is under a duty before proceeding to modify an out-of-state decree to ascertain whether the allegations contained in the petition are valid, and whether the petitioner has complied with the statutory requirements and is entitled to bring further proceedings in the Georgia courts. *Osgood v. Dent*, 167 Ga. App. 406, 306 S.E.2d 698 (1983); *Galvez v. Galvez*, 221 Ga. App. 644, 472 S.E.2d 492 (1996) (decided under former Uniform Child Custody Jurisdiction Act).

Trial court lacked jurisdiction to hear an action for modification brought by the father, where the mother had legal custody and lived with the child in a different state, and the child was temporarily visiting the father in Georgia; findings of the court that abuse of the child may have occurred and that the mother’s nonmarital cohabitation may have been detrimental to the child were not sufficient to support the exercise of emergency jurisdiction. *In re M.M.*, 222 Ga. App. 313, 474 S.E.2d 53 (1996) (decided under former Uniform Child Custody Jurisdiction Act).

Purpose of the emergency exception to home state jurisdiction is to allow an appropriate non-home state court to exercise jurisdiction where the circumstances and well-being of the child demand immediate action; thus, because no true emergency existed, the Georgia court properly refused to take jurisdiction in a child custody case involving a child who resided in Virginia. *Rozier v. Berto*, 230 Ga. App. 427, 496 S.E.2d 544 (1998) (decided under former Uniform Child Custody Jurisdiction Act).

Specific objection to jurisdiction. — When the home state of the child was not Georgia and the mother as custodial parent specifically objected to jurisdiction over her person and the subject matter without making an appearance in court, the state superior court had no jurisdiction over this custody determination. *Baker v. Ashburn*, 179 Ga. App. 757, 347 S.E.2d 660, aff'd, 256 Ga. 507, 350 S.E.2d 437 (1986) (decided under former Uniform Child Custody Jurisdiction Act).

Court had jurisdiction of the child and the issue of the child's custody since the child had continually lived in Georgia and this was the child's home state. *Gregg v. Barnes*, 203 Ga. App. 549, 417 S.E.2d 206, cert. denied, 203 Ga. App. 906, 417 S.E.2d 206 (1992) (decided under former Uniform Child Custody Jurisdiction Act).

Because the only reason the child had a growing connection with another state was that the father moved the child there without notice, jurisdiction in Georgia was properly based on findings that it was in the best interest of the child, the mother had a significant connection with the state, and substantial evidence concerning the child's present and future needs was available in Georgia. *Holt v. Leiter*, 232 Ga. App. 376, 501 S.E.2d 879 (1998) (decided under former Uniform Child Custody Jurisdiction Act).

Georgia court had jurisdiction of noncustodial father's action for modification of custody since no other state had jurisdiction as the "home state" of the children. *Mock v. Smith*, 233 Ga. App. 36, 503 S.E.2d 319 (1998) (decided under former Uniform Child Custody Jurisdiction Act).

Georgia court could assume jurisdiction pursuant to paragraph (a)(2) of former § 19-9-43 because substantial evidence was available in Georgia bearing on the children's past and future activities, relationships, and care; in addition, jurisdiction could be assumed pursuant to paragraph (a)(4) of that section as no other state had jurisdiction. *Wylie v. Blatchley*, 237 Ga. App. 563, 515 S.E.2d 855 (1999) (decided under former Uniform Child Custody Jurisdiction Act).

Trial court lacked jurisdiction over a resident noncustodial father's action

against a nonresident custodial mother seeking to modify visitation rights and to hold the mother in contempt of the visitation provisions of a Georgia decree since personal service had not been made on the mother in Georgia. *Ashburn v. Baker*, 256 Ga. 507, 350 S.E.2d 437 (1986); *Ruckstuhl v. Corley*, 218 Ga. App. 660, 462 S.E.2d 795 (1995) (decided under former Uniform Child Custody Jurisdiction Act).

When the mother removed the minor child of the parties from Georgia to the Federal Republic of Germany when there was in effect no court order providing for custody of the child and she subsequently obtained from a German court a decree awarding custody to her, and the father later filed a complaint in a Georgia superior court and attempted to serve the mother in Germany by publication, the Georgia court was without jurisdiction to award custody of the child to the father. *Richardson v. Richardson*, 257 Ga. 101, 355 S.E.2d 664 (1987) (decided under former Uniform Child Custody Jurisdiction Act).

In an action by a noncustodial parent, filed in Georgia, for modification of the visitation provisions of the divorce decree, the assertion by the nonresident custodial parent of a counterclaim for modification of support did not constitute a waiver of the custodial parent's right to insist on litigating custody matters in Texas, the home state of the parties' child. *Kemp v. Sharp*, 261 Ga. 600, 409 S.E.2d 204 (1991) (decided under former Uniform Child Custody Jurisdiction Act).

Trial court lacked jurisdiction to hear an action for modification of custody brought by father, since the mother had legal custody and lived with the child in a different state, the child was temporarily visiting the father in Georgia, there was no extreme emergency authorizing the conduct of the father in denying custody to the mother, and there was not substantial evidence otherwise sufficient to vest jurisdiction in the Georgia court. *Lightfoot v. Lightfoot*, 210 Ga. App. 400, 436 S.E.2d 700 (1993) (decided under former Uniform Child Custody Jurisdiction Act).

Even though the Tennessee court had declined to exercise the court's jurisdiction over a custody matter, the Georgia court

did not gain jurisdiction because, under the former Uniform Child Custody and Jurisdiction Act, jurisdiction could not be conferred by stipulation, agreement, or consent of the parties or another court. *Williams v. Goss*, 211 Ga. App. 195, 438 S.E.2d 670 (1993) (decided under former Uniform Child Custody Jurisdiction Act).

When Tennessee was the house state of a minor child, the fact that the child indicated a preference to reside with his father who lived in Georgia did not create a significant connection between the child and the state where the parent resided so as to confer jurisdiction of custody proceedings in the Georgia courts. *Williams v. Goss*, 211 Ga. App. 195, 438 S.E.2d 670 (1993) (decided under former Uniform Child Custody Jurisdiction Act).

Trial court lacked jurisdiction to hear an action for modification of custody brought by the father because the father did not have standing until more than six months after the date of the filing and Florida was the state with the closest connections to the child and family. *Mezquita v. Campbell*, 238 Ga. App. 396, 519 S.E.2d 27 (1999) (decided under former Uniform Child Custody Jurisdiction Act).

Purpose. — Former § 19-9-47 was not a separate grant of jurisdiction over interstate child custody proceedings, but established a discretionary abstention doctrine. *Mulle v. Yount*, 211 Ga. App. 584, 440 S.E.2d 210 (1993) (decided under former § 19-9-47).

Limited jurisdiction. — When the trial court held that the court did not have jurisdiction over child custody because of

the pendency of an appeal in another state, custody ceased to be a contestable issue, and the court was not precluded from addressing issues over which the court had jurisdiction including divorce. *Norowski v. Norowski*, 267 Ga. 841, 483 S.E.2d 577 (1997) (decided under former § 19-9-47).

While a trial court had a limited grant of authority under subsection (f) of former § 19-9-47 to dismiss a custody proceeding on the ground of forum non conveniens, it could not dismiss the divorce proceeding as well. *Holtsclaw v. Holtsclaw*, 269 Ga. 163, 496 S.E.2d 262 (1998); *Patterson v. Patterson*, 271 Ga. 306, 519 S.E.2d 438 (1999) (decided under former § 19-9-47).

Inquiry required. — Trial court erred in dismissing a child custody proceeding without an inquiry into whether the law of the other state involved in the case would allow a court of that state to exercise jurisdiction. *Patterson v. Patterson*, 271 Ga. 306, 519 S.E.2d 438 (1999) (decided under former § 19-9-47).

In father's action seeking modification of a child custody order, the trial court properly applied the Uniform Child Custody Jurisdiction Act (UCCJA) to resolve the parties' dispute because the UCCJA was the law in effect when the father filed his petition seeking modification of a child custody order, and the trial court did not err by concluding that the father's petition under former O.C.G.A. § 19-9-43(a)(1)(B) was timely because O.C.G.A. § 1-3-1(d)(3) extended the six-month period the father had to file the petition from a Saturday to the following Monday. *Parke v. Fant*, 260 Ga. App. 84, 578 S.E.2d 896 (2003).

RESEARCH REFERENCES

Am. Jur. 2d. — 24A Am. Jur. 2d, Divorce and Separation, §§ 868, 874, 870, 878. 39 Am. Jur. 2d, Habeas Corpus, §§ 95 et seq., 107.

C.J.S. — 27C C.J.S., Divorce, §§ 611, 612, 618, 629, 635. 39 C.J.S., Habeas Corpus, § 241 et seq. 43 C.J.S., Infants, § 10 et seq. 67A C.J.S., Parent and Child, § 99 et seq.

U.L.A. — Uniform Child Custody Jurisdiction Act (U.L.A.) § 3.

ALR. — Removal of child from state pending proceedings for custody as defeating jurisdiction to award custody, 171 ALR 1405.

Jurisdiction of court to award custody of child domiciled in state but physically outside it, 9 ALR2d 434.

Child custody: when does state that issued previous custody determination have continuing jurisdiction under Uniform Child Custody Jurisdiction Act

(UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A, 83 ALR4th 742.

Significant connection jurisdiction of court under § 3(a)(2) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(B), 5 ALR5th 550; 67 ALR5th 1.

Abandonment and emergency jurisdiction of court under § 3(a)(3) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(C), 5 ALR5th 788.

Home state jurisdiction of court under § 3(a)(1) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(A), 6 ALR5th 1.

Default jurisdiction of court under § 3(a)(4) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(D), 6 ALR5th 69.

Home state jurisdiction of court to modify foreign child custody decree under

§§ 3(a)(1) and 14(a)(2) of Uniform Child Custody Jurisdiction Act (UCCJA) and Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. §§ 1738A(c)(2)(A) and 1738A(f)(1), 72 ALR5th 249.

Declining jurisdiction to modify prior child custody decree under § 14(a)(1) of Uniform Child Custody Jurisdiction Act (UCCJA) and Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. § 1738A(f)(2), 73 ALR5th 185.

Abandonment jurisdiction of court under §§ 3(a)(3)(i) and 14(a) of Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act, 28 USCA §§ 1738A(c)(2)(C)(i) and 1738A(f), notwithstanding existence of prior valid custody decree rendered by second state, 78 ALR5th 465.

Emergency jurisdiction of court under §§ 3(a)(3)(ii) and 14(a) of Uniform Child Custody Jurisdiction Act and Parental Kidnapping Prevention Act, 28 USCA §§ 1738A(c)(2)(C)(ii) and 1738A(f), to protect interests of child notwithstanding existence of prior, valid custody decree rendered by another state, 80 ALR5th 117.

19-9-61. Jurisdiction requirements for initial child custody determinations; physical presence alone insufficient.

(a) Except as otherwise provided in Code Section 19-9-64, a court of this state has jurisdiction to make an initial child custody determination only if:

(1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(2) A court of another state does not have jurisdiction under paragraph (1) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Code Section 19-9-67 or 19-9-68 and:

(A) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(B) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(3) All courts having jurisdiction under paragraph (1) or (2) of this subsection have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Code Section 19-9-67 or 19-9-68; or

(4) No court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2), or (3) of this subsection.

(b) Subsection (a) of this Code section is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination. (Code 1981, § 19-9-61, enacted by Ga. L. 2001, p. 129, § 1.)

Law reviews. — For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004). For annual survey of domestic relations law, see 58 Mercer L. Rev. 133 (2006). For survey article on

domestic relations law, see 60 Mercer L. Rev. 121 (2008).

For note on the 2001 amendments to O.C.G.A. §§ 19-9-61 to 19-9-70, see 18 Ga. St. U.L. Rev. 58 (2001).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under former Code Sections 19-9-43 and 19-9-53 are included in the annotations for this Code section.

International jurisdiction. — Jurisdictional standards of the former Georgia Uniform Child Custody Jurisdiction Act (UCCJA) were set out in former O.C.G.A. § 19-9-53, which in essence established home state jurisdiction, significant connection jurisdiction, emergency jurisdiction, and appropriate forum jurisdiction; when the Supreme Court of the Commonwealth of the Bahamas assumed jurisdiction over a child-custody dispute, it did so in conformance with the jurisdictional standards of the UCCJA. *Edwards v. Edwards*, 254 Ga. App. 849, 563 S.E.2d 888 (2002) (decided under former Code Section 19-9-53).

Georgia was child's "home state." — First parent took the parties' child from Georgia to South Carolina and filed a custody action there. As the child had lived with the second parent in Georgia for at least six consecutive months immediately before the second parent commenced a child custody proceeding there, pursuant to O.C.G.A. § 19-9-41, Georgia was the child's "home state" and the Geor-

gia trial court thus had jurisdiction under O.C.G.A. § 19-9-61(a)(1) to grant the second parent temporary custody. *Croft v. Croft*, 298 Ga. App. 303, 680 S.E.2d 150 (2009).

Trial court erred in dismissing a husband's divorce complaint on the ground that jurisdiction was properly with the Italian court because the trial court had jurisdiction to make the initial custody determination under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), O.C.G.A. § 19-9-61(a) and (b), and no other court did since Georgia was the only state, including Italy, that could qualify as the "home state" of the parties' child pursuant to the UCCJEA, O.C.G.A. § 19-9-41(7), at the time either the Italian custody proceeding or the Georgia proceeding was commenced and at the time the trial court entered the court's initial child custody order; under the UCCJEA, the jurisdictional inquiry entered into by the Italian court was insufficient because the Italian court undertook no analysis of the home state of the child or of any other factors that could be considered a substitute for such but simply found that the prerequisites for jurisdiction over a divorce action were met. *Bellew v. Larese*, 288 Ga. 495, 706 S.E.2d 78 (2011).

Trial court did not abuse the court's discretion by denying a wife's motion to stay the Georgia divorce proceeding commenced by the husband in lieu of the State of New York proceeding the wife filed because the record showed that the wife and children lived in Georgia with the husband since 2000 and continued to live in Georgia until sometime after the couple filed their respective petitions for divorce; thus, Georgia was the home state of the children for the purposes of the Uniform Child Custody Jurisdiction and Enforcement Act, O.C.G.A. § 19-9-40 et seq., and New York was not. *Black v. Black*, 292 Ga. 691, 740 S.E.2d 613 (2013).

Venue for motion to modify custody. — Fulton County court did not err in transferring a father's custody modification petition to the Cobb County court under both O.C.G.A. §§ 19-9-61 and 19-9-62(a) as Cobb County was the proper forum to hear the modification petition, despite the fact that the divorce and original custody order was heard in Fulton County, given that: (1) the mother and the children later moved to Cobb County; (2) the Cobb County Court entered a custody order; and (3) the Cobb County court thereafter maintained exclusive and continuing jurisdiction over its own child custody determination. *Upchurch v. Smith*, 281 Ga. 28, 635 S.E.2d 710 (2006).

Jurisdiction to modify custody order entered before UCCJEA. — There was no merit to a mother's argument that the trial court lacked jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), O.C.G.A. § 19-9-40 et seq., to modify the court's child custody determination because the determination was made before the UCCJEA was enacted; the UCCJEA in Georgia required only that the initial child custody determination be entered "consistent with" O.C.G.A. § 19-9-61 or O.C.G.A. § 19-9-63. *Devito v. Devito*, 280 Ga. 367, 628 S.E.2d 108 (2006).

Custody can only be relitigated where legal custodian resides. — Trial court erred by granting a parent's complaint for modification of child custody and support and changing custody, which was filed in that parent's county of residence, as that county was not the jurisdic-

tion wherein the issue of custody and support was originally litigated and the opposing parent never waived the challenge to the jurisdiction of the trial court via a pro se letter, which merely acknowledged receipt of the complaint; as a result, the judgment granting the change of custody was reversed and the case was remanded to the trial court with directions for the trial court to transfer the case to the trial court of the proper county. *Hatch v. Hatch*, 287 Ga. App. 832, 652 S.E.2d 874 (2007).

Full faith and credit required. — Georgia trial court was required to give full faith and credit to decision of the Supreme Court of the Commonwealth of the Bahamas awarding child's custody to the mother, even though it conflicted with the trial court's previous order awarding child's custody to the father. *Edwards v. Edwards*, 254 Ga. App. 849, 563 S.E.2d 888 (2002) (decided under former Code Section 19-9-53).

Extension of period to file petition. — In father's action seeking modification of a child custody order, the trial court did not err by concluding that the father's petition under former O.C.G.A. § 19-9-43(a)(1)(B) was timely because O.C.G.A. § 1-3-1(d)(3) extended the six-month period the father had to file the petition from a Saturday to the following Monday. *Parke v. Fant*, 260 Ga. App. 84, 578 S.E.2d 896 (2003).

Jurisdiction proper. — When a wife filed a divorce action in West Virginia before the husband filed an action in Georgia, the West Virginia court's unappealed ruling that a wife was still a resident of Georgia and that court's refusal to exercise jurisdiction over the wife's complaint there were of sufficient effect to authorize the Georgia court to make an initial child custody determination under O.C.G.A. § 19-9-61(a)(3). Implicit in the West Virginia court's finding of lack of jurisdiction was a ruling that Georgia was a more appropriate forum for the action; as West Virginia was the only other court that could have had jurisdiction under § 19-9-61(a)(1) or (2), the Georgia court properly exercised jurisdiction in this case. *Cohen v. Cohen*, 300 Ga. App. 7, 684 S.E.2d 94 (2009).

Jurisdiction over grandparents' modification action. — Because the Georgia superior court had exclusive and continuing subject matter jurisdiction over the grandparents' modification of custody action, as there was no evidence to suggest that the initial 2001 custody determination was not made consistent with O.C.G.A. § 19-9-61, even without personal jurisdiction over the child's parent, the custody determination entered by the superior court was upheld on appeal; but, absent personal jurisdiction over the mother to enter a contempt order, such was reversed. *Daniels v. Barnes*, 289 Ga. App. 897, 658 S.E.2d 472 (2008).

Lack of subject matter jurisdiction. — Superior court erred in granting an aunt and uncle custody of minor children because the court lacked subject matter jurisdiction to consider the petition for custody since a probate court had exclusive jurisdiction to issue and revoke letters of testamentary guardianship, and O.C.G.A. § 29-2-4(b) mandated the issuance of letters of testamentary guardianship to the brother of the children's father without notice and a hearing and without consideration of the children's best interests; the children's physical presence in

the state was insufficient to confer subject matter jurisdiction over the petition for custody as the Uniform Child Custody Jurisdiction and Enforcement Act, O.C.G.A. § 19-9-40 et seq., presumed that a "court" acting under its auspices already had jurisdiction to act as authorized by law. *Zinkhan v. Bruce*, 305 Ga. App. 510, 699 S.E.2d 833 (2010).

Georgia trial court did not have subject matter jurisdiction to modify a Kansas custody determination under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), O.C.G.A. § 19-9-40 et seq., because, while Georgia was the child's home state under O.C.G.A. § 19-9-61, Georgia failed to satisfy the remaining requirements of O.C.G.A. § 19-9-63 since the Kansas court never made a determination that it no longer had continuing, exclusive jurisdiction over the custody issue or that Georgia provided a more convenient forum than Kansas. *Delgado v. Combs*, 314 Ga. App. 419, 724 S.E.2d 436 (2012), cert. denied, No. S12C1106, 2012 Ga. LEXIS 602 (Ga. 2012).

Cited in *Hall v. Wellborn*, 295 Ga. App. 884, 673 S.E.2d 341 (2009); *Oglesby v. Deal*, 311 Ga. App. 622, 716 S.E.2d 749 (2011).

RESEARCH REFERENCES

ALR. — Construction and application of Uniform Child Custody Jurisdiction and Enforcement Act's significant connec-

tion jurisdiction provision, 52 ALR6th 433.

19-9-62. Prerequisites for termination of exclusive, continuing jurisdiction.

(a) Except as otherwise provided in Code Section 19-9-64, a court of this state which has made a child custody determination consistent with Code Section 19-9-61 or 19-9-63 has exclusive, continuing jurisdiction over the determination until:

(1) A court of this state determines that neither the child nor the child's parents or any person acting as a parent has a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(2) A court of this state or a court of another state determines that neither the child nor the child's parents or any person acting as a parent presently resides in this state.

(b) A court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this Code section may modify that determination only if it has jurisdiction to make an initial determination under Code Section 19-9-61. (Code 1981, § 19-9-62, enacted by Ga. L. 2001, p. 129, § 1.)

Law reviews. — For survey article on domestic relations law, see 60 Mercer L. Rev. 121 (2008).

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 19-9-62(a) did not violate Ga. Const. 1983, Art. VI, Sec. II, Para. VI; a trial court correctly ruled that the court had subject matter jurisdiction over a father's post-decree child custody modification action pursuant to O.C.G.A. § 19-9-62 and that personal jurisdiction over the mother was unnecessary in order for the court to address the requested modification. *Devito v. Devito*, 280 Ga. 367, 628 S.E.2d 108 (2006).

Court had subject matter jurisdiction. — Under O.C.G.A. § 19-9-62, the juvenile court properly exercised subject matter jurisdiction to terminate the parental rights of the adoptive parents to the child, born in and a citizen of Zambia, but who, at the time of the termination proceedings, had lived in Fulton County for at least six consecutive months with persons acting as her parents. In the Interest of *E. E. B. W.*, 318 Ga. App. 65, 733 S.E.2d 369 (2012).

Jurisdiction to modify custody determination entered before UCCJEA. — There was no merit to a mother's argument that the trial court lacked jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), O.C.G.A. § 19-9-40 et seq., to modify its child custody determination because it was made before the UCCJEA was enacted; the UCCJEA in Georgia required only that the initial child custody determination be entered "consistent with" O.C.G.A. § 19-9-61 or O.C.G.A. § 19-9-63. *Devito v. Devito*, 280 Ga. 367, 628 S.E.2d 108 (2006).

Venue for motion to modify custody. — Fulton County court did not err in transferring a father's custody modification petition to the Cobb County court under both O.C.G.A. §§ 19-9-61 and 19-9-62(a) as Cobb County was the proper forum to hear the modification petition, despite the fact that the divorce and original custody order was heard in Fulton County, given that: (1) the mother and the children later moved to Cobb County; (2) the Cobb County Court entered a custody order; and (3) the Cobb County court thereafter maintained exclusive and continuing jurisdiction over its own child custody determination. *Upchurch v. Smith*, 281 Ga. 28, 635 S.E.2d 710 (2006).

Trial court erred by granting a parent's complaint for modification of child custody and support and changing custody, which was filed in that parent's county of residence, as that county was not the jurisdiction wherein the issue of custody and support was originally litigated and the opposing parent never waived the challenge to the jurisdiction of the trial court via a pro se letter, which merely acknowledged receipt of the complaint; as a result, the judgment granting the change of custody was reversed and the case was remanded to the trial court with directions for the trial court to transfer the case to the trial court of the proper county. *Hatch v. Hatch*, 287 Ga. App. 832, 652 S.E.2d 874 (2007).

Exclusive, continuing jurisdiction lost. — While a mother claimed that a Bibb County, Georgia court had exclusive,

continuing jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, O.C.G.A. § 19-9-40 et seq., since the court made an initial custody ruling, that jurisdiction was lost under O.C.G.A. § 19-9-62(a) when a Florida court determined in a paternity proceeding that both parents and the child resided in Florida. *Hall v. Wellborn*, 295 Ga. App. 884, 673 S.E.2d 341 (2009).

Jurisdiction over grandparents' modification action. — Because the Georgia superior court had exclusive and continuing subject matter jurisdiction over the grandparents' modification of custody action, as there was no evidence

to suggest that the initial 2001 custody determination was not made consistent with O.C.G.A. § 19-9-61, even without personal jurisdiction over the child's parent, the custody determination entered by the superior court was upheld on appeal; but, absent personal jurisdiction over the mother to enter a contempt order, such was reversed. *Daniels v. Barnes*, 289 Ga. App. 897, 658 S.E.2d 472 (2008).

Cited in *Bailey v. Bailey*, 283 Ga. App. 361, 641 S.E.2d 580 (2007); *Taylor v. Curl*, 298 Ga. App. 45, 679 S.E.2d 80 (2009); *Oglesby v. Deal*, 311 Ga. App. 622, 716 S.E.2d 749 (2011).

RESEARCH REFERENCES

ALR. — Construction and application of Uniform Child Custody Jurisdiction and Enforcement Act's significant connec-

tion jurisdiction provision, 52 ALR6th 433.

19-9-63. Prerequisites for modifying custody determination from foreign court.

Except as otherwise provided in Code Section 19-9-64, a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under paragraph (1) or (2) of subsection (a) of Code Section 19-9-61 and:

(1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under Code Section 19-9-62 or that a court of this state would be a more convenient forum under Code Section 19-9-67; or

(2) A court of this state or a court of the other state determines that neither the child nor the child's parents or any person acting as a parent presently resides in the other state. (Code 1981, § 19-9-63, enacted by Ga. L. 2001, p. 129, § 1.)

JUDICIAL DECISIONS

Custody can only be relitigated where legal custodian resides. — Trial court erred by granting a parent's complaint for modification of child custody and support and changing custody, which was filed in that parent's county of residence, as that county was not the jurisdiction wherein the issue of custody and

support was originally litigated and the opposing parent never waived the challenge to the jurisdiction of the trial court via a pro se letter, which merely acknowledged receipt of the complaint; as a result, the judgment granting the change of custody was reversed and the case was remanded to the trial court with directions

for the trial court to transfer the case to the trial court of the proper county. *Hatch v. Hatch*, 287 Ga. App. 832, 652 S.E.2d 874 (2007).

Other state no longer has exclusive, continuing jurisdiction. — In a Georgia action to modify an Alaska child custody determination, the Georgia trial court properly assumed jurisdiction pursuant to O.C.G.A. § 19-9-63 because during a telephone conversation between the Georgia and the Alaska courts, the Alaska court determined that it no longer had exclusive continuing jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, O.C.G.A. § 19-9-40 et seq., that Georgia was the home state of the children, and that the Georgia court was the more appropriate forum. *Lopez v. Olson*, 314 Ga. App. 533, 724 S.E.2d 837 (2012).

Lack of subject matter jurisdiction. — Georgia trial court did not have subject

matter jurisdiction to modify a Kansas custody determination under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), O.C.G.A. § 19-9-40 et seq., because, while Georgia was the child's home state under O.C.G.A. § 19-9-61, Georgia failed to satisfy the remaining requirements of O.C.G.A. § 19-9-63 since the Kansas court never made a determination that it no longer had continuing, exclusive jurisdiction over the custody issue or that Georgia provided a more convenient forum than Kansas. Furthermore, although the Georgia court determined that neither the child nor the parents were presently residing in Kansas, the court erred in doing so. *Delgado v. Combs*, 314 Ga. App. 419, 724 S.E.2d 436 (2012), cert. denied, No. S12C1106, 2012 Ga. LEXIS 602 (Ga. 2012).

Cited in *Jones v. Van Horn*, 283 Ga. App. 144, 640 S.E.2d 712 (2006).

RESEARCH REFERENCES

ALR. — Construction and application of Uniform Child Custody Jurisdiction and Enforcement Act's significant connec-

tion jurisdiction provision, 52 ALR6th 433.

19-9-64. Temporary emergency jurisdiction; continuing effect; communicating with other courts.

(a) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child or a sibling or parent of the child is subjected to or threatened with mistreatment or abuse.

(b) If there is no previous child custody determination that is entitled to be enforced under this article and a child custody proceeding has not been commenced in a court of a state having jurisdiction under Code Sections 19-9-61 through 19-9-63, a child custody determination made under this Code section remains in effect until an order is obtained from a court of a state having jurisdiction under Code Sections 19-9-61 through 19-9-63. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under Code Sections 19-9-61 through 19-9-63, a child custody determination made under this Code section becomes a final determination, if it so provides and this state becomes the home state of the child.

(c) If there is a previous child custody determination that is entitled to be enforced under this article, or a child custody proceeding has been

commenced in a court of a state having jurisdiction under Code Sections 19-9-61 and 19-9-63, any order issued by a court of this state under this Code section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under Code Sections 19-9-61 through 19-9-63. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.

(d) A court of this state which has been asked to make a child custody determination under this Code section, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under Code Sections 19-9-61 through 19-9-63, shall immediately communicate with the other court. A court of this state which is exercising jurisdiction pursuant to Code Sections 19-9-61 through 19-9-63, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of another state under a statute similar to this Code section, shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order. (Code 1981, § 19-9-64, enacted by Ga. L. 2001, p. 129, § 1.)

JUDICIAL DECISIONS

Custody can only be relitigated where legal custodian resides. — Trial court erred by granting a parent's complaint for modification of child custody and support and changing custody, which was filed in that parent's county of residence, as that county was not the jurisdiction wherein the issue of custody and support was originally litigated and the opposing parent never waived the challenge to the jurisdiction of the trial court via a pro se letter, which merely acknowledged receipt of the complaint; as a result, the judgment granting the change of custody was reversed and the case was remanded to the trial court with directions for the trial court to transfer the case to the trial court of the proper county. *Hatch v. Hatch*, 287 Ga. App. 832, 652 S.E.2d 874 (2007).

Temporary emergency jurisdiction properly asserted. — Trial court had temporary emergency jurisdiction in a child custody case because the children were visiting the father in Walker County,

which was the location of the trial court, when the order was issued, and the trial court found that the children had been subjected to or threatened with mistreatment or abuse; these were the only two requirements for temporary emergency jurisdiction under O.C.G.A. § 19-9-64. *Taylor v. Curl*, 298 Ga. App. 45, 679 S.E.2d 80 (2009).

Jurisdiction declined. — When a father made threatening telephone calls from another state to a mother and to their child, a trial court could properly decline to exercise jurisdiction under O.C.G.A. § 19-9-64(a) of the Uniform Child Custody Jurisdiction and Enforcement Act, O.C.G.A. § 19-9-40 et seq., and under the similar jurisdictional provisions of the Parental Kidnapping and Prevention Act, 28 U.S.C. § 1738A, because the child was in no immediate danger as the child continued to be in the mother's custody so there was no true emergency requiring a Georgia court to exercise jurisdiction for the child's protection. *Anderson*

v. Deas, 273 Ga. App. 770, 615 S.E.2d 859 (2005). Combs, 314 Ga. App. 419, 724 S.E.2d 436 (2012); Black v. Black, 292 Ga. 691, 740 S.E.2d 613 (2013).

Cited in Baca v. Baca, 256 Ga. App. 514, 568 S.E.2d 746 (2002); Delgado v.

RESEARCH REFERENCES

ALR. — Construction and application of uniform child custody jurisdiction and enforcement act's temporary emergency jurisdiction provision, 53 ALR6th 419.

19-9-65. Notice required; intervention.

(a) Before a child custody determination is made under this article, notice and an opportunity to be heard in accordance with the standards of Code Section 19-9-47 must be given to all persons entitled to notice under the law of this state as in a child custody proceeding between residents of this state, any parent whose parental rights have not been previously terminated, and any person having physical custody of the child.

(b) This article does not govern the enforceability of a child custody determination made without notice or an opportunity to be heard.

(c) The obligation to join a party and the right to intervene as a party in a child custody proceeding under this article are governed by the law of this state as in child custody proceedings between residents of this state. (Code 1981, § 19-9-65, enacted by Ga. L. 2001, p. 129, § 1.)

19-9-66. Procedure where proceedings pending in another state.

(a) Except as otherwise provided in Code Section 19-9-64, a court of this state may not exercise its jurisdiction under this part if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this article; unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under Code Section 19-9-67.

(b) Except as otherwise provided in Code Section 19-9-64, a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to Code Section 19-9-69. If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this article, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this article does not determine that the court of this

state is a more appropriate forum, the court of this state shall dismiss the proceeding.

(c) In a proceeding to modify a child custody determination, a court of this state shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child custody determination has been commenced in another state, the court may:

(1) Stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement;

(2) Enjoin the parties from continuing with the proceeding for enforcement; or

(3) Proceed with the modification under conditions it considers appropriate. (Code 1981, § 19-9-66, enacted by Ga. L. 2001, p. 129, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under the Uniform Child Custody Jurisdiction Act, former Code 1933, §§ 74-501 through 74-525, subsequently codified as §§ 19-9-40 through 19-9-64, are included in the annotations for this Code section.

Purpose of former § 19-9-46 was prevention of jurisdictional conflicts between states. *Webb v. Webb*, 245 Ga. 650, 266 S.E.2d 463 (1980), cert. dismissed, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981) (decided under former Uniform Child Custody Jurisdiction Act).

Informational requirements of former § 19-9-49 were necessary to effective functioning of former § 19-9-46. *Youmans v. Youmans*, 247 Ga. 529, 276 S.E.2d 837 (1981) (decided under former Uniform Child Custody Jurisdiction Act).

Jurisdiction in Georgia disallowed when proceeding pending in another state. — Wisconsin court was exercising jurisdiction in child custody proceeding substantially in conformity with the former Uniform Child Custody Jurisdiction Act when Wisconsin had significant connections with both parents and child, was marital home of parties, and was state where child in question was born and in which parties' divorce was obtained and

all earlier child custody determinations were made. Consequently, it was improper for the Georgia court to exercise the Georgia court's jurisdiction in a proceeding brought by child's mother, who had removed the child from Wisconsin and was residing in Georgia. *Steele v. Steele*, 250 Ga. 101, 296 S.E.2d 570 (1982) (decided under former Uniform Child Custody Jurisdiction Act).

Florida court's award of custody to the father was not entitled to recognition in Georgia since the Florida court assumed jurisdiction over issues of child custody in disregard of the requirement imposed by subsection (c) of former § 19-9-46 and since Georgia was the home state of the children at the time of the Florida court's action. *Thompson v. Thompson*, 241 Ga. App. 616, 526 S.E.2d 576 (1999) (decided under former Code Section 19-9-46).

No requirement to confer with foreign court that lacked jurisdiction. — As Georgia was a child's home state and South Carolina did not have jurisdiction over child custody under the Uniform Child Custody Jurisdiction and Enforcement Act, O.C.G.A. § 19-9-40 et seq., the Georgia trial court was not required by O.C.G.A. § 19-9-66(b) to confer with a South Carolina trial court where a parent

had filed a custody action. *Croft v. Croft*, 298 Ga. App. 303, 680 S.E.2d 150 (2009).

Jurisdiction properly exercised by Georgia court. — Record demonstrated that the North Carolina court was not exercising jurisdiction under the former Uniform Child Custody Jurisdiction Act because at the time of the former husband's motion for change of custody, North Carolina had not been the child's home state within six months before commencement of the custody proceedings; thus, the Georgia court did not err in assuming jurisdiction in these proceedings brought by the natural mother's new husband for permanent adoption. *Kelly v. Silverstein*, 207 Ga. App. 381, 427 S.E.2d 851 (1993) (decided under former Code Section 19-9-46).

Trial court erred in dismissing a husband's divorce complaint on the ground that jurisdiction was properly with the Italian court because the trial court had jurisdiction to make the initial custody determination under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), O.C.G.A. § 19-9-61(a) and (b), and no other court did since Georgia was the only state, including Italy, that could qualify as the "home state" of the parties' child pursuant to the UCCJEA, O.C.G.A. § 19-9-41(7), at the time either the Italian custody proceeding or the Georgia proceeding was commenced and at the time the trial court entered the court's initial child custody order; under the UCCJEA, the jurisdictional inquiry

entered into by the Italian court was insufficient because the Italian court undertook no analysis of the home state of the child or of any other factors that could be considered a substitute for such but simply found that the prerequisites for jurisdiction over a divorce action were met. *Bellew v. Larese*, 288 Ga. 495, 706 S.E.2d 78 (2011).

Trial court did not abuse the court's discretion by denying a wife's motion to stay the Georgia divorce proceeding commenced by the husband in lieu of the State of New York proceeding the wife filed because the record showed that the wife and children had lived in Georgia with the husband since 2000 and continued to live in Georgia until sometime after the couple filed their respective petitions for divorce; thus, Georgia was the home state of the children for the purposes of the Uniform Child Custody Jurisdiction and Enforcement Act, O.C.G.A. § 19-9-40 et seq., and New York was not. *Black v. Black*, 292 Ga. 691, 740 S.E.2d 613 (2013).

Attempt to retain perpetual jurisdiction unconstitutional. — Ohio court's attempt to retain perpetual jurisdiction of children by an initial decree allowing the mother to move to Georgia only on condition that she submit eternally to the jurisdiction of Ohio was essentially unconstitutional for preventing the mother and her children from living wherever the mother who had legal custody chose. *Gouse v. Wilson*, 207 Ga. App. 574, 428 S.E.2d 571 (1993) (decided under former Code Section 19-9-54).

RESEARCH REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d, Abatement, Survival and Revival, §§ 18, 19, 33. 24 Am. Jur. 2d, Divorce and Separation, § 142 et seq.

C.J.S. — 1 C.J.S., Abatement and Revival, §§ 36, 51. 27A C.J.S., Divorce, § 127.

U.L.A. — Uniform Child Custody Jurisdiction Act (U.L.A.) § 6.

ALR. — What types of proceedings or determinations are governed by the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental Kidnapping Prevention Act (PKPA), 78 ALR4th 1028.

Significant connection jurisdiction of

court under § 3(a)(2) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(B), 5 ALR5th 550; 67 ALR5th 1.

Abandonment and emergency jurisdiction of court under § 3(a)(3) of the Uniform Child Custody Jurisdiction Act (UCCJA) and the Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A(c)(2)(C), 5 ALR5th 788.

Pending proceeding in another state as ground for declining jurisdiction under § 6(a) of the Uniform Child Custody Jurisdiction Act (UCCJA) or the Parental

Kidnapping Prevention Act (PKPA), 28
U.S.C.S. § 1738A(g), 20 ALR5th 700.

19-9-67. Finding of inconvenient forum; conditions.

(a) A court of this state which has jurisdiction under this article to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(b) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(1) Whether family violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(2) The length of time the child has resided outside this state;

(3) The distance between the court in this state and the court in the state that would assume jurisdiction;

(4) The relative financial circumstances of the parties;

(5) Any agreement of the parties as to which state should assume jurisdiction;

(6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(8) The familiarity of the court of each state with the facts and issues in the pending litigation.

(c) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

(d) A court of this state may decline to exercise its jurisdiction under this article if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the

divorce or other proceeding. (Code 1981, § 19-9-67, enacted by Ga. L. 2001, p. 129, § 1.)

Law reviews. — For annual survey of domestic relations law, see 56 Mercer L. Rev. 221 (2004).

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under the Uniform Child Custody Jurisdiction Act, former Code 1933, §§ 74-501 through 74-525, subsequently codified as §§ 19-9-40 through 19-9-64, are included in the annotations for this Code section.

Purpose. — Former § 19-9-47 was not a separate grant of jurisdiction over interstate child custody proceedings, but established a discretionary abstention doctrine. *Mulle v. Yount*, 211 Ga. App. 584, 440 S.E.2d 210 (1993) (decided under former Code Section § 19-9-47).

Limited jurisdiction. — When the trial court held that the court did not have jurisdiction over child custody because of the pendency of an appeal in another state, custody ceased to be a contestable issue, and the court was not precluded from addressing issues over which the court had jurisdiction, including divorce. *Norowski v. Norowski*, 267 Ga. 841, 483 S.E.2d 577 (1997) (decided under former Code Section § 19-9-47).

While a trial court had a limited grant of authority under subsection (f) of former § 19-9-47 to dismiss a custody proceeding on the ground of forum non conveniens, it could not dismiss the divorce proceeding as well. *Holtsclaw v. Holtsclaw*, 269 Ga. 163, 496 S.E.2d 262 (1998); *Patterson v. Patterson*, 271 Ga. 306, 519 S.E.2d 438 (1999) (decided under former Code Section § 19-9-47).

Although a trial court was authorized to dismiss the child custody portion of a husband's case on the basis of forum non conveniens under O.C.G.A. § 19-9-67(a), the trial court erred in dismissing the husband's divorce case as well because he had a right to litigate his divorce in his county of residence. Although the trial court could arguably decline to exercise

jurisdiction over the divorce case under O.C.G.A. § 9-10-31.1, the trial court did not invoke § 9-10-31.1 or consider the factors that statute enumerated. *Spies v. Carpenter*, 296 Ga. 131, 765 S.E.2d 340 (2014).

Georgia trial court had jurisdiction. — Trial court erred in dismissing a husband's divorce complaint on the ground that jurisdiction was properly with the Italian court because the trial court had jurisdiction to make the initial custody determination under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), O.C.G.A. § 19-9-61(a) and (b), and no other court did since Georgia was the only state, including Italy, that could qualify as the "home state" of the parties' child pursuant to the UCCJEA, O.C.G.A. § 19-9-41(7), at the time either the Italian custody proceeding or the Georgia proceeding was commenced and at the time the trial court entered its initial child custody order; under the UCCJEA, the jurisdictional inquiry entered into by the Italian court was insufficient because the Italian court undertook no analysis of the home state of the child or of any other factors that could be considered a substitute for such but simply found that the prerequisites for jurisdiction over a divorce action were met. *Bellew v. Larese*, 288 Ga. 495, 706 S.E.2d 78 (2011).

Inquiry required. — Trial court erred in dismissing a child custody proceeding without an inquiry into whether the law of the other state involved in the case would allow a court of that state to exercise jurisdiction. *Patterson v. Patterson*, 271 Ga. 306, 519 S.E.2d 438 (1999) (decided under former Code Section § 19-9-47).

Findings on all statutory factors required. — It is an abuse of discretion for a trial court not to address each of the

seven factors listed in O.C.G.A. § 9-10-31.1(a), and in order to ensure that the trial court’s decision-making process was guided by the statutory requirements, the trial court must make specific findings either in writing or orally on the record demonstrating that the court has considered all seven of the factors. The same rules apply to a court considering whether the court should decline jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, O.C.G.A. Art. 3, Ch. 9, T. 19, as an inconvenient forum in accordance with O.C.G.A. § 19-9-67. *Murillo v. Murillo*, 300 Ga. App. 61, 684 S.E.2d 126 (2009).

Nature and location of evidence. — It was not improper for the trial court to consider that because a father’s fitness as a parent was no longer the controlling custody issue under the revised provisions of O.C.G.A. § 19-9-3(a)(5), this affected the nature and location of the relevant evidence under O.C.G.A. § 19-9-67(b)(6). *Murillo v. Murillo*, 300 Ga. App. 61, 684 S.E.2d 126 (2009).

No abuse of discretion in declining

jurisdiction. — Trial court did not abuse the court’s discretion by declining to exercise jurisdiction in a child custody case under O.C.G.A. § 19-9-67(b) because the children lived in Texas, the witnesses, such as the children’s teachers and health care providers were in Texas, and the trial court determined that the case could be more expeditiously resolved there. *Odion v. Odion*, 325 Ga. App. 733, 754 S.E.2d 778 (2014).

Trial court properly examined the factors set forth in O.C.G.A. § 19-9-67(b) and declined to exercise jurisdiction over the child custody portion of a divorce case because, in part, the children had been living with their mother in California for more than six months and attended school there, and a California court had already conducted two hearings and issued a child custody order, whereas the Georgia court was just beginning to become familiar with the case. *Spies v. Carpenter*, 296 Ga. 131, 765 S.E.2d 340 (2014).

Cited in *Daniels v. Barnes*, 289 Ga. App. 897, 658 S.E.2d 472 (2008).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Courts, §§ 62, 116.
C.J.S. — 21 C.J.S., Courts, § 118.
U.L.A. — Uniform Child Custody Jurisdiction Act (U.L.A.) § 7.

ALR. — Inconvenience of forum as ground for declining jurisdiction under § 7 of the Uniform Child Custody Jurisdiction Act (UCCJA), 21 ALR5th 396.

19-9-68. Wrongfully obtained jurisdiction; actions to prevent repetition of unjustifiable conduct; expenses.

(a) Except as otherwise provided in Code Section 19-9-64 or by any other law of this state, if a court of this state has jurisdiction under this article because a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction unless:

- (1) The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;
- (2) A court of the state otherwise having jurisdiction under Code Sections 19-9-61 through 19-9-63 determines that this state is a more appropriate forum under Code Section 19-9-67; or
- (3) No court of any other state would have jurisdiction under the criteria specified in Code Sections 19-9-61 through 19-9-63.

(b) If a court of this state declines to exercise its jurisdiction pursuant to subsection (a) of this Code section, it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under Code Sections 19-9-61 through 19-9-63.

(c) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subsection (a) of this Code section, it shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state unless authorized by law other than this article. (Code 1981, § 19-9-68, enacted by Ga. L. 2001, p. 129, § 1.)

JUDICIAL DECISIONS

Editor's notes. — In light of the similarity of the statutory provisions, annotations decided under the Uniform Child Custody Jurisdiction Act, former Code 1933, §§ 74-501 through 74-525, subsequently codified as §§ 19-9-40 through 19-9-64, are included in the annotations for this Code section.

Intent to discourage defiance of custody orders. — It is in public interest to discourage conduct such as noncustodial parent seeking custody in this state while withholding children in defiance of another state's order, without any prejudice whatsoever to the noncustodial parent's right to bring such a petition where the legal custodian and children reside. *Reid v. Adams*, 241 Ga. 521, 246 S.E.2d 655 (1978) (decided under former Uniform Child Custody Jurisdiction Act).

Decree obtained in Georgia not controlling. — That petition represents complaint for modification rather than for initial decree, and that divorce was originally obtained in Georgia rather than in another state, are not facts of such material import as to control decision. *Graham v. Hajosy*, 159 Ga. App. 466, 283 S.E.2d 683 (1981) (decided under former Uniform Child Custody Jurisdiction Act).

Residence of legal custody. — Georgia courts will not relitigate custody except where legal custodian resides. *Yearta v. Scroggins*, 245 Ga. 831, 268 S.E.2d 151 (1980) (decided under former Uniform Child Custody Jurisdiction Act).

Noncustodial parent may not change custody by snatching child. — If it is in the child's best interest that child custody be changed, noncustodial parent must, instead of snatching child, seek change of custody where jurisdiction lies. *Etzion v. Evans*, 247 Ga. 390, 276 S.E.2d 577 (1981) (decided under former Uniform Child Custody Jurisdiction Act).

When noncustodial resident parent improperly brings child into Georgia. — As a matter of public policy, Georgia courts refuse to provide forum in Georgia for relitigating custody when noncustodial parent resident in Georgia improperly has removed child from physical custody of custodial parent who resides in another state. *Etzion v. Evans*, 247 Ga. 390, 276 S.E.2d 577 (1981) (decided under former Uniform Child Custody Jurisdiction Act).

Trial court lacked jurisdiction to hear an action for modification of custody brought by father, when the mother had legal custody and lived with the child in a different state, the child was temporarily

visiting the father in Georgia, there was no extreme emergency authorizing the conduct of the father in denying custody to the mother, and there was no substantial evidence otherwise sufficient to vest jurisdiction in the Georgia court. *Lightfoot v. Lightfoot*, 210 Ga. App. 400, 436 S.E.2d 700 (1993) (decided under former Uniform Child Custody Jurisdiction Act).

No unjustifiable conduct. — Mother was not entitled to attorney fees pursuant

to O.C.G.A. § 19-9-68 since the father never alleged or presented evidence that the mother no longer resided in Kansas, but the Georgia trial court's holding to that effect was due to the court's own error, and was not based on any alleged unjustifiable conduct by the father. *Delgado v. Combs*, 314 Ga. App. 419, 724 S.E.2d 436 (2012), cert. denied, No. S12C1106, 2012 Ga. LEXIS 602 (Ga. 2012).

RESEARCH REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d, Courts, §§ 62, 116.

C.J.S. — 21 C.J.S., Courts, § 118.

U.L.A. — Uniform Child Custody Jurisdiction Act (U.L.A.) § 8.

ALR. — Child custody: when does state that issued previous custody determination have continuing jurisdiction under

Uniform Child Custody Jurisdiction Act (UCCJA) or Parental Kidnapping Prevention Act (PKPA), 28 USCS § 1738A, 83 ALR4th 742.

Parties' misconduct as ground for declining jurisdiction under § 8 of the Uniform Child Custody Jurisdiction Act (UCCJA), 16 ALR5th 650.

19-9-69. Information required as part of pleading or affidavit; continuing duty; sealing of information; children residing in family violence shelters.

(a) In a child custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:

(1) Has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number, and the date of the child custody determination, if any;

(2) Knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to family violence, protective orders, termination of parental rights, and adoptions and, if so, identify the court, the case number, and the nature of the proceeding; and

(3) Knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.

(b) If the information required by subsection (a) of this Code section is not furnished, the court, upon motion of a party or its own motion, may stay the proceeding until the information is furnished.

(c) If the declaration as to any of the items described in paragraphs (1) through (3) of subsection (a) of this Code section is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.

(d) Each party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the current proceeding.

(e) If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of identifying information, the information must be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in which the court takes into consideration the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice.

(f) In providing the information required by subsection (a) of this Code section, a party who is disclosing that the child is or has been a resident of a family violence shelter shall provide only the name of the shelter and the state in which the shelter is located to avoid a violation of Code Section 19-13-23. A disclosure of the name of the shelter and the state in which the shelter is located shall be sufficient for the purposes of subsection (a) of this Code section. (Code 1981, § 19-9-69, enacted by Ga. L. 2001, p. 129, § 1.)

JUDICIAL DECISIONS

Claims of error made under O.C.G.A. § 19-9-69 unsupported absent a transcript. — In a change of custody proceeding, because: (1) a parent failed to allege that information was withheld which would have provided cause for a continuance; (2) nothing in the record showed that the parent moved for a continuance because the petition did not contain all the information required by

O.C.G.A. § 19-9-69(a); and (3) there was no evidence in the record that the trial court abused the court's discretion under O.C.G.A. § 19-9-69(b) by not staying the proceedings on the court's own motion until more information was furnished, no error resulted from the trial court's denial of a stay of the proceedings. *Jones v. Van Horn*, 283 Ga. App. 144, 640 S.E.2d 712 (2006).

19-9-70. Requiring appearance for in state and out of state residents; other court orders.

(a) In a child custody proceeding in this state, the court may order a party to the proceeding who is in this state to appear before the court in

person with or without the child. The court may order any person who is in this state and who has physical custody or control of the child to appear in person with the child.

(b) If a party to a child custody proceeding whose presence is desired by the court is outside this state, the court may order that a notice given pursuant to Code Section 19-9-47 include a statement directing the party to appear in person with or without the child and informing the party that failure to appear may result in a decision adverse to the party.

(c) The court may enter any orders necessary to ensure the safety of the child and of any person ordered to appear under this Code section.

(d) If a party to a child custody proceeding who is outside this state is directed to appear under subsection (b) of this Code section or desires to appear personally before the court with or without the child, the court may require another party to pay reasonable and necessary travel and other expenses of the party so appearing and of the child. (Code 1981, § 19-9-70, enacted by Ga. L. 2001, p. 129, § 1.)

PART 3

JURISDICTION AND ENFORCEMENT OF FOREIGN DECREES

Law reviews. — For article, “Domestic Relations Law,” see 53 Mercer L. Rev. 265 (2001).

JUDICIAL DECISIONS

Editor’s notes. — In light of the similarity of the statutory provisions, annotations decided under the Uniform Child Custody Jurisdiction Act, former Code 1933, §§ 74-501 through 74-525, subsequently codified as §§ 19-9-40 through 19-9-64, are included in the annotations for this Code section.

Enforcement of foreign custody decrees. — Foreign custody decrees are enforceable merely by filing a certified copy with the clerk of superior court. *Roehl v. O’Keefe*, 243 Ga. 696, 256 S.E.2d 375 (1979) (decided under former Code Section 19-9-55).

Failure to domesticate foreign decree. — Trial court lacked subject matter jurisdiction of a Florida decree that had not been domesticated. *Kempton v. Richards*, 233 Ga. App. 238, 503 S.E.2d 876 (1998) (decided under former Code Section 19-9-55).

Without an original signature or court seal, a foreign divorce decree did not meet the statutory requirements for proper domestication. *Henderson v. Justice*, 223 Ga. App. 591, 478 S.E.2d 434 (1996) (decided under former Code Section 19-9-55).

Domestication of foreign decree. — Trial court did not domesticate Texas divorce decree and was therefore not authorized to modify child support and visitation provisions of that decree. *McGowan v. McGowan*, 231 Ga. App. 362, 498 S.E.2d 574 (1998) (decided under former Code Section 19-9-55).

Act of simply appending a divorce and custody decree as an exhibit to a petition for modification of custody did not constitute a proper filing of the decree for purposes of the decree’s domestication. *Wylie v. Blatchley*, 237 Ga. App. 563, 515 S.E.2d

855 (1999) (decided under former Code Section 19-9-55).

RESEARCH REFERENCES

C.J.S. — 50 C.J.S., Judgments, §§ 1259 et seq., 1274.

19-9-81. Definitions.

As used in this part, the term:

(1) “Petitioner” means a person who seeks enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child custody determination.

(2) “Respondent” means a person against whom a proceeding has been commenced for enforcement of an order for return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child custody determination. (Code 1981, § 19-9-81, enacted by Ga. L. 2001, p. 129, § 1.)

Law reviews. — For note on the 2001 enactments of O.C.G.A. §§ 19-9-81 to 19-9-97, see 18 Ga. St. U.L. Rev. 58 (2001).

19-9-82. Orders made under the Hague Convention.

Under this part a court of this state may enforce an order for the return of the child made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child custody determination. (Code 1981, § 19-9-82, enacted by Ga. L. 2001, p. 129, § 1.)

19-9-83. Recognition of foreign custody decrees; remedies.

(a) A court of this state shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this article or the determination was made under factual circumstances meeting the jurisdictional standards of this article and the determination has not been modified in accordance with this article.

(b) A court of this state may utilize any remedy available under other laws of this state to enforce a child custody determination made by a court of another state. The remedies provided in this part are cumulative and do not affect the availability of other remedies to enforce a child custody determination. (Code 1981, § 19-9-83, enacted by Ga. L. 2001, p. 129, § 1.)

JUDICIAL DECISIONS

Cited in Daniels v. Barnes, 289 Ga. App. 897, 658 S.E.2d 472 (2008).

19-9-84. Authority to enter temporary orders if lacking jurisdiction; remedy from court with jurisdiction; victims of family violence.

(a) A court of this state which does not have jurisdiction to modify a child custody determination may issue a temporary order enforcing:

(1) A visitation schedule made by a court of another state; or

(2) The visitation provisions of a child custody determination of another state that does not provide for a specific visitation schedule.

(b) If a court of this state makes an order under paragraph (2) of subsection (a) of this Code section, it shall specify in the order a period that it considers adequate to allow the petitioner to obtain an order from a court having jurisdiction under the criteria specified in Part 2 of this article. The order remains in effect until an order is obtained from the other court or the period expires.

(c) If a court of another state or a court of this state has made a finding of family violence on the part of either parent of the child, in issuing a temporary order enforcing a visitation schedule or the visitation provisions of a child custody determination of another state in accordance with subsection (a) of this Code section, a court of this state may enter any orders necessary to ensure the safety of the child and of any person who has been the victim of family violence, including but not limited to an order for supervised visitation pursuant to Code Section 19-9-7. (Code 1981, § 19-9-84, enacted by Ga. L. 2001, p. 129, § 1.)

19-9-85. Registering foreign custody determinations; requirements of registering court; contesting registration; confirmation of registered order.

(a) A child custody determination issued by a court of another state may be registered in this state, with or without a simultaneous request for enforcement, by sending to the superior court in the appropriate venue in this state:

(1) A letter or other document requesting registration;

(2) Two copies, including one certified copy, of the determination sought to be registered, and a statement under penalty of perjury that to the best of the knowledge and belief of the person seeking registration the order has not been modified; and

(3) Except as otherwise provided in Code Section 19-9-69, the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation in the child custody determination sought to be registered.

(b) On receipt of the documents required by subsection (a) of this Code section, the registering court shall:

(1) Cause the determination to be filed as a foreign judgment, together with one copy of any accompanying documents and information, regardless of their form; and

(2) Serve notice upon the persons named pursuant to paragraph (3) of subsection (a) of this Code section and provide them with an opportunity to contest the registration in accordance with this Code section.

(c) The notice required by paragraph (2) of subsection (b) of this Code section must state that:

(1) A registered determination is enforceable as of the date of the registration in the same manner as a determination issued by a court of this state;

(2) A hearing to contest the validity of the registered determination must be requested within 20 days after service of notice; and

(3) Failure to contest the registration will result in confirmation of the child custody determination and preclude further contest of that determination with respect to any matter that could have been asserted.

(d) A person seeking to contest the validity of a registered order must request a hearing within 20 days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes that:

(1) The issuing court did not have jurisdiction under Part 2 of this article;

(2) The child custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so under Part 2 of this article; or

(3) The person contesting registration was entitled to notice, but notice was not given in accordance with the standards of Code Section 19-9-47 in the proceedings before the court that issued the order for which registration is sought.

(e) If a timely request for a hearing to contest the validity of the registration is not made, the registration is confirmed as a matter of

law, and the person requesting registration and all persons served must be notified of the confirmation.

(f) Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration. (Code 1981, § 19-9-85, enacted by Ga. L. 2001, p. 129, § 1.)

JUDICIAL DECISIONS

Registration not a prerequisite to modification. — In a Georgia action to modify an Alaska child custody determination, although the Alaska judgment was not registered, the plain language of O.C.G.A. §§ 19-9-85 and 19-9-86 did not require that the Alaska custody determination be registered before it was modifiable. *Lopez v. Olson*, 314 Ga. App. 533, 724 S.E.2d 837 (2012).
Cited in *Daniels v. Barnes*, 289 Ga. App. 897, 658 S.E.2d 472 (2008).

19-9-86. Granting relief and enforcing registered custody determinations.

(a) A court of this state may grant any relief normally available under the laws of this state to enforce a registered child custody determination made by a court of another state.

(b) A court of this state shall recognize and enforce, but may not modify, except in accordance with Part 2 of this article, a registered child custody determination of a court of another state. (Code 1981, § 19-9-86, enacted by Ga. L. 2001, p. 129, § 1.)

JUDICIAL DECISIONS

Registration not a prerequisite to modification. — In a Georgia action to modify an Alaska child custody determination, although the Alaska judgment was not registered, the plain language of O.C.G.A. §§ 19-9-85 and 19-9-86 did not require that the Alaska custody determination be registered before it was modifiable. *Lopez v. Olson*, 314 Ga. App. 533, 724 S.E.2d 837 (2012).

RESEARCH REFERENCES

C.J.S. — 50 C.J.S., Judgment's, § 1297 et seq.

19-9-87. Communication between enforcing court and modifying court.

If a proceeding for enforcement under this part is commenced in a court of this state and the court determines that a proceeding to modify the determination is pending in a court of another state having jurisdiction to modify the determination under Part 2 of this article, the

enforcing court shall immediately communicate with the modifying court. The proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding. (Code 1981, § 19-9-87, enacted by Ga. L. 2001, p. 129, § 1.)

19-9-88. Verification and petition for enforcement requirements; sealing; appearance; expenses.

(a) A petition under this part must be verified. Certified copies of all orders sought to be enforced and of any order confirming registration must be attached to the petition. A copy of a certified copy of an order may be attached instead of the original.

(b) A petition for enforcement of a child custody determination must state:

(1) Whether the court that issued the determination identified the jurisdictional basis it relied upon in exercising jurisdiction and, if so, what the basis was;

(2) Whether the determination for which enforcement is sought has been vacated, stayed, or modified by a court whose decision must be enforced under this article and, if so, identify the court, the case number, and the nature of the proceeding;

(3) Whether any proceeding has been commenced that could affect the current proceeding, including proceedings relating to family violence, protective orders, termination of parental rights, and adoptions and, if so, identify the court, the case number, and the nature of the proceeding;

(4) The present physical address of the child and the respondent, if known, except in cases involving a parent who has been the subject of a finding of family violence by a court of this state or another state;

(5) Whether relief in addition to the immediate physical custody of the child and attorney's fees is sought, including a request for assistance from law enforcement officials and, if so, the relief sought; and

(6) If the child custody determination has been registered and confirmed under Code Section 19-9-85, the date and place of registration.

(c) If a party alleges in an affidavit or pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of information required by this Code section, the information must be sealed and may not be disclosed to the other party or the public unless the court orders the disclosure to be made after a hearing in

which the court takes into consideration the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice.

(d) Upon the filing of a petition, the court shall issue an order directing the respondent to appear in person with or without the child at a hearing and may enter any order necessary to ensure the safety of the parties and the child. The hearing must be held on the next judicial day after service of the order unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The court may extend the date of hearing at the request of the petitioner.

(e) An order issued under subsection (d) of this Code section must state the time and place of the hearing and advise the respondent that at the hearing the court will order that the petitioner may take immediate physical custody of the child and the payment of fees, costs, and expenses under Code Section 19-9-92, and may schedule a hearing to determine whether further relief is appropriate, unless the respondent appears and establishes that:

(1) The child custody determination has not been registered and confirmed under Code Section 19-9-85 and that:

(A) The issuing court did not have jurisdiction under Part 2 of this article;

(B) The child custody determination for which enforcement is sought has been vacated, stayed, or modified by a court having jurisdiction to do so under Part 2 of this article;

(C) The respondent was entitled to notice, but notice was not given in accordance with the standards of Code Section 19-9-47, in the proceedings before the court that issued the order for which enforcement is sought; or

(2) The child custody determination for which enforcement is sought was registered and confirmed under Code Section 19-9-85, but has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under Part 2 of this article. (Code 1981, § 19-9-88, enacted by Ga. L. 2001, p. 129, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 30 Am. Jur. 2d, Executions, Etc., §§ 673, 689, 690.

C.J.S. — 50 C.J.S., Judgments, §§ 750, 1295.

U.L.A. — Uniform Child Custody Jurisdiction Act (U.L.A.) § 15.

19-9-89. Service of petitions and orders.

Except as otherwise provided in Code Section 19-9-91, the petition and order must be served, by any method authorized by the laws of this state, upon respondent and any person who has physical custody of the child. (Code 1981, § 19-9-89, enacted by Ga. L. 2001, p. 129, § 1.)

19-9-90. Finding of immediate physical custody; awarding of fees, costs, and expenses; drawing adverse inference from refusal to testify; spousal relationship irrelevant.

(a) Unless the court issues a temporary emergency order pursuant to Code Section 19-9-64, upon a finding that a petitioner is entitled to immediate physical custody of the child, the court shall order that the petitioner may take immediate physical custody of the child unless the respondent establishes that:

(1) The child custody determination has not been registered and confirmed under Code Section 19-9-85 and that:

(A) The issuing court did not have jurisdiction under Part 2 of this article;

(B) The child custody determination for which enforcement is sought has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under Part 2 of this article; or

(C) The respondent was entitled to notice, but notice was not given in accordance with the standards of Code Section 19-9-47, in the proceedings before the court that issued the order for which enforcement is sought; or

(2) The child custody determination for which enforcement is sought was registered and confirmed under Code Section 19-9-85 but has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under Part 2 of this article.

(b) The court shall award the fees, costs, and expenses authorized under Code Section 19-9-92 and may grant additional relief, including a request for the assistance of law enforcement officials, and set a further hearing to determine whether additional relief is appropriate.

(c) If a party called to testify refuses to answer on the ground that the testimony may be self-incriminating, the court may draw an adverse inference from the refusal.

(d) A privilege against disclosure of communications between spouses and a defense of immunity based on the relationship of husband and wife or parent and child may not be invoked in a

proceeding under this part. (Code 1981, § 19-9-90, enacted by Ga. L. 2001, p. 129, § 1.)

Cross references. — Privilege against self incrimination, § 24-5-506.

19-9-91. Verified application for warrant seeking physical custody; requirement for serious physical harm; warrant requirements; enforceability; conditions.

(a) Upon the filing of a petition seeking enforcement of a child custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is immediately likely to suffer serious physical harm or be removed from this state.

(b) If the court, upon the testimony of the petitioner or other witness, finds that the child is imminently likely to suffer serious physical harm or be removed from this state, it may issue a warrant to take physical custody of the child. The petition must be heard on the next judicial day after the warrant is executed unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The application for the warrant must include the statements required by subsection (b) of Code Section 19-9-88.

(c) A warrant to take physical custody of a child must:

(1) Recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;

(2) Direct law enforcement officers to take physical custody of the child immediately; and

(3) Provide for the placement of the child pending final relief.

(d) The respondent must be served with the petition, warrant, and order immediately after the child is taken into physical custody.

(e) A warrant to take physical custody of a child is enforceable throughout this state. If the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour.

(f) The court may impose conditions upon placement of a child to ensure the appearance of the child and the child's custodian. (Code 1981, § 19-9-91, enacted by Ga. L. 2001, p. 129, § 1.)

19-9-92. Awarding of necessary and reasonable expenses.

(a) The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.

(b) The court may not assess fees, costs, or expenses against a state unless authorized by law other than this article. (Code 1981, § 19-9-92, enacted by Ga. L. 2001, p. 129, § 1.)

JUDICIAL DECISIONS

Only applicable to prevailing party in enforcement proceeding. — Costs and attorney fees are allowable under O.C.G.A. § 19-9-92 only to the prevailing party in an enforcement proceeding, not to

a party prevailing on the issue of jurisdiction. *Delgado v. Combs*, 314 Ga. App. 419, 724 S.E.2d 436 (2012), cert. denied, No. S12C1106, 2012 Ga. LEXIS 602 (Ga. 2012).

19-9-93. Full faith and credit to orders of other states.

A court of this state shall accord full faith and credit to an order issued by another state and consistent with this article which enforces a child custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under Part 2 of this article. (Code 1981, § 19-9-93, enacted by Ga. L. 2001, p. 129, § 1.)

Cross references. — Faith and credit among states, U.S. Const., Art. 4, Sec. 1.

JUDICIAL DECISIONS

Out of state judgment did not have to be followed as to tax exemption after custody award changed. — Because there was reasonable evidence of changed circumstances which supported the trial court's award of physical custody of the children to the mother, the court was not bound by the prior ruling of a Wyoming court with respect to the depen-

dency exemption; thus, the court did not err in finding that the parent who was awarded physical custody of the children, the mother, was entitled to claim the dependency exemptions for the three children. *Blumenshine v. Hall*, 329 Ga. App. 449, 765 S.E.2d 647 (2014).

Cited in *Daniels v. Barnes*, 289 Ga. App. 897, 658 S.E.2d 472 (2008).

RESEARCH REFERENCES

C.J.S. — 50 C.J.S., Judgments, § 1278 et seq.

19-9-94. Appeals.

An appeal may be taken from a final order in a proceeding under this article in accordance with expedited appellate procedures in other civil cases. Unless the court enters a temporary emergency order under Code Section 19-9-64, the enforcing court may not stay an order enforcing a child custody determination pending appeal. (Code 1981, § 19-9-94, enacted by Ga. L. 2001, p. 129, § 1.)

19-9-95. Actions by district attorney.

(a) In a case arising under this article or involving the Hague Convention on the Civil Aspects of International Child Abduction, the district attorney may take any lawful action, including resort to a proceeding under this part or any other available civil proceeding to locate a child, obtain the return of a child, or enforce a child custody determination if there is:

- (1) An existing child custody determination;
- (2) A request to do so from a court in a pending child custody proceeding;
- (3) A reasonable belief that a criminal statute has been violated; or
- (4) A reasonable belief that the child has been wrongfully removed or retained in violation of the Hague Convention on the Civil Aspects of International Child Abduction.

(b) A district attorney acting under this Code section acts on behalf of the court and may not represent any party. (Code 1981, § 19-9-95, enacted by Ga. L. 2001, p. 129, § 1.)

19-9-96. Assistance by law enforcement.

At the request of a district attorney acting under Code Section 19-9-95, a law enforcement officer may take any lawful action reasonably necessary to locate a child or a party and assist a district attorney with responsibilities under Code Section 19-9-95. (Code 1981, § 19-9-96, enacted by Ga. L. 2001, p. 129, § 1.)

19-9-97. Recovering expenses of district attorney and law enforcement.

If the respondent is not the prevailing party, the court may assess against the respondent all direct expenses and costs incurred by the district attorney and law enforcement officers under Code Section 19-9-95 or 19-9-96. (Code 1981, § 19-9-97, enacted by Ga. L. 2001, p. 129, § 1.)

PART 4

CONSTRUCTION

Law reviews. — For article, “Domestic Relations Law,” see 53 Mercer L. Rev. 265 (2001).

19-9-101. Promotion of uniformity between states.

In applying and construing this uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it. (Code 1981, § 19-9-101, enacted by Ga. L. 2001, p. 129, § 1.)

Law reviews. — For note on the 2001 19-9-104, see 18 Ga. St. U.L. Rev. 58 enactments of O.C.G.A. §§ 19-9-101 to (2001).

19-9-102. Application.

A motion or other request for relief made in a child custody proceeding or to enforce a child custody determination which was commenced before July 1, 2001, is governed by the law in effect at the time the motion or other request was made. (Code 1981, § 19-9-102, enacted by Ga. L. 2001, p. 129, § 1.)

Code Commission notes. — Pursuant 2001,” was substituted for “the effective to Code Section 28-9-5, in 2001, “July 1, date of this article”.

JUDICIAL DECISIONS

Applicability. — O.C.G.A. § 19-9-102 § 19-9-40 et seq., was enacted. *Devito v. Devito*, 280 Ga. 367, 628 S.E.2d 108 (2006). applies only to motions and requests made before the Uniform Child Custody Jurisdiction and Enforcement Act, O.C.G.A.

19-9-103. Construction.

This article shall not be construed to repeal, amend, or impair the provisions of Code Section 19-13-23. (Code 1981, § 19-9-103, enacted by Ga. L. 2001, p. 129, § 1.)

19-9-104. “Conflicts with Child Custody Intrastate Jurisdiction Act.”

In the event of any conflict between this article and Article 2 of this chapter, the “Georgia Child Custody Intrastate Jurisdiction Act of 1978,” this article shall apply. (Code 1981, § 19-9-104, enacted by Ga. L. 2001, p. 129, § 1.)

ARTICLE 4

POWER OF ATTORNEY FOR THE CARE OF A MINOR CHILD

Editor's notes. — Ga. L. 2008, p. 667, § 1/SB 88, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Care of a Grandchild Act.'"

Ga. L. 2008, p. 667, § 2/SB 88, not codified by the General Assembly, provides: "The General Assembly finds that:

"(1) An increasing number of relatives in Georgia, including grandparents and great-grandparents, are providing care to children who cannot reside with their par-

ents due to the parent's incapacity or inability to perform the regular and expected functions to provide such care and support;

"(2) Parents need a means to confer to grandparents or great-grandparents the authority to act on behalf of grandchildren without the time and expense of a court proceeding; and

"(3) Providing a statutory mechanism for granting such authority enhances family preservation and stability."

19-9-120. Short title.

This article shall be known and may be cited as the "Power of Attorney for the Care of a Minor Child Act." (Code 1981, § 19-9-120, enacted by Ga. L. 2008, p. 667, § 3/SB 88.)

19-9-121. Definitions.

As used in this article, the term:

(1) "Grandchild" means the minor child of a grandparent.

(2) "Grandparent" shall have the same meaning as provided in subsection (a) of Code Section 19-7-3 and shall include the biological great-grandparent or stepgreat-grandparent who is the parent or stepparent of a grandparent of a minor child.

(3) "Parent" shall have the same meaning as provided in Code Section 19-3-37. Such term used in the singular shall mean both parents if both parents share joint legal custody of the child, unless otherwise clearly indicated.

(4) "Reasonable evidence" means evidence that a reasonable person would find sufficient to determine whether one conclusion is more likely than another.

(5) "School" means:

(A) Any county or independent school system as defined in Code Section 20-1-9;

(B) Any private school as such term is defined in Code Section 20-2-690;

(C) A home study program meeting the requirements set forth in subsection (c) of Code Section 20-2-690;

(D) Pre-kindergarten programs; or

(E) Early care and education programs as such term is defined in paragraph (6) of Code Section 20-1A-2.

(6) "School term" means the part of the year in which school is in session.

(7) "Serious illness" means a physical or mental illness as determined by a licensed health care professional, including a psychiatrist or psychologist, that causes the parent to be unable to care for the minor child due to the physical or mental condition or health of the parent, including a condition created by medical treatment.

(8) "Terminal illness" has the same meaning as the term "terminal condition" as provided in paragraph (14) of Code Section 31-32-2. (Code 1981, § 19-9-121, enacted by Ga. L. 2008, p. 667, § 3/SB 88.)

19-9-122. Delegation of authority; hardships; exception.

(a) A parent of a minor child may delegate to any grandparent residing in this state caregiving authority regarding the minor child when hardship prevents the parent from caring for the child. This authority may be delegated without the approval of a court by executing in writing a power of attorney for the care of a minor child in a form substantially complying with the provisions of this article.

(b) Hardships may include, but are not limited to:

(1) A parent being unable to provide care due to the death of the other parent;

(2) A serious illness or terminal illness of a parent;

(3) The physical or mental condition of the parent or the child such that proper care and supervision of the child cannot be provided by the parent;

(4) The incarceration of a parent;

(5) The loss or uninhabitability of the child's home as the result of a natural disaster; or

(6) A period of active military duty of a parent exceeding 24 months.

(c) Hardship shall not include the granting of a power of attorney for the care of a minor child for the purpose of subverting an investigation of the child's welfare initiated by the Department of Human Services or other agency responsible for such investigations. (Code 1981, § 19-9-122, enacted by Ga. L. 2008, p. 667, § 3/SB 88; Ga. L. 2009, p. 453, § 2-2/HB 228.)

19-9-123. Powers granted by power of attorney.

Through the power of attorney for the care of a minor child, the parent may authorize the agent grandparent to perform the following functions:

- (1) Enroll the child in school and in extracurricular activities;
- (2) Enroll the child in any health insurance program offered to the grandparent;
- (3) Provide access to school records and may disclose the contents to others;
- (4) Arrange for and consent to medical, dental, and mental health treatment for the child;
- (5) Provide access to medical, dental, and mental health records and may disclose the contents thereof to others;
- (6) Provide for the child's food, lodging, housing, recreation, and travel; and
- (7) Any additional powers as specified by the parent. (Code 1981, § 19-9-123, enacted by Ga. L. 2008, p. 667, § 3/SB 88.)

19-9-124. Liability; education; compliance with court orders.

(a) An agent grandparent under a power of attorney for the care of a minor child shall act in the best interests of the minor child. Such agent grandparent shall not be liable for consenting or refusing to consent to medical, dental, or mental health care for a minor child when such decision is made in good faith and is exercised in the best interests of the minor child.

(b)(1) The agent grandparent shall have the right to enroll the minor child in a public school serving the area where the agent grandparent resides and may enroll the minor child in a private school, pre-kindergarten program, or home study program.

(2) The public school shall allow such agent grandparent with a properly executed power of attorney for the care of a minor child to enroll the minor child.

(3) At the time of enrollment the grandparent shall provide to the school such residency documentation as is customary in that school district.

(4) The school may request reasonable evidence of the stated hardship.

(5) If a public school denies enrollment of a minor child under this Code section, such denial may be appealed and shall be treated as

any other denial of enrollment of a child in that school district, including all of the remedies otherwise available when enrollment is denied to a child.

(6) Except where limited by federal law, the agent grandparent shall have the same rights, duties, and responsibilities that would otherwise be exercised by the parent pursuant to the laws of this state.

(7) An agent grandparent shall be obligated to comply with any existing court order relative to the child, including, but not limited to, any visitation order. (Code 1981, § 19-9-124, enacted by Ga. L. 2008, p. 667, § 3/SB 88.)

19-9-125. Protection from criminal or civil liability.

No person, school official, or health care provider who acts in good faith reliance on a power of attorney for the care of a minor child shall be subject to criminal or civil liability or professional disciplinary action for such reliance. (Code 1981, § 19-9-125, enacted by Ga. L. 2008, p. 667, § 3/SB 88.)

19-9-126. Grant of temporary written permission for emergency services.

Nothing in this article shall preclude a parent or agent grandparent from granting temporary written permission to seek emergency medical treatment or other services for a minor child while in the custody of an adult who is not the parent or agent grandparent and who is temporarily supervising the child at the parent's or agent grandparent's request. (Code 1981, § 19-9-126, enacted by Ga. L. 2008, p. 667, § 3/SB 88.)

19-9-127. Violations; execution of power of attorney; power of attorney to be signed and acknowledged.

(a) Except as may be permitted by the federal No Child Left Behind Act, 20 U.S.C.A. Section 6301, et seq., and Section 7801, et seq., a parent executing the power of attorney for the care of a minor child shall certify that such action is not for the primary purpose of enrolling the child in a school for the sole purpose of participating in the academic or interscholastic athletic programs provided by that school or for any other unlawful purpose. Violation of this subsection shall be punishable in accordance with Georgia law and may require, in addition to any other remedies, repayment by such parent or grandparent of all costs incurred by the school as a result of the violation.

(b)(1) The instrument providing for the power of attorney for the care of a minor child shall be executed by both parents, if both parents are

living and have joint legal custody of the minor child, and shall specify which hardship prevents the parent or parents from caring for the child. If the parents do not have joint legal custody, the parent having sole permanent legal custody shall have authority to grant the power of attorney.

(2) The power of attorney for the care of a minor child shall be signed and acknowledged before a notary public by the parent executing the power of attorney. Any noncustodial parent shall be notified in writing of the name and address of the grandparent who has been appointed the agent grandparent under the power of attorney. The executing parent shall send the notification by certified mail or statutory overnight delivery, return receipt requested, to the noncustodial parent at the noncustodial parent's last known address within five days of the execution of the power of attorney. A noncustodial parent who has joint legal custody shall have the same authority to execute a revocation of the power of attorney as granted to the custodial parent.

(c) If only one parent has sole permanent legal custody of the minor child, then that parent shall have authority to execute the power of attorney for the care of a minor child and to revoke the power of attorney. (Code 1981, § 19-9-127, enacted by Ga. L. 2008, p. 667, § 3/SB 88; Ga. L. 2010, p. 878, § 19/HB 1387.)

19-9-128. Revocation of power of attorney; termination of power of attorney; resignation of agent grandparent.

(a)(1) The agent grandparent shall have the authority to act on behalf of the minor child until each parent who executed the power of attorney for the care of a minor child revokes the power of attorney in writing and provides notice of the revocation to the agent grandparent as provided in this Code section.

(2) The agent grandparent shall have the authority to act on behalf of the child until a copy of the revocation of the power of attorney is received by certified mail or statutory overnight delivery, return receipt requested, and upon receipt of the revocation the agent grandparent shall cease to act as agent.

(3) The parent shall send a copy of the revocation of the power of attorney to the agent grandparent within five days of the execution of the revocation by certified mail or statutory overnight delivery, return receipt requested.

(4) The revoking parent shall notify the school, health care providers, and others known to the parent to have relied upon such power of attorney.

(b) The power of attorney for the care of a minor child may also be terminated by any order of a court of competent jurisdiction.

(c)(1) The agent grandparent shall notify the school in which the agent grandparent had enrolled the child whenever a change in circumstances results in a change in residence for such child that is expected to last more than six weeks during a school term and such change in residence is not due to hospitalization, vacation, study abroad, or some reason otherwise acceptable to the school.

(2) The agent grandparent may resign by notifying the parent in writing by certified mail or statutory overnight delivery, return receipt requested, and, if the agent grandparent is aware that the parent's hardship still exists, such agent grandparent shall also notify child protective services or such government authority that is charged with assuring proper care of such minor child.

(3) Upon the death of the authorizing parent, the agent grandparent shall notify the surviving parent as soon as practicable. With consent of the surviving parent or if the whereabouts of the surviving parent are unknown, the power of attorney for the care of a minor child may continue for up to six months so that the child may receive consistent care until more permanent custody arrangements are made.

(d) The authority to designate an agent to act on behalf of a minor child is in addition to any other lawful action a parent may take for the benefit of such minor child, and the parent shall continue to have the right to medical, dental, mental health, and school records pertaining to the minor child. (Code 1981, § 19-9-128, enacted by Ga. L. 2008, p. 667, § 3/SB 88.)

19-9-129. Power of attorney form.

(a) The statutory power of attorney for the care of a minor child form contained in this Code section may be used to grant an agent grandparent powers over the minor child's enrollment in school, medical, dental, and mental health care, food, lodging, recreation, travel, and any additional powers as specified by the parent. This power of attorney is not intended to be exclusive. No provision of this article shall be construed to bar use by the parent of any other or different form of power of attorney for the care of a minor child which complies with this article. A power of attorney for the care of a minor child in substantially the form set forth in this Code section shall have the same meaning and effect as prescribed in this article. Substantially similar forms may include forms from other states.

(b) The power of attorney for the care of a minor child shall be in substantially the following form:

“GEORGIA POWER OF ATTORNEY FOR THE CARE OF A
MINOR CHILD

NOTICE:

(1) THE PURPOSE OF THIS POWER OF ATTORNEY IS TO GIVE THE GRANDPARENT THAT YOU DESIGNATE (THE AGENT GRANDPARENT) POWERS TO CARE FOR YOUR MINOR CHILD, INCLUDING THE POWER TO: ENROLL THE CHILD IN SCHOOL AND IN EXTRACURRICULAR SCHOOL ACTIVITIES; HAVE ACCESS TO SCHOOL RECORDS AND DISCLOSE THE CONTENTS TO OTHERS; ARRANGE FOR AND CONSENT TO MEDICAL, DENTAL, AND MENTAL HEALTH TREATMENT FOR THE CHILD; HAVE ACCESS TO SUCH RECORDS RELATED TO TREATMENT OF THE CHILD AND DISCLOSE THE CONTENTS OF THOSE RECORDS TO OTHERS; PROVIDE FOR THE CHILD'S FOOD, LODGING, RECREATION, AND TRAVEL; AND HAVE ANY ADDITIONAL POWERS AS SPECIFIED BY THE PARENT.

(2) THE AGENT GRANDPARENT IS REQUIRED TO EXERCISE DUE CARE TO ACT IN THE CHILD'S BEST INTEREST AND IN ACCORDANCE WITH THE GRANT OF AUTHORITY SPECIFIED IN THIS FORM.

(3) A COURT OF COMPETENT JURISDICTION MAY REVOKE THE POWERS OF THE AGENT GRANDPARENT IF IT FINDS THAT THE AGENT GRANDPARENT IS NOT ACTING PROPERLY.

(4) THE AGENT GRANDPARENT MAY EXERCISE THE POWERS GIVEN IN THIS POWER OF ATTORNEY FOR THE CARE OF A MINOR CHILD THROUGHOUT THE CHILD'S MINORITY UNLESS THE PARENT REVOKES THIS POWER OF ATTORNEY AND PROVIDES NOTICE OF THE REVOCATION TO THE AGENT GRANDPARENT OR UNTIL A COURT OF COMPETENT JURISDICTION TERMINATES THIS POWER.

(5) THE AGENT GRANDPARENT MAY RESIGN AS AGENT AND MUST IMMEDIATELY COMMUNICATE SUCH RESIGNATION TO THE PARENT, AND IF COMMUNICATION WITH SUCH PARENT IS NOT POSSIBLE, THE AGENT GRANDPARENT SHALL NOTIFY CHILD PROTECTIVE SERVICES OR SUCH GOVERNMENT AUTHORITY THAT IS CHARGED WITH ASSURING PROPER CARE OF SUCH MINOR CHILD.

(6) THIS POWER OF ATTORNEY MAY BE REVOKED IN WRITING BY ANY AUTHORIZING PARENT. IF THE POWER OF ATTORNEY IS REVOKED, THE REVOKING PARENT SHALL NOTIFY THE AGENT GRANDPARENT, SCHOOL, HEALTH CARE PROVIDERS, AND OTHERS KNOWN TO THE PARENT TO HAVE RELIED UPON SUCH POWER OF ATTORNEY.

(7) IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

POWER OF ATTORNEY FOR THE CARE OF A MINOR CHILD

made this _____ day of _____, _____.

(1)(A) I, _____ (insert name and address of parent or parents), hereby appoint _____ (insert name and address of grandparent to be named as agent) as attorney in fact (the agent grandparent) for my child _____ (insert name of child) to act for me and in my name in any way that I could act in person.

(B) I hereby certify that the agent grandparent named herein is the (place a check mark beside the appropriate description):

_____ Biological grandparent;

_____ Stepgrandparent;

_____ Biological great-grandparent; or

_____ Stepgreat-grandparent.

(2) The agent grandparent may:

(A) Enroll the child in school and in extracurricular activities, have access to school records, and may disclose the contents to others;

(B) Arrange for and consent to medical, dental, and mental health treatment of the child, have access to such records related to treatment of the child, and disclose the contents of such records to others;

(C) Provide for the child's food, lodging, recreation, and travel; and

(D) Carry out any additional powers specified by the parent as follows:

(3) The powers granted above shall not include the following powers or shall be subject to the following rules or limitations (here you may include any specific limitations that you deem appropriate):

(4) This power of attorney for the care of a minor child is being executed because of the following hardship (initial all that apply):

_____ (A) The death, serious illness, or terminal illness of a parent;

_____ (B) The physical or mental condition of the parent or the child such that proper care and supervision of the child cannot be provided by the parent;

_____ (C) The loss or uninhabitability of the child's home as the result of a natural disaster;

_____ (D) The incarceration of a parent; or

_____ (E) A period of active military duty of a parent.

(5) (Optional) If a guardian of my minor child is to be appointed, I nominate the following person to serve as such guardian: ____ (insert name and address of person nominated to be guardian of the minor child).

(6) I am fully informed as to all of the contents of this form and I understand the full import of this grant of powers to the agent grandparent.

(7) I certify that the minor child is not emancipated, and, if the minor child becomes emancipated, this power of attorney shall no longer be valid.

(8) Except as may be permitted by the federal No Child Left Behind Act, 20 U.S.C.A. Section 6301, et seq., and Section 7801, et seq., I hereby certify that this power of attorney is not executed for the primary purpose of unlawfully enrolling the child in a school so that the child may participate in the academic or interscholastic athletic programs provided by that school.

(9) I certify that, to my knowledge, the minor child's welfare is not the subject of an investigation by the Department of Human Services.

(10) I declare under penalty of perjury under the laws of the State of Georgia that the foregoing is true and correct.

Parent Signature: _____
Printed name: _____

Parent Signature: _____
Printed name: _____

Signed and sealed in the presence of: _____

Notary public

My commission expires _____”

(c) The following notice shall be attached to the power of attorney:

“ADDITIONAL INFORMATION:

To the grandparent designated as attorney in fact:

(1) If a change in circumstances results in the child not living with you for more than six weeks during a school term and such change is not due to hospitalization, vacation, study abroad, or some reason otherwise acceptable to the school, you should notify in writing the school in which you have enrolled the child and to which you have given this power of attorney form.

(2) You have the authority to act on behalf of the minor child until each parent who executed the power of attorney for the care of the minor child revokes the power of attorney in writing and provides notice of revocation to you as provided in O.C.G.A. Section 19-9-128.

(3) If you are made aware of the death of the parent who executed the power of attorney, you must notify the surviving parent as soon as practicable. With the consent of the surviving parent, or if the whereabouts of the surviving parent are unknown, the power of attorney may continue for up to six months so that the child may receive consistent care until more permanent custody arrangements are made.

(4) You may resign as agent by notifying each parent in writing by certified mail or statutory overnight delivery, return receipt requested, and if you become unable to care for the child, you shall cause such resignation to be communicated to the parent. If communication with such parent is not possible, you must notify child protective services or such government authority that is charged with assuring proper care of such minor child.

To school officials:

(1) Except as provided in the policies and regulations of the county school board and the federal No Child Left Behind Act, 20 U.S.C.A. Section 6301, et seq., and Section 7801, et seq., this power of attorney, properly completed and notarized, authorizes the agent grandparent named herein to enroll the child named herein in school in the district in which the agent grandparent resides. That agent grandparent is authorized to provide consent in all school related matters and to obtain from the school district educational and behavioral information about the child. Furthermore, this power of attorney shall not

prohibit the parent of the child from having access to all school records pertinent to the child.

(2) The school district may require such residency documentation as is customary in that school district.

(3) No school official who acts in good faith reliance on a power of attorney for the care of a minor child shall be subject to criminal or civil liability or professional disciplinary action for such reliance.

To health care providers:

(1) No health care provider who acts in good faith reliance on a power of attorney for the care of a minor child shall be subject to criminal or civil liability or professional disciplinary action for such reliance.

(2) The parent continues to have the right to all medical, dental, and mental health records pertaining to the minor child.” (Code 1981, § 19-9-129, enacted by Ga. L. 2008, p. 667, § 3/SB 88; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2010, p. 878, § 19/HB 1387.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2010, a comma was inserted following “20 U.S.C.A. Section 6301, et seq.” under “To school officials” in paragraph (c)(1).

CHAPTER 10

ABANDONMENT OF SPOUSE OR CHILD

Sec.		Sec.	
19-10-1.	Abandonment of dependent child; criminal penalties; continuing offense; venue; blood tests or other comparisons as evidence; payment of expenses of birth of child born out of		wedlock; agreement for support of child born out of wedlock.
		19-10-2.	Abandonment of dependent pregnant wife; criminal penalties; continuing offense.

Law reviews. — For article, “Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System,” see 8 Ga. St. U.L. Rev. 539 (1992).

19-10-1. Abandonment of dependent child; criminal penalties; continuing offense; venue; blood tests or other comparisons as evidence; payment of expenses of birth of child born out of wedlock; agreement for support of child born out of wedlock.

(a) A child abandoned by its father or mother shall be considered to be in a dependent condition when the father or mother does not furnish sufficient food, clothing, or shelter for the needs of the child.

(b) If any father or mother willfully and voluntarily abandons his or her child, either legitimate or born out of wedlock, leaving it in a dependent condition, he or she shall be guilty of a misdemeanor. Moreover, if any father or mother willfully and voluntarily abandons his or her child, either legitimate or born out of wedlock, leaving it in a dependent condition, and leaves this state or if any father or mother willfully and voluntarily abandons his or her child, either legitimate or born out of wedlock, leaving it in a dependent condition, after leaving this state, he or she shall be guilty of a felony punishable by imprisonment for not less than one nor more than three years. The felony shall be reducible to a misdemeanor. Any person, upon conviction of the third offense for violating this Code section, shall be guilty of a felony and shall be imprisoned for not less than one nor more than three years, which felony shall not be reducible to a misdemeanor. The husband and wife shall be competent witnesses in such cases to testify for or against the other.

(c) The offense of abandonment is a continuing offense. Except as provided in subsection (i) of this Code section, former acquittal or conviction of the offense shall not be a bar to further prosecution therefor under this Code section, if it is made to appear that the child

in question was in a dependent condition, as defined in this Code section, for a period of 30 days prior to the commencement of prosecution.

(d) In prosecutions under this Code section when the child is born out of wedlock, the venue of the offense shall be in the county in which the child and the mother are domiciled at the time of the swearing out of the arrest warrant; but, if the child and the mother are domiciled in different counties, venue shall be in the county in which the child is domiciled.

(e) Upon the trial of an accused father or mother under this Code section, it shall be no defense that the accused father or mother has never supported the child.

(f) In the trial of any abandonment proceeding in which the question of parentage arises, regardless of any presumptions with respect to parentage, the accused father may request a paternity blood test and agree and arrange to pay for same; and in such cases the court before which the matter is brought, upon pretrial motion of the defendant, shall order that the alleged parent, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged parent, the known natural parent, and the child. The results of those blood tests and comparisons, including the statistical likelihood of the alleged parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist, duly qualified geneticist, or other duly qualified person. Upon receipt of a motion and the entry of an order under this subsection, the court shall proceed as follows:

(1) Where the issue of parentage is to be decided by a jury, where the results of those blood tests and comparisons are not shown to be inconsistent with the results of any other blood tests and comparisons, and where the results of those blood tests and comparisons indicate that the alleged parent cannot be the natural parent of the child, the jury shall be instructed that if they believe that the witness presenting the results testified truthfully as to those results and if they believe that the tests and comparisons were conducted properly, then it will be their duty to decide that the alleged parent is not the natural parent;

(2) The court shall require the defendant requesting the blood tests and comparisons pursuant to this subsection to be initially responsible for any of the expenses thereof. Upon the entry of a verdict incorporating a finding of parentage or nonparentage, the court shall tax the expenses for blood tests and comparisons, in

addition to any fees for expert witnesses whose testimonies supported the admissibility thereof, as costs.

(g) In prosecutions under this Code section, when the child is born out of wedlock and the accused father is convicted, the father may be required by the court to pay the reasonable medical expenses paid by or incurred on behalf of the mother due to the birth of the child.

(h) The accused father and the mother of a child born out of wedlock may enter into a written agreement providing for future support of the child by regular periodic payments to the mother until the child reaches the age of 18 years, marries, or becomes self-supporting; provided, however, that the agreement shall not be binding on either party until it has been approved by the court having jurisdiction to try the pending case.

(i) If, during the trial of any person charged with the offense of abandonment as defined in this Code section, the person contends that he or she is not the father or mother of the child alleged to have been abandoned, in a jury trial the trial judge shall charge the jury that if its verdict is for the acquittal of the person and its reason for so finding is that the person is not the father or mother of the child alleged to have been abandoned, then its verdict shall so state. In a trial before the court without the intervention of the jury, if the court renders a verdict of acquittal based on the contention of the person that he or she is not the father or mother of the child alleged to have been abandoned, the trial judge shall so state this fact in his verdict of acquittal. Where the verdict of the jury or the court is for acquittal of a person on the grounds that the person is not the father or mother of the child alleged to have been abandoned, the person cannot thereafter again be tried for the offense of abandoning the child, and the verdict of acquittal shall be a bar to all civil and criminal proceedings attempting to compel the person to support the child.

(j)(1) In a prosecution for and conviction of the offense of abandonment, the trial court may suspend the service of the sentence imposed in the case, upon such terms and conditions as it may prescribe for the support, by the defendant, of the child or children abandoned during the minority of the child or children. Service of the sentence, when so suspended, shall not begin unless and until ordered by the court having jurisdiction thereof, after a hearing as in cases of revocation or probated sentences, because of the failure or refusal of the defendant to comply with the terms and conditions upon which service of a sentence was suspended.

(2) Service of any sentence suspended in abandonment cases may be ordered by the court having jurisdiction thereof at any time before the child or children reach the age of 18 or become emancipated, after

a hearing as provided in paragraph (1) of this subsection and a finding by the court that the defendant has failed or refused to comply with the terms and conditions upon which service of the sentence was suspended by the court having jurisdiction thereof.

(3) Notwithstanding any other provisions of law, in abandonment cases where the suspension of sentence has been revoked and the defendant is serving the sentence, the court may thereafter again suspend the service of sentence under the same terms and conditions as the original suspension. The sentence shall not be considered probated and the defendant shall not be on probation, but the defendant shall again be under a suspended sentence. However, the combined time of incarceration of the defendant during the periods of revocation of suspended sentences shall not exceed the maximum period of punishment for the offense.

(4) Notwithstanding any other provision of law to the contrary, the terms and conditions prescribed by the court as to support by the defendant shall be subject to review and modification by the court, upon notice and hearing to the defendant, as to the ability of the defendant to furnish support and as to the adequacy of the present support payments to the child's or children's needs. The review provided for in this paragraph as to the ability of the defendant to furnish support and as to the adequacy of the present support payments to the child's or children's needs shall not be had in less than two-year intervals and shall authorize the court to increase as well as to decrease the amount of child support to be paid as a term and condition of the suspended sentence. The review as to ability to support and adequacy of support shall not be equivalent to a hearing held in cases of revocation of probated sentences for purposes of service of the suspended sentence; nor shall a modification, if any, be deemed a change in sentence; nor shall a modification, if any, be deemed to change the suspended sentence to a probated sentence. (Ga. L. 1866, p. 151, § 1; Code 1868, § 4307; Code 1873, § 4373; Ga. L. 1878-79, p. 66, § 1; Code 1882, § 4373; Penal Code 1895, § 114; Ga. L. 1907, p. 57, § 1; Penal Code 1910, § 116; Code 1933, § 74-9902; Ga. L. 1941, p. 481, § 2; Ga. L. 1946, p. 63, § 1; Ga. L. 1952, p. 173, § 1; Ga. L. 1956, p. 800, § 1; Ga. L. 1960, p. 952, § 1; Ga. L. 1965, p. 197, § 1; Ga. L. 1967, p. 453, § 1; Ga. L. 1973, p. 697, § 2; Ga. L. 1976, p. 1014, § 1; Ga. L. 1980, p. 1374, § 2; Ga. L. 1988, p. 1720, § 11; Ga. L. 1989, p. 381, § 1; Ga. L. 2006, p. 141, § 6/HB 847.)

Cross references. — Punishment of repeat offenders generally, § 17-10-7. Blood tests for determination of paternity generally, §§ 19-7-45, 19-7-46. Husband

and wife as witnesses for and against each other in criminal proceedings, § 24-5-503.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1991, a semico-

lon was substituted for the period at the end of paragraph (f)(1).

Editor's notes. — Ga. L. 1980, p. 1374, § 3, not codified by the General Assembly, provides that this section and the remedy provided herein are intended to be in addition to and cumulative of all other existing laws related to paternity, child support, or other subjects covered herein and that this section shall not be construed to limit the operation of or repeal any such existing law.

Law reviews. — For article surveying developments in Georgia constitutional

law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 51 (1981). For survey article on domestic relations, see 34 Mercer L. Rev. 113 (1982). For article, "Georgia Inheritance Rights of Children Born Out of Wedlock," see 23 Ga. St. B.J. 28 (1986). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 79 (2006).

For note discussing Georgia's child support laws, their problems, and some proposed solutions, see 11 Ga. L. Rev. 387 (1977).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

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ELEMENTS OF ABANDONMENT

1. IN GENERAL

2. APPLICATION

ILLEGITIMACY AND PATERNITY

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PROSECUTION OF OFFENSE

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General Consideration

Statutes making abandonment a criminal offense are to be strictly construed because the statutes are in derogation of common law and also because the statutes are penal in nature. *Logue v. State*, 94 Ga. App. 777, 96 S.E.2d 209 (1956).

Abandonment of child, legitimate or otherwise, was not a criminal offense at common law. The proceeding is statutory and criminal in nature, and accordingly subject to strict construction. *Mangum v. State*, 91 Ga. App. 520, 86 S.E.2d 365 (1955).

Legislative intent. — Clear intent of the statutory scheme is to allow the court that heard the child abandonment case to retain jurisdiction over the issue of child support throughout the child's minority. The statute gives the trial court an important coercive tool — the suspended sentence — to ensure that the parent provides support. *Pruitt v. Lindsey*, 261 Ga. 540, 407 S.E.2d 750 (1991).

One purpose of abandonment laws is to provide that children be provided for by their natural parents. *Perini v. State*, 245 Ga. 160, 264 S.E.2d 172 (1980).

Former Penal Code 1895, § 114 was punitive, it is not a remedial remedy. *Brown v. State*, 122 Ga. 568, 50 S.E. 378 (1905).

Abandonment is not an offense malum in se. — Abandonment of one's parental duties by failure to provide financial support for one's minor child is not such an offense as may be categorized malum in se or the product of a depraved mind, either under common law or statutes adopted in this state. *Seaboard Coast Line R.R. v. West*, 155 Ga. App. 391, 271 S.E.2d 36 (1980).

There can be only one offense for same act of abandonment regardless of number of children in one's family. *Balkcom v. Defore*, 219 Ga. 641, 135 S.E.2d 425 (1964).

Offense of abandonment is a continuing offense, and it is therefore not required of state to show a return to

children and a subsequent abandonment following an original abandonment for which the person was first tried. *Hall v. State*, 202 Ga. 42, 42 S.E.2d 130 (1947).

Offense of abandonment may be committed by noncustodial parent. — Fact that divorce decree has been entered, placing custody of minor children in mother will not bar prosecution for abandonment on the theory that the defendant cannot “abandon” children whose custody has been taken from the defendant by process of law. *Dyer v. State*, 87 Ga. App. 440, 74 S.E.2d 129 (1953).

Prohibition against one Act referring to more than one section. — Even though the crime of abandonment involves two distinct elements — bastardy and forsaking of parental duties, the statute creating the offense (O.C.G.A. § 19-10-1) deals with only one subject — the crime of abandonment — and therefore does not violate the constitutional prohibition (Ga. Const. 1976, Art. III, Sec. VII, Para. IV [see now Ga. Const. 1983, Art. III, Sec. V, Para. III]) against one act referring to more than one subject. *Bembry v. State*, 250 Ga. 237, 297 S.E.2d 36 (1982).

Construed with § 19-6-15. — It would not be improper to use the guidelines for computation of a child support award in civil proceedings as a condition in a criminal abandonment action since the child support award is neither a part of the sentence nor a punishment. *Vogel v. State*, 196 Ga. App. 514, 396 S.E.2d 262 (1990).

Guidelines for computing the amount of child support found in O.C.G.A. § 19-6-15(b) and (c), known as the “Child Support Guidelines,” are the expression of the legislative will regarding the calculation of child support and must be considered by any court setting the child support. *Pruitt v. Lindsey*, 261 Ga. 540, 407 S.E.2d 750 (1991).

Duty to support child is not dependent on right of custody. — Amendment to former Code 1933, § 74-9902 (see now O.C.G.A. § 19-10-1) which made it a crime for a father to fail to support his illegitimate child is not unreasonable, arbitrary, or discriminatory against him because he did not have the right to custody since the duty of the father to support a

legitimate child was not dependent on the right of custody. *Pasley v. State*, 215 Ga. 768, 113 S.E.2d 454 (1960).

Duty of support is not dependent on the right to custody. *Chapman v. State*, 181 Ga. App. 320, 352 S.E.2d 216 (1986).

Parent must support child regardless of child’s residence. — Abandonment which is penalized by law is voluntary abandonment, and it must appear that parent willingly withholds support from child; but support and custody are not necessary concomitants. A parent must support a child, whether or not the child lives with the parent. *Waters v. State*, 99 Ga. App. 727, 109 S.E.2d 847 (1959).

Parents cannot bargain away child’s right to seek increases in child support payments without court approval. *Padova v. State*, 151 Ga. App. 167, 259 S.E.2d 169 (1979).

Word “child” denotes that class of children under age of majority. *Rhodes v. State*, 76 Ga. App. 667, 47 S.E.2d 293 (1948).

Motion for directed verdict of acquittal not authorized. — Mere fact that it was “impossible” for the crime to have been committed on the date alleged in the accusation did not authorize the grant of a motion for a directed verdict of acquittal. *Minnix v. State*, 162 Ga. App. 29, 290 S.E.2d 131 (1982).

Modification of terms of suspended sentence for bastardy. — Bastardy (under former Code 1933, § 74-9901) and abandonment were separate offenses, and O.C.G.A. § 42-8-34, relating to modification of terms and conditions upon which sentences are suspended in cases of abandonment, does not apply in bastardy cases; and, thus, when the defendant had pled guilty to the misdemeanor charge of bastardy in 1972, the trial court lacked authority to modify the terms of the defendant’s suspended sentence in 1981. *Tillman v. State*, 249 Ga. 792, 294 S.E.2d 516 (1982).

O.C.G.A. § 19-10-1(i) is an exception to the use of a general verdict form in criminal cases as provided by O.C.G.A. § 17-9-2; the statute authorizes but does not require the trier of fact to return a special verdict as to the issue of paternity.

General Consideration (Cont'd)

Whitman v. State, 212 Ga. App. 523, 442 S.E.2d 313 (1994).

No tort remedy against father's parents for violation of abandonment statute. — Legislature allowed for contempt, garnishment, and income withholding to enforce child support obligations and did not intend to create additional implied remedies under O.C.G.A. § 51-1-6 for violation of O.C.G.A. § 19-10-1, the child abandonment statute. Therefore, a wife was not entitled to recover damages from her ex-husband's parents for her husband's violation of § 19-10-1. Bridges v. Wooten, 305 Ga. App. 682, 700 S.E.2d 678 (2010).

Cited in Rimes v. State, 7 Ga. App. 556, 67 S.E. 223 (1910); Garrett v. State, 41 Ga. App. 545, 153 S.E. 628 (1930); Faulkner v. State, 43 Ga. App. 763, 160 S.E. 117 (1931); McComas v. Glendinning, 59 Ga. App. 234, 200 S.E. 304 (1938); Glendinning v. McComas, 188 Ga. 345, 3 S.E.2d 562 (1939); Hall v. State, 202 Ga. 42, 42 S.E.2d 130 (1947); Moore v. State, 78 Ga. App. 470, 51 S.E.2d 467 (1949); Johnson v. Strickland, 88 Ga. App. 281, 76 S.E.2d 533 (1953); Goza v. State, 91 Ga. App. 842, 87 S.E.2d 232 (1955); Kirchman v. Kirchman, 212 Ga. 488, 93 S.E.2d 685 (1956); Williams v. State, 213 Ga. 221, 98 S.E.2d 373 (1957); Murphey v. Murphey, 215 Ga. 19, 108 S.E.2d 872 (1959); Medders v. State, 100 Ga. App. 216, 110 S.E.2d 709 (1959); Simmons v. State, 100 Ga. App. 780, 112 S.E.2d 306 (1959); Wheeler v. Little, 113 Ga. App. 106, 147 S.E.2d 352 (1966); Shepard v. Bozeman, 222 Ga. 585, 151 S.E.2d 147 (1966); Bunch v. State, 114 Ga. App. 623, 152 S.E.2d 695 (1966); Wilbanks v. State, 116 Ga. App. 698, 158 S.E.2d 274 (1967); Y. v. S., 224 Ga. 352, 162 S.E.2d 321 (1968); Culpepper v. State, 120 Ga. App. 62, 169 S.E.2d 681 (1969); Thornton v. State, 129 Ga. App. 574, 200 S.E.2d 298 (1973); Smith v. State, 132 Ga. App. 199, 207 S.E.2d 681 (1974); Mullins v. State, 133 Ga. App. 554, 211 S.E.2d 631 (1974); Thornton v. State, 234 Ga. 480, 216 S.E.2d 330 (1975); Thornton v. State, 136 Ga. App. 655, 222 S.E.2d 158 (1975); Geiger v. State, 140 Ga. App. 800, 232 S.E.2d 109 (1976); Greer v. Moss, 240

Ga. 121, 239 S.E.2d 685 (1977); Hutchins v. State, 147 Ga. App. 567, 249 S.E.2d 364 (1978); Williamson v. Alderman, 148 Ga. App. 297, 251 S.E.2d 153 (1978); Etchison v. State, 149 Ga. App. 866, 256 S.E.2d 148 (1979); Miller v. State, 150 Ga. App. 597, 258 S.E.2d 279 (1979); Fincher v. State, 153 Ga. App. 190, 264 S.E.2d 713 (1980); State v. Benton, 154 Ga. App. 141, 267 S.E.2d 775 (1980); Goddard v. State, 154 Ga. App. 472, 268 S.E.2d 765 (1980); Nash v. State, 155 Ga. App. 42, 270 S.E.2d 269 (1980); State v. Benton, 246 Ga. 750, 272 S.E.2d 718 (1980); State v. Causey, 246 Ga. 735, 273 S.E.2d 6 (1980); Helms v. Jones, 621 F.2d 211 (5th Cir. 1980); Jones v. State, 157 Ga. App. 163, 276 S.E.2d 674 (1981); White v. State, 160 Ga. App. 857, 288 S.E.2d 574 (1982); Worthington v. Worthington, 162 Ga. App. 813, 292 S.E.2d 861 (1982); In re M.A.F., 254 Ga. 748, 334 S.E.2d 668 (1985); Kindle v. State, 181 Ga. App. 52, 351 S.E.2d 461 (1986); Charvin v. State, 182 Ga. App. 870, 357 S.E.2d 284 (1987); In re Herring, 185 Ga. App. 541, 365 S.E.2d 139 (1988); Pinson v. State, 194 Ga. App. 506, 391 S.E.2d 28 (1990); Weaver v. Chester, 195 Ga. App. 471, 393 S.E.2d 715 (1990); Mallory v. State, 225 Ga. App. 418, 483 S.E.2d 907 (1997); Rollins v. Campbell (In re Rollins), 243 B.R. 540 (N.D. Ga. 1997).

Constitutionality

O.C.G.A. § 19-10-1 does not violate constitutional requirement that state's administration of the state's laws be impartial and evenhanded. Jones v. Helms, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

State may enhance misdemeanor of child abandonment to felony if resident offender leaves state after committing the offense. Jones v. Helms, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

Limitation on right to free travel. — Persons, including indigents and other migrants, have a right to free travel. On the other hand, persons charged with commission of crimes shall be delivered up to state having jurisdiction of the crime. Jones v. Helms, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

Right to travel cannot bar prosecution in Georgia. — Person charged in Georgia with commission of crime who has left Georgia and entered another state cannot be said to have a constitutionally protected right of free travel in interstate commerce that can be asserted to bar prosecution for Georgia offense. *Jones v. Helms*, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

Attempt to discourage inward migration of “undesirables.” — There is an entirely obvious difference between an attempt by a “receiving state” to preclude or discourage inward migration from “sending states” of persons deemed by “receiving state” to be “undesirables,” “noncontributors” or “economically burdensome persons,” and efforts by “sending state” to bring persons accused of crimes back from “receiving states” to face criminal trial and punishment in “sending state.” *Jones v. Helms*, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

Rational relationship between classification and offense. — Commission of misdemeanor of child abandonment would not justify permanent restriction on offender’s freedom to leave the jurisdiction. But a restriction that is rationally related to offense itself — either to procedure for ascertaining guilt or innocence, or to imposition of proper punishment or remedy — must be within state’s power. Thus, although a simple penalty for leaving a state is plainly impermissible, if departure aggravates the consequences of conduct that is otherwise punishable, the state may treat the entire sequence of events, from initial offense to departure from state, as more serious than its separate components. *Jones v. Helms*, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

Criminal provisions of former Code 1933, § 74-902 did not deny due process or violate equal protection principles. *Huskins v. State*, 245 Ga. 541, 266 S.E.2d 163 (1980).

Basis for enhancing punishment for leaving state. — United States Const., amend. 14 does not preclude state from enhancing from misdemeanor to felony the punishment for a crime because the parent charged with child abandon-

ment leaves the state because the General Assembly could have concluded that the parental support obligation is more difficult to enforce if the parent charged with child abandonment leaves the state. *Garren v. State*, 245 Ga. 323, 264 S.E.2d 876 (1980).

Gender-based classification concerning payment of medical expenses is reasonable and does not violate equal protection. *Perini v. State*, 245 Ga. 160, 264 S.E.2d 172 (1980).

Requiring putative father to pay blood test costs unconstitutional. — Requiring indigent putative father to bear initial burden of paying for paternity blood test is violative of the due process and equal protection clauses of the fourteenth amendment. *Pierce v. State*, 251 Ga. 590, 308 S.E.2d 367 (1983).

Requiring indigent to pay blood test costs unconstitutional. — O.C.G.A. § 19-10-1(f)(2) is violative of the equal protection and due process clauses of the fourteenth amendment to the Constitution of the United States to the extent that persons determined to be indigent are initially responsible for the expense of paternity blood tests they request pursuant to the statute. Therefore, in a prosecution for child abandonment, when the defendant is an indigent, it is error to deny the defendant’s motion for funds for a blood test. *Burns v. State*, 252 Ga. 140, 312 S.E.2d 317 (1984).

Indigent defendant entitled to blood test and new trial. — When the defendant pled guilty to an abandonment charge in 1978 in part because he could not afford the cost of a paternity blood testing, his subsequent efforts to raise money for a 1983 blood test which proved him not the father, considered along with a subsequent Supreme Court decision holding that an accused father could not be held responsible for costs of such a test, constituted due diligence and entitled him to a new trial based on newly discovered evidence. *Britten v. State*, 173 Ga. App. 840, 328 S.E.2d 556 (1985).

Elements of Abandonment

1. In General

There are two elements of offense of abandonment of a child: (a) deser-

Elements of Abandonment (Cont'd)**1. In General (Cont'd)**

tion and (b) dependency. Both elements must be present to complete the offense. *Blackwell v. State*, 48 Ga. App. 221, 172 S.E. 670 (1934); *Archer v. State*, 48 Ga. App. 854, 173 S.E. 921 (1934); *Brock v. State*, 51 Ga. App. 414, 180 S.E. 644 (1935), later appeal, 54 Ga. App. 403, 187 S.E. 906 (1936); *Cannon v. State*, 53 Ga. App. 264, 185 S.E. 364 (1936); *Nelson v. State*, 77 Ga. App. 255, 48 S.E.2d 570 (1948); *Cox v. State*, 85 Ga. App. 702, 70 S.E.2d 100 (1952); *Funderburk v. State*, 91 Ga. App. 373, 85 S.E.2d 640 (1955); *Fairbanks v. State*, 105 Ga. App. 27, 123 S.E.2d 319 (1961); *Waites v. State*, 138 Ga. App. 513, 226 S.E.2d 621 (1976); *Moody v. State*, 145 Ga. App. 734, 245 S.E.2d 40 (1978).

Gist of action for abandonment includes both abandonment and condition of dependency as to child. *Heard v. State*, 79 Ga. App. 601, 54 S.E.2d 495 (1949).

To constitute abandonment two material facts must appear: (1) that parent willfully and voluntarily abandons or deserts child; and (2) that child was left by reason thereof in dependent condition. *Glad v. State*, 85 Ga. App. 312, 69 S.E.2d 699 (1952).

Offense of child abandonment has two essential elements: (1) willful and voluntary abandonment of child by father or mother; and (2) leaving of child in dependent condition. *Moody v. State*, 141 Ga. App. 294, 233 S.E.2d 264 (1977).

Test for child abandonment is two-fold: (1) alimony or child support was not paid; and (2) other elements of abandonment appear. *Lewis v. State*, 157 Ga. App. 567, 278 S.E.2d 149 (1981).

Separation and failure to supply are essential elements and there must be a conjunction thereof. *Campbell v. State*, 20 Ga. App. 190, 92 S.E. 951 (1917).

Intention is peculiarly part of offense of abandonment. *Brock v. State*, 51 Ga. App. 414, 180 S.E. 644 (1935), later appeal, 54 Ga. App. 403, 187 S.E. 906 (1936); *Cox v. State*, 85 Ga. App. 702, 70 S.E.2d 100 (1952).

Abandonment must be willful and voluntary. — There was no crime, under

terms of statute, unless abandonment was willful and voluntary. *Cox v. State*, 85 Ga. App. 702, 70 S.E.2d 100 (1952).

Desertion contemplated by section must be willful and voluntary — that is, without coercive cause. *Dyer v. State*, 87 Ga. App. 440, 74 S.E.2d 129 (1953).

Actual desertion is necessary. *Gay v. State*, 105 Ga. 599, 31 S.E. 569, 70 Am. St. R. 68 (1898).

When parent deserts child, leaving the child in dependent condition, offense is complete. *Blackwell v. State*, 48 Ga. App. 221, 172 S.E. 670 (1934).

Continued refusal to provide support after actual desertion was necessary to complete offense, but it alone was not an offense. *Brock v. State*, 51 Ga. App. 414, 180 S.E. 644 (1935), later appeal, 54 Ga. App. 403, 187 S.E. 906 (1936).

Offense is complete upon willful and voluntary abandonment of child, leaving the child in dependent condition. *Dailey v. State*, 103 Ga. App. 117, 118 S.E.2d 379 (1961).

Offense is complete when parent willfully and voluntarily separates from child and fails to supply necessities. *Smith v. State*, 42 Ga. App. 419, 156 S.E. 308 (1930); *Dailey v. State*, 103 Ga. App. 117, 118 S.E.2d 379 (1961).

Failure to comply with duty under statute as intentional, willful, voluntary abandonment. *Williamson v. State*, 138 Ga. App. 306, 226 S.E.2d 102 (1976).

Dependency must be considered only in relation to actual physical needs of child. *Logue v. State*, 94 Ga. App. 777, 96 S.E.2d 209 (1956).

Abandonment is something more than leaving children in dependent condition. It means forsaking and desertion of children; the refusal of father to live where they are domiciled, and to perform duties of parent to his offspring. *Blackwell v. State*, 48 Ga. App. 221, 172 S.E. 670 (1934); *Brock v. State*, 51 Ga. App. 414, 180 S.E. 644 (1935), later appeal, 54 Ga. App. 403, 187 S.E. 906 (1936).

Abandonment requires desertion, accompanied by intention to sever parental relation. — To constitute abandonment of child there must be an actual desertion, accompanied by an intention to entirely sever, so far as it is possible to do

so, the parental relation, and throw off all obligations growing out of the relationship; when the effect of this separation is to leave the child in a dependent condition. *Brock v. State*, 51 Ga. App. 414, 180 S.E. 644 (1935), later appeal, 54 Ga. App. 403, 187 S.E. 906 (1936).

Abandonment begins and continues as long as there is a failure to perform parental duty, and consequent dependence. *Cannon v. State*, 53 Ga. App. 264, 185 S.E. 364 (1936); *Dailey v. State*, 103 Ga. App. 117, 118 S.E.2d 379 (1961).

Distinction between new act of desertion and continuation of original act of desertion. See *Weltzbarker v. State*, 89 Ga. App. 765, 81 S.E.2d 301 (1954).

2. Application

There can be no abandonment of unborn child. — Under provisions of statute, father cannot abandon his child prior to child's birth, because there is nothing in language that refers to abandonment of unborn child. *Waites v. State*, 138 Ga. App. 513, 226 S.E.2d 621 (1976).

Effect of father's abandonment before child's birth. — That father begins to abandon child some months before the child is born will not excuse him for persisting in abandonment and failing to furnish the child with necessities of life after the child's birth. *Fairbanks v. State*, 105 Ga. App. 27, 123 S.E.2d 319 (1961).

Leaving immediately after child's conception, alone, does not constitute abandonment. — Father of illegitimate child who abandons mother and child immediately after child is conceived cannot be convicted of abandonment unless he shall fail to furnish sufficient food and clothing for needs of child after the child's birth. *Bailey v. State*, 214 Ga. 409, 105 S.E.2d 320 (1958).

Abandonment begun before birth of child is not complete unless continued after child is born. *Waites v. State*, 138 Ga. App. 513, 226 S.E.2d 621 (1976).

Leaving before child's birth and failing to provide for child. — Father who willfully and voluntarily abandons child before child is born, and persists in abandonment afterwards, leaving child in a dependent condition, is guilty of a misdemeanor. *Smith v. State*, 42 Ga. App.

419, 156 S.E. 308 (1930) (decided prior to enactment of § 19-10-2 regarding abandonment of dependent pregnant wife).

Inability to pay negates willful and voluntary elements. — Although a father's inability to pay due to his financial condition did not excuse his nonpayment of child support for ten months, it substantially negated the willful and voluntary elements necessary to prove the crime of abandonment. *Ramos v. Ramos*, 173 Ga. App. 30, 325 S.E.2d 415 (1984).

Mere failure to provide adequate shelter, food, and clothing does not constitute abandonment, it being required also that in addition such failure must be willful and voluntary and a failure to give parental care. *Weltzbarker v. State*, 89 Ga. App. 765, 81 S.E.2d 301 (1954).

Failure to pay child support demonstrated abandonment. — Sufficient evidence existed to support a defendant's conviction for abandonment as the evidence established that the defendant did not provide child support for 10 months which the defendant was required by a court order to pay, and the child's mother struggled to provide for the minor daughter shared with the defendant. *Carter v. State*, 287 Ga. App. 463, 651 S.E.2d 544 (2007).

Leaving children in economic condition to which children are accustomed. — When mother did leave children, but left the children in same economic condition in which the children had been all along, mere act of leaving does not constitute penal offense of abandonment. *Logue v. State*, 94 Ga. App. 777, 96 S.E.2d 209 (1956).

Voluntarily and willfully failing to support dependent children after lawfully leaving the children violated the law. *Brown v. State*, 122 Ga. 568, 50 S.E. 378 (1905); *Hunt v. State*, 93 Ga. App. 84, 91 S.E.2d 133 (1955).

When parent can be prosecuted for abandonment. — Even after divorce decree awarding child support, parent can be prosecuted for abandonment. *Ozburn v. State*, 79 Ga. App. 823, 54 S.E.2d 376 (1949).

Partial compliance or noncompliance with support judgment may subject parent to prosecution for abandon-

Elements of Abandonment (Cont'd)**2. Application (Cont'd)**

ment. *McCullough v. State*, 141 Ga. App. 840, 234 S.E.2d 678 (1978).

Noncompliance with alimony decree, and showing of other elements of abandonment establishes offense. *Dyer v. State*, 87 Ga. App. 440, 74 S.E.2d 129 (1953).

When wife justifiably leaves and husband fails to support child. — When wife, because of failure of husband, father of her unborn child, to properly support her and on account of his misconduct, was justified in leaving him, and after birth of child, the father willfully failed to furnish the child with necessities of life, and child became dependent upon persons other than the father, the offense of abandonment became complete. *Fairbanks v. State*, 105 Ga. App. 27, 123 S.E.2d 319 (1961).

Driving spouse and children from home by abuse constitutes desertion. — When father drives mother and minor child or children away from home, or where the children are forced to leave to be safe from his anticipated assaults of which the children are justifiably apprehensive, under the law this constitutes desertion. Failure to furnish sufficient food and clothing for needs of children constitutes dependency or leaving children in dependent condition. *Nelson v. State*, 77 Ga. App. 255, 48 S.E.2d 570 (1948).

Abandonment and dependency proved. — When, after his divorce, defendant's parental duty consisted of child support, proof that he substantially and persistently failed to comply with that support obligation was sufficient to authorize a finding of willful abandonment. Additionally, proof that the mother was forced to rely on public assistance for housing, and family assistance plus public aid to families with dependent children to support their minor daughters was sufficient to authorize the conclusion that the children were dependent for necessities. *Wilson v. State*, 244 Ga. App. 224, 534 S.E.2d 910 (2000).

Illegitimacy and Paternity

Statutory scheme relating to illegitimate children and remedies available to state require support from both parents and both are subject to criminal prosecution. *Hudgins v. State*, 243 Ga. 798, 256 S.E.2d 899 (1979).

Both parents are responsible for support of illegitimate child. *Thorpe v. Collins*, 245 Ga. 77, 263 S.E.2d 115 (1980).

Parol agreement to support illegitimate child is valid. — Agreement to support illegitimate child is valid although parol, and although parentage is not acknowledged. *Warner v. Burke*, 137 Ga. App. 185, 223 S.E.2d 234 (1976), overruled on other grounds, *Worthington v. Worthington*, 250 Ga. 730, 301 S.E.2d 44 (1983).

Father's agreement to pay support in settlement of abandonment prosecution. — It does not in and of itself violate public policy for putative father of child to agree to make support payments in settlement of pending prosecution for abandonment. *Burdeshaw v. McClain*, 150 Ga. App. 108, 257 S.E.2d 24 (1979).

Illegitimate child's father need not have lived with child's mother. — Father of illegitimate child can be prosecuted and convicted for willful and voluntary abandonment of his child, leaving the child in a dependent condition; the law does not require that father of such illegitimate child shall have lived with mother in any relationship after birth of child. *Bailey v. State*, 214 Ga. 409, 105 S.E.2d 320 (1958).

Putative father must request blood test prior to conviction. — When the accused father does not mention a paternity blood test until after he has been convicted of abandonment, this comes too late. *Crayton v. State*, 166 Ga. App. 544, 305 S.E.2d 19 (1983).

Putative father must request blood test prior to close of evidence. — Trial court does not err in refusing the defendant's request for a paternity blood test following the close of the evidence in the case. Subsection (f) of O.C.G.A. § 19-10-1 requires that such request be made by

pretrial motion. *Tutt v. State*, 168 Ga. App. 599, 310 S.E.2d 14 (1983).

Request for paternity blood test must be made by pretrial motion. A telephone call to the district attorney's office expressing a desire to have such a test is not the equivalent of a pretrial motion. *Barnes v. State*, 181 Ga. App. 581, 353 S.E.2d 76 (1987).

New trial not warranted by blood test results. — When the defendant was charged by accusation with misdemeanor abandonment of his illegitimate child and, after his conviction and prior to the hearing on his motion for new trial, he, the natural mother, and the child submitted to a blood test, the results of which test indicated a 99.53 percent probability that he had fathered the child, this "newly discovered evidence" did not warrant the grant of a new trial. *Bray v. State*, 181 Ga. App. 678, 353 S.E.2d 531 (1987).

Failure to prove paternity. — Failure to prove paternity beyond a reasonable doubt does not necessarily mean that the defendant is not the father of the abandoned child. *Whitman v. State*, 212 Ga. App. 523, 442 S.E.2d 313 (1994).

It is competent in paternity proceeding to exhibit child to jury. — In prosecution of one charged with abandonment of illegitimate child, one issue was paternity. It was competent as to this issue for mother to exhibit child to jury. *Hunt v. State*, 101 Ga. App. 126, 112 S.E.2d 817 (1960).

Mother's unrefuted testimony sufficient to establish paternity. — When the mother unequivocally states that the accused is the father of her child and that she and the accused have engaged in the requisite sexual intercourse, and there is no evidence that the accused denied such sexual activity or that he was not the father of the child, the trial court is warranted in finding paternal responsibility. *Crayton v. State*, 166 Ga. App. 544, 305 S.E.2d 19 (1983).

Adjudication of paternity by conviction of abandonment is conclusive in subsequent civil proceedings for child support. *Cummings v. Carter*, 155 Ga. App. 688, 272 S.E.2d 552 (1980).

Jurisdiction and Venue

Desertion and condition of dependency must occur in Georgia. — When father deserted children in a state other than Georgia and mother thereafter brought children into Georgia, where father also resided, and children while here were in a dependent condition, such father could not be properly charged with and convicted of abandonment, for reason that act of father's desertion, and dependency of his child must occur in this state. *Glad v. State*, 85 Ga. App. 312, 69 S.E.2d 699 (1952).

Acts of nonresident father constituting "recognition" of children in Georgia. — Trial court did not err in denying the defendant's plea in abatement challenging the jurisdiction of the court, where, although the defendant was divorced in North Carolina and continued to live there, his regular exercise of his visitation rights by driving to Georgia to pick up his children for weekend stays in North Carolina showed that he had received and recognized his minor children as his family after they had come into Georgia. *Chapman v. State*, 177 Ga. App. 580, 340 S.E.2d 237 (1986).

Jurisdiction over continuing abandonment remains in state where abandonment began. — When undisputed evidence in abandonment proceeding against father of minor children showed that parents separated in Florida and mother took children with her to Georgia to live, and that, since return of wife and children to Georgia, defendant's desertion remained continuous, that he never again resumed his parental duties and status in regard to the children, and that no divorce or alimony proceeding was ever maintained, jurisdiction of offense remains in Florida rather than in Georgia. *Weltzbarker v. State*, 89 Ga. App. 765, 81 S.E.2d 301 (1954).

Venue for prosecuting first offense is county where dependency began. — Venue of first prosecution for offense of abandonment of minor children is in county where state of dependency of children upon others began on account of parent's failure to support the children.

Jurisdiction and Venue (Cont'd)

Cannon v. State, 53 Ga. App. 264, 185 S.E. 364 (1936); Nelson v. State, 77 Ga. App. 255, 48 S.E.2d 570 (1948).

Venue of prosecution for offense of abandonment is county where minor child first becomes dependent upon persons other than parent for support. Fairbanks v. State, 105 Ga. App. 27, 123 S.E.2d 319 (1961); Waites v. State, 138 Ga. App. 513, 226 S.E.2d 621 (1976); Browning v. State, 139 Ga. App. 91, 228 S.E.2d 24 (1976).

In prosecution for abandonment, the offense of abandoning one's child and leaving the child in a dependent condition is consummated and, in a legal sense, committed in county where state of child's dependency upon others begins on account of withdrawal of parent's presence and aid in way of support. Cleveland v. State, 7 Ga. App. 622, 67 S.E. 696 (1910); Ware v. State, 7 Ga. App. 797, 68 S.E. 443 (1910); Boyd v. State, 18 Ga. App. 623, 89 S.E. 1091 (1916).

Regardless of where abandonment had its beginning, the offense of abandoning one's child and leaving the child in a dependent condition is consummated and, in a legal sense, committed in county where state of child's dependency upon others begins on account of withdrawal of parent's presence and aid in way of support. Waites v. State, 138 Ga. App. 513, 226 S.E.2d 621 (1976).

Prosecution of Offense

First instance of abandonment may be prosecuted immediately. Nelson v. State, 77 Ga. App. 255, 48 S.E.2d 570 (1948).

Applicability of thirty-day period referred to in subsection (c). — Dependent condition for a period of 30 days prior to commencement of prosecution is not required unless there has been former acquittal or conviction. Nelson v. State, 77 Ga. App. 255, 48 S.E.2d 570 (1948); Dorsey v. State, 145 Ga. App. 750, 245 S.E.2d 31 (1978).

Failure to allege abandonment in accusation. — Accusation for abandonment failing to allege abandonment of "minor" child suffices. Heard v. State, 79 Ga. App. 601, 54 S.E.2d 495 (1949).

Indictment must specify whether child is legitimate or illegitimate. — Indictment for abandonment of minor child which fails to allege whether child is legitimate or illegitimate is subject to special demurrer pointing out such defect. Nesbit v. State, 111 Ga. App. 274, 141 S.E.2d 603 (1965).

Indictment must state that parent willfully abandoned child. McDaniel v. Campbell, 78 Ga. 188 (1886).

Sex of child need not be alleged. Woodward v. State, 18 Ga. App. 59, 88 S.E. 825 (1916).

State need not prove illegitimacy referred to in indictment. — When indictment charges abandonment of "illegitimate" minor child, since crime of abandonment does not depend on whether child is legitimate or illegitimate, characterization of child as illegitimate is regarded as mere surplusage which state has no obligation to prove. Joseph v. State, 149 Ga. App. 296, 254 S.E.2d 383 (1979).

Allegation that the child was abandoned in destitute condition is surplusage, and no longer need be proved, it being sufficient to allege and prove that parent abandoned child and left the child dependent. McCullough v. State, 141 Ga. App. 840, 234 S.E.2d 678 (1977).

Wife is competent witness to prove marriage. Cunningham v. State, 13 Ga. App. 80, 78 S.E. 780 (1913).

Paternity blood test. — O.C.G.A. § 19-10-1 makes no specific provisions for the state's requesting or compelling the defendant to submit to a paternity blood test. However, under O.C.G.A. § 17-5-21(a)(5), a search warrant is an appropriate vehicle for obtaining a blood sample from a defendant. State v. Slavny, 195 Ga. App. 818, 395 S.E.2d 56 (1990).

Payment for blood test. — When the state requests pretrial paternity blood testing for a defendant charged with child abandonment, the state must initially pay the cost. A verdict incorporating a finding of parentage authorizes the court to tax the cost of the blood test against the defendant or, under certain circumstances, against the prosecutor/prosecutrix or complainant. State v. Slavny, 195 Ga. App. 818, 395 S.E.2d 56 (1990).

No demand for support is necessary. Floyd v. State, 17 Ga. App. 265, 86 S.E. 460 (1915).

Conviction may require child support in excess of award. — Criminal conviction requiring child support in higher amount than that awarded in prior divorce action was not a modification of that civil judgment. It was expressly authorized by former Code 1933, § 27-2702 (see now O.C.G.A. § 42-8-34). *Dorsey v. State*, 145 Ga. App. 750, 245 S.E.2d 31 (1978).

State proved the abandonment of a minor child when the testimony of the state's witness is that the defendant never provided support for the child and the defendant admits this. *Crawford v. State*, 166 Ga. App. 643, 305 S.E.2d 403 (1983).

Verdict finding paternity but not abandonment not inconsistent. — There is nothing inconsistent with a verdict finding that the defendant is the father of an illegitimate child, but has not willfully abandoned the child. *Bray v. State*, 166 Ga. App. 187, 303 S.E.2d 752 (1983).

Contract to make support payments did not abrogate state's right to bring charges against the father for failure to meet his statutory obligations to provide support, the child's right to that support, or the mother's right to seek the relief provided by law in the event the father failed in his agreement. *Pooler v. Taylor*, 173 Ga. App. 859, 328 S.E.2d 749 (1985).

Jury's findings regarding paternity and abandonment not interfered with. — Evidence for state authorized finding that the defendant was father of child, and that he had abandoned child several years before present trial, and the jury having resolved this issue against the defendant, the appellate court was powerless to interfere. *O'Kelley v. State*, 63 Ga. App. 609, 11 S.E.2d 718 (1940).

Defendant's suspended sentence barred when minor child reaches majority. — Trial court erred by requiring the defendant to serve a suspended sentence for abandonment of his minor child because the time during which the court could require the sentence to be served had expired when the defendant's child reached the age of majority. *Moody v. State*, 190 Ga. App. 91, 378 S.E.2d 375 (1989) (decided under former § 42-8-34(d)(2)).

Felony sentence unauthorized. — Trial court erred in sentencing the defendant as a felon since it was stipulated that the defendant was never physically in the State of Georgia. *Wilson v. State*, 244 Ga. App. 224, 534 S.E.2d 910 (2000).

Defenses

Because offense is continuing, defendant cannot plead statute of limitations. — Fact that dependency began more than two years prior to accusation is no ground for interposition of statute of limitations. *Phelps v. State*, 10 Ga. App. 41, 72 S.E. 524 (1911); *Campbell v. State*, 20 Ga. App. 190, 92 S.E. 951 (1917).

Abandonment is a continuing offense, at least until the defendant has once been convicted, and the statute of limitations will not relieve the father who abandoned the child and failed to supply the child's needs more than two years prior to the date of accusation, but who before that date temporarily returned to the child and for the time performed his parental duties, but who subsequently and before finding of accusation again left the child and thereafter failed to supply the child's necessities. *Lomax v. State*, 44 Ga. App. 500, 162 S.E. 395 (1931).

Provision declaring offense to be a continuing one carries with it the significance that it continues after a prior adjudication in accordance with provisions of former Code 1933, § 74-9902 (see now O.C.G.A. § 19-10-1) relating thereto, so that now when essential elements of crime are present, the defendant not only cannot plead the statute of limitations but when previously tried and thereafter essential elements of offense maintain for a period of more than 30 days, the defendant also cannot plead former jeopardy. *Nelson v. State*, 77 Ga. App. 255, 48 S.E.2d 570 (1948).

Res judicata. — Offense of abandonment which is predicated on a failure to sufficiently provide for the needs of the child is a continuing offense; consequently, the principle of res judicata cannot be used to prevent a court from implementing appropriate procedures to ensure that the child is sufficiently cared for. *Vogel v. State*, 196 Ga. App. 514, 396 S.E.2d 262 (1990).

Defenses (Cont'd)

Prosecution under § 19-10-2 does not preclude subsequent prosecution. — Prosecution for abandonment of wife while pregnant under former Code 1933, § 74-9903 (see now O.C.G.A. § 19-10-2) did not bar further prosecution for abandonment of the child under former Code 1933, § 74-9902 (see now O.C.G.A. § 19-10-1) after the child was born. *Waites v. State*, 138 Ga. App. 513, 226 S.E.2d 621 (1976).

Only legal defense to abandonment is to prove that separation from child never occurred, or that the parent did not fail in supplying the child with necessities of life, such as food, shelter, clothing, etc. *Smith v. State*, 42 Ga. App. 419, 156 S.E. 308 (1930); *Dailey v. State*, 103 Ga. App. 117, 118 S.E.2d 379 (1961).

Defense of financial difficulties. — Contention that personal financial difficulties prevented fulfillment of support duties is, at best, a partial defense. *Jones v. State*, 154 Ga. App. 581, 269 S.E.2d 77 (1980); *Lewis v. State*, 157 Ga. App. 567, 278 S.E.2d 149 (1981).

Willfulness and voluntariness negated by evidence of inability to pay. — Requirement that abandonment be willful and voluntary may be negated by introducing the defendant's evidence regarding the defendant's financial condition which demonstrates an inability to make child support payments. *Elam v. State*, 138 Ga. App. 432, 226 S.E.2d 290 (1976).

Conduct of other parent is no excuse for abandonment. *Moore v. State*, 1 Ga. App. 502, 57 S.E. 1016 (1907); *Daniels v. State*, 8 Ga. App. 469, 69 S.E. 588 (1910); *Parrish v. State*, 10 Ga. App. 836, 74 S.E. 445 (1912).

Conduct of child's mother, or her refusal to live with the child's father as her husband, is no defense to the father's prosecution for abandonment of the child. *Cannon v. State*, 53 Ga. App. 264, 185 S.E. 364 (1936); *Hunt v. State*, 93 Ga. App. 84, 91 S.E.2d 133 (1955).

It is no defense to prosecution for abandonment of child that mother has deserted father, or even if she is guilty of grossest immorality or unwifely conduct. The child

is not responsible for, or to be abandoned because of, misconduct of wife and mother. *Fairbanks v. State*, 105 Ga. App. 27, 123 S.E.2d 319 (1961).

It is no defense that other parent meets defendant's duties. — Fact that mother supplied food, shelter, and clothing was no legal defense to accusation against father. *Chandler v. State*, 38 Ga. App. 362, 144 S.E. 51 (1928); *Cannon v. State*, 53 Ga. App. 264, 185 S.E. 364 (1936).

Statute referred to both parents, and made it obvious that it was no defense as to one of them that the other had met duties of support which he has failed to assume. *Padova v. State*, 151 Ga. App. 167, 259 S.E.2d 169 (1979); *Carnegie v. State*, 246 Ga. 187, 269 S.E.2d 457 (1980).

Fact that children were being cared for by someone. — Fact that children were being cared for by paternal grandparents, or other relatives, or the charity of strangers, does not prevent criminal prosecution of parent for willfully and voluntarily abandoning his minor children and leaving the children in dependent condition by failing to furnish such children with sufficient food and clothing for their needs. *Rhodes v. State*, 76 Ga. App. 667, 47 S.E.2d 293 (1948).

Act failing to alleviate dependent condition cannot be used as defense to charge of abandonment. *Dailey v. State*, 103 Ga. App. 117, 118 S.E.2d 379 (1961).

Judgment for support not complied with is no defense. — When accused does not comply with judgment for alimony, he cannot set up such judgment in defense to prosecution. *King v. State*, 12 Ga. App. 482, 77 S.E. 651 (1913).

After judgment for divorce and award of alimony for support of minor children, father can be prosecuted for abandonment when he does not comply with judgment and when the record reveals that he only partially complied with decree of court. *Ozburn v. State*, 79 Ga. App. 823, 54 S.E.2d 376 (1949).

Judgment for alimony against accused and in favor of his wife and children would constitute no defense when it appeared that after rendition of such judgment he abandoned his children, leaving the children in a dependent condition, and failed

to comply with the judgment. *Dorsey v. State*, 145 Ga. App. 750, 245 S.E.2d 31 (1978).

Willingness to support child of former marriage in own home. — When father did not insist on legal right to custody, if he had such right, but allowed boy to live with mother and then, when action for abandonment of child was brought, attempted to defend on ground that he was willing and able to provide for minor in his own home, he having subsequently remarried, as well as on grounds that he was partially supporting the boy by providing him with a place to eat away from the mother's table (with a restaurant charge account) and on further ground that he was unable to contribute more, the first issue constituted no defense to the action, and the other two were questions solely addressed to discretion of the jury. *Waters v. State*, 99 Ga. App. 727, 109 S.E.2d 847 (1959).

Minority of defendant at time of marriage to child's mother is no defense. *Smith v. State*, 42 Ga. App. 419, 156 S.E. 308 (1930).

Threat of future prosecution does not invalidate promise of support. — Threat of future prosecution does not constitute such duress as will void promise to pay support for benefit of minor child. *Burdeshaw v. McClain*, 150 Ga. App. 108, 257 S.E.2d 24 (1979).

Conviction not barred by provision in separation agreement. — Separation agreement incorporated in a divorce decree providing that the father was relieved of any child support except for health insurance did not bar the father's conviction for abandonment for failure to provide sufficient food, clothing, or shelter to meet the needs of the children. *Chapman v. State*, 181 Ga. App. 320, 352 S.E.2d 216 (1986).

Provisions of foreign decree relevant but not a defense. — Child support and visitation provisions of a North Carolina divorce decree, while providing no defense to a charge of abandonment, were clearly relevant evidence on the issue of intent, and their exclusion was reversible error. *Chapman v. State*, 177 Ga. App. 580, 340 S.E.2d 237 (1986).

While a divorce decree specifically re-

lieving defendant of his child support obligation due to his illness would not operate as a full defense, it was evidence that his failure to support was not done "willfully and voluntarily." *Crews v. State*, 178 Ga. App. 397, 343 S.E.2d 428 (1986).

Probation

Editor's notes. — Some of the annotations appearing below were decided under former § 42-8-34(d), which was identical to subsection (j) of this Code section.

Probation and/or confinement, ordinarily, and in abandonment cases. — In the ordinary case when probation and/or confinement are involved, they begin immediately and cannot continue beyond the maximum period of sentence. In abandonment and bastardy cases, on the other hand, the service of the sentence may be postponed (suspended), but remain viable in the first instance until the child is 18, and the second until he is 14 years of age. The suspension feature may be eliminated, after notice and hearing, for failure to abide by the terms relating to weekly support payments, etc. But once the suspension feature is eliminated, and sentence modified to embrace confinement and/or probation as the case may be, the defendant does in fact enter upon the service of the sentence, and its probated feature, if any, cannot exceed the length of time applicable if incarceration instead of probation had been mandated. *Turnipseed v. State*, 147 Ga. App. 735, 250 S.E.2d 186 (1978).

When, after the original suspended sentence in a bastardy proceeding was entered in 1968, the court held a hearing in 1974, and ordered child support payments to include medical bills, and certain arrearage caught up as conditions of probation, and a second post-sentence hearing was held in 1978, at a time when the defendant was not in arrears under either of the prior orders, the stated purpose of the hearing being for reconsideration of the terms of the defendant's suspended sentence, after which the defendant's weekly payments were increased from \$12.50 to \$25.00, the effect was to increase the terms of the sentence originally passed and as such it was illegal.

Probation (Cont'd)

Turnipseed v. State, 147 Ga. App. 735, 250 S.E.2d 186 (1978).

In both bastardy and abandonment cases, the service of the suspended sentence does not commence until the suspension feature is revoked, whereas in all other cases where the defendant is placed on probation, the period of maximum sentence is to be counted from the date the sentence begins. Turnipseed v. State, 147 Ga. App. 735, 250 S.E.2d 186 (1978).

Court may, at the time of sentencing, specify the amount to be paid by the parent for the support of the minor child and may suspend the service of the sentence pending the minority of the child. When the child reaches majority, the sentence is at an end. However, service of any sentence so suspended in abandonment cases may be ordered at any time before the child reaches the age of 21. However, when a sentence is merely probated, the probationary feature of the sentence ends when the elapsed time equals the maximum sentence of confinement which could have been imposed. Entrekin v. State, 147 Ga. App. 724, 250 S.E.2d 177 (1978).

In abandonment cases, a suspended sentence does not begin (for purposes of exhaustion) until the suspension feature is revoked, whereas when the defendant is placed on probation, the period of the exhaustion of the sentence commences to run and is counted from the date the sentence is imposed. Jones v. State, 166 Ga. App. 277, 304 S.E.2d 451 (1983).

Effect of simultaneously probating and suspending sentence. — If a sentence could be simultaneously probated and suspended, an underlying purpose of the conditional suspension (i.e., assuring child support from appellant during the child's minority) would be defeated. Jones v. State, 154 Ga. App. 581, 269 S.E.2d 77 (1980).

Exhaustion of sentence by probation following suspension. — When the sentence was suspended but the court later ordered that the delinquent father would be continued on probation, revoked the earlier sentence, and required the father to serve confinement as well as increasing the support payments, and

thereafter, in subsequent orders, the court spoke of and treated the revoked sentences as being of the nature of probation, the record clearly indicates that the trial court considered the father on probation; and his claimed position that his probated sentence had expired after the authorized length of sentence following the order of probation has merit under these facts. Jones v. State, 166 Ga. App. 277, 304 S.E.2d 451 (1983).

Increase in support not violation of ex post facto clause. — Increase in the amount of child support did not violate the ex post facto clause as applied to a defendant originally convicted of abandonment of his children and whose sentence was suspended upon condition that he pay a certain amount per month for child support, since the child support obligation was a pre-existing duty under state law and was neither a part of the sentence nor a punishment. Hudson v. Deyton, 770 F.2d 1558 (11th Cir. 1985), rehearing denied, 777 F.2d 704 (11th Cir. 1985).

Child support in lieu of imprisonment. — When the defendant was convicted of abandonment of his illegitimate child and his 12-month sentence was suspended on condition that he pay \$240 monthly child support, it was held that such a suspended sentence was authorized pursuant to O.C.G.A. § 42-8-34(d)(1) [now (j)(1) of this section]. Bray v. State, 181 Ga. App. 678, 353 S.E.2d 531 (1987).

Payment of higher child support than awarded in divorce action. — Criminal conviction requiring child support in a higher amount than that awarded in a prior divorce action is not a modification of that civil judgment. It is expressly authorized by statute. Dorsey v. State, 145 Ga. App. 750, 245 S.E.2d 31 (1978).

Comparison of section with §§ 19-6-18 and 19-6-19. — O.C.G.A. § 42-8-34(d)(4) [now (j)(4) of this Code section] is analogous to the provisions on the civil side of the court, O.C.G.A. §§ 19-6-18 and 19-6-19, and is necessary and proper in order to enforce the statutory child-support obligation in a manner which would allow for upward as well as downward modifications when conditions

warrant. *Hudson v. State*, 248 Ga. 397, 283 S.E.2d 271 (1981).

Section not authority for modifying terms of certain suspended sentences. — Bastardy (under former Code 1933, § 74-9901) and abandonment were separate offenses, and the provisions of O.C.G.A. § 19-10-1 which relate to modification of terms and conditions upon which sentences are suspended in cases of abandonment do not apply in bastardy cases; and, thus, when the defendant pled guilty to a misdemeanor charge of bastardy in 1972, the trial court lacked authority to modify the terms of his suspended sentence in 1981. *Tillman v. State*, 249 Ga. 792, 294 S.E.2d 516 (1982).

Judicial review at two-year intervals. — Judicial review and modification

of a support order based on the defendant's ability to furnish support and the adequacy of the present support payment as it pertains to the child's need cannot be made at less than two-year intervals. *Deberry v. State*, 171 Ga. App. 484, 320 S.E.2d 264 (1984).

Evidence sufficient to support abandonment charge. — Evidence that the defendant did not provide support for the defendant's children, was \$30,000 in arrears on court ordered child support, and that the mother was forced to rely on the family for assistance to support her sons, was sufficient to support the defendant's conviction of child abandonment. *Greene v. State*, 268 Ga. App. 125, 601 S.E.2d 490 (2004).

OPINIONS OF THE ATTORNEY GENERAL

Legislature clearly intended that word "child," as used in statute, include illegitimate children. 1969 Op. Att'y Gen. No. 69-323.

Father is criminally liable, throughout minority of illegitimate child, for failure to support that child. 1969 Op. Att'y Gen. No. 69-323.

Bastardy prosecution is not bar to subsequent child abandonment prosecution. 1969 Op. Att'y Gen. No. 69-323.

Venue when mother delivers child

in county other than residence. — When mother resides in one county, goes to another for purpose of delivering the child, and returns to the original county, thereafter not receiving any support from the father of the child for the child's necessities, the venue for criminal prosecution of abandonment would be in the county to which the mother returned after the birth of her child. 1962 Op. Att'y Gen. p. 138.

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, §§ 1, 29 et seq., 41, 50, 61 et seq.

C.J.S. — 67A C.J.S., Parent and Child, § 359 et seq.

ALR. — Attempt to bastardize child as affecting right to custody of the child, 37 ALR 531.

Abandonment of adopted child, 44 ALR 820.

Power to make abandonment, desertion, or nonsupport of wife or family criminal offense, 48 ALR 1193.

One charged with desertion or failure to support wife or child as fugitive from justice, subject to extradition, 54 ALR 281.

Criminal responsibility of parent under desertion or nonsupport statutes, as af-

fected by child's possession of independent means, or by fact other persons supply his needs or are able to do so, 131 ALR 482.

Failure to provide medical attention for child as criminal neglect, 12 ALR2d 1047.

Father's criminal liability for desertion of or failure to support child where divorce decree awards custody to another, 73 ALR2d 960.

Application, to illegitimate children, of criminal statutes relating to abandonment, and nonsupport of children, 99 ALR2d 746.

Right of putative father to visit illegitimate child, 15 ALR3d 887.

Validity and construction of putative father's promise to support or provide for illegitimate child, 20 ALR3d 500.

Parent's desertion, abandonment, or failure to support minor child as affecting right or measure of recovery for wrongful death of child, 53 ALR3d 566.

Bastardy proceedings: propriety of exhibition of child to jury to show family resemblance, or lack of it, on issue of paternity, 55 ALR3d 1087.

Admissibility, in disputed paternity proceedings, of evidence to rebut mother's claim of prior chastity, 59 ALR3d 659.

Statute of limitations in illegitimacy or bastardy proceedings, 59 ALR3d 685.

Competency of one spouse to testify

against other in prosecution for offense against child of both or either, 93 ALR3d 1018.

Parent's obligation to support unmarried minor child who refuses to live with parent, 98 ALR3d 334.

Right to indigent defendant in paternity suit to have assistance of counsel at state expense, 4 ALR4th 363.

Constitutionality of gender-based classifications in criminal laws proscribing nonsupport of spouse or child, 14 ALR4th 717.

19-10-2. Abandonment of dependent pregnant wife; criminal penalties; continuing offense.

(a) A wife who is pregnant with her husband's child shall be deemed to be in a dependent condition when her husband does not furnish her sufficient food, clothing, or medical treatment to meet her needs, both before and immediately upon the birth of the child.

(b) Any husband who willfully and voluntarily abandons his wife, while she is pregnant with his child, leaving her in a dependent condition, shall be guilty of a misdemeanor.

(c) Any husband who willfully and voluntarily abandons his wife while she is pregnant with his child and leaves the jurisdiction of this state shall be guilty of a felony punishable by imprisonment for not less than one year nor more than three years. The felony shall be reducible to a misdemeanor.

(d) For purposes of this Code section, a husband shall not be deemed to have abandoned his wife willfully and voluntarily unless he has actual knowledge of her pregnant condition.

(e) The offense of abandonment as set forth in this Code section is a continuing offense.

(f) The wife shall be competent to be a witness against her husband in any proceedings or cases brought against the husband for abandonment as set forth in this Code section. (Code 1933, § 74-9903, enacted by Ga. L. 1964, p. 224, § 1.)

Cross references. — Husband and wife as witnesses for and against each other in criminal proceedings, § 24-5-503.

JUDICIAL DECISIONS

For discussion of public policy underlying statute. — See *Garrett v. State*, 125 Ga. App. 743, 188 S.E.2d 920 (1972).

Prosecution under former Code 1933, § 74-9903 (see now O.C.G.A.

§ 19-10-2) did not bar further prosecution for abandonment of the child under former Code 1933, § 74-9902 (see now O.C.G.A. § 19-10-1). *Waites v. State*, 138 Ga. App. 513, 226 S.E.2d 621 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, §§ 1 et seq., 36.

ALR. — Criminal responsibility of husband for abandonment or nonsupport of wife, who refuses to live with him, 8 ALR 1314.

Power to make abandonment, desertion, or nonsupport of wife or family criminal offense, 48 ALR 1193.

Right to indigent defendant in paternity suit to have assistance of counsel at state expense, 4 ALR4th 363.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution—modern state cases, 74 ALR4th 223.

CHAPTER 10A

SAFE PLACE FOR NEWBORNS

Sec.	Sec.
19-10A-1. Short title.	19-10A-5. Investigating and reporting utilization of provisions.
19-10A-2. Medical facility defined.	19-10A-6. Reimbursement of medical costs; placement with Department of Human Services.
19-10A-3. Purpose.	19-10A-7. Liability.
19-10A-4. No criminal prosecution for leaving child in custody of medical facility.	

Cross references. — Hospital care for pregnant women, § 31-8-40. enactment of this chapter, see 19 Ga. St. U.L. Rev. 151 (2002).
Law reviews. — For note on the 2002

19-10A-1. Short title.

This chapter shall be known and may be cited as the “Safe Place for Newborns Act of 2002.” (Code 1981, § 19-10A-1, enacted by Ga. L. 2002, p. 1137, § 1.)

RESEARCH REFERENCES

ALR. — Construction and application of State Abandoned Newborn Infant Protection Acts, 70 ALR6th 183.

19-10A-2. Medical facility defined.

As used in this chapter, the term “medical facility” shall mean any licensed general or specialized hospital, institutional infirmary, health center operated by a county board of health, or facility where human births occur on a regular and ongoing basis which is classified by the Department of Community Health as a birthing center, but shall not mean physicians’ or dentists’ private offices. (Code 1981, § 19-10A-2, enacted by Ga. L. 2002, p. 1137, § 1; Ga. L. 2008, p. 12, § 2-1/SB 433.)

19-10A-3. Purpose.

It is the express purpose and intent of the General Assembly in enacting this chapter to prevent injuries to and deaths of newborn children that are caused by a mother who abandons the newborn. (Code 1981, § 19-10A-3, enacted by Ga. L. 2002, p. 1137, § 1.)

19-10A-4. No criminal prosecution for leaving child in custody of medical facility.

A mother shall not be prosecuted for violating Code Section 16-5-70, 16-12-1, or 19-10-1 because of the act of leaving her newborn child in the physical custody of an employee, agent, or member of the staff of a medical facility who is on duty, whether there in a paid or volunteer position, provided that the newborn child is no more than one week old and the mother shows proof of her identity, if available, to the person with whom the newborn is left and provides her name and address. (Code 1981, § 19-10A-4, enacted by Ga. L. 2002, p. 1137, § 1; Ga. L. 2003, p. 140, § 19; Ga. L. 2013, p. 294, § 4-28/HB 242.)

The 2013 amendment, effective January 1, 2014, substituted “violating Code Section 16-5-70, 16-12-1, or 19-10-1 because” for “the crimes of cruelty to a child, Code Section 16-5-70; contributing to the delinquency, unruliness, or deprivation of a child, Code Section 16-12-1; or abandonment of a dependent child, Code Section 19-10-1, because” near the beginning of this Code section. See editor’s note for applicability.

Editor’s notes. — Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: “This Act shall become effective on January 1, 2014, and

shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions.”

RESEARCH REFERENCES

ALR. — Construction and application of state abandoned newborn infant protection acts, 70 ALR6th 183.

19-10A-5. Investigating and reporting utilization of provisions.

The Department of Human Services shall investigate and report to the General Assembly as to children left with a medical facility pursuant to Code Section 19-10A-4, including in such report the desirability and cost effectiveness of a dedicated toll-free telephone line for providing information to and answering questions from the public and employees and staff members of medical facilities concerning the acts and consequences thereof contemplated in Code Section 19-10A-4. (Code 1981, § 19-10A-5, enacted by Ga. L. 2002, p. 1137, § 1; Ga. L. 2009, p. 453, § 2-2/HB 228.)

19-10A-6. Reimbursement of medical costs; placement with Department of Human Services.

A medical facility which accepts for inpatient admission a child left pursuant to Code Section 19-10A-4 shall be reimbursed by the Department of Human Services for all reasonable medical and other reasonable costs associated with the child prior to the child being placed in the care of the department. A medical facility shall notify the Department of Human Services at such time as the child is left and at the time the child is medically ready for discharge. Upon notification that the child is medically ready for discharge, the Department of Human Services shall take physical custody of the child within six hours. The Department of Human Services upon taking physical custody shall promptly bring the child before the juvenile court as required by Code Section 15-11-145. (Code 1981, § 19-10A-6, enacted by Ga. L. 2002, p. 1137, § 1; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2013, p. 294, § 4-29/HB 242.)

The 2013 amendment, effective January 1, 2014, substituted “Code Section 15-11-145” for “Code Section 15-11-47” at the end of the last sentence. See editor’s note for applicability.

Editor’s notes. — Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: “This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring

before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions.”

19-10A-7. Liability.

Medical facilities and their employees, agents, and staff members shall not be liable for civil damages or subject to criminal prosecution for failure to discharge the duties provided for in this chapter. The immunity provided in this chapter shall in no way be construed as providing immunity for any acts of negligent treatment of the child taken into custody. (Code 1981, § 19-10A-7, enacted by Ga. L. 2002, p. 1137, § 1.)

CHAPTER 11

ENFORCEMENT OF DUTY OF SUPPORT

Article 1		Sec.	
Child Support Recovery Act		19-11-10.	Investigation to determine ability to support; notification of parent; information forms; penalty for falsifying parents' report.
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19-11-1.	Short title.		
19-11-2.	Purposes of article; construction.	19-11-11.	Issuance of subpoenas by department; court order requiring compliance.
19-11-3.	Definitions.		
19-11-4.	Application of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."	19-11-12.	Review of orders for child support; review procedures; order adjusting support award amount; no release from liability due to subsequent financial obligation.
19-11-5.	Debt to state created by payment of public assistance; amount of debt; waiver, reduction, or negotiation of certain repayments.	19-11-13.	Determination of paternity; acknowledgment under oath; legal proceedings.
19-11-6.	Enforcement of child support payments and alimony for public assistance recipients.	19-11-14.	Father's liability for support of child born out of wedlock; full faith and credit to paternity determination by another state.
19-11-7.	Enforcement of support payments for dependent minor child public assistance recipients; attorney's fees; interest on judgment; limited scope of action.	19-11-15.	Voluntary support agreement; notice and hearing; notice of final determination; information to be included therein.
19-11-8.	Department's duty to enforce support of abandoned minor public assistance recipient; scope of action.	19-11-15.1.	Information required to be given to individuals receiving services.
19-11-9.	Location of absent parents by department; assistance of other governmental agencies; putative father registry; use of information obtained.	19-11-16.	Periodic redeterminations and reinvestigations.
19-11-9.1.	Duty to furnish information about obligor to department; use of information obtained; penalty for noncompliance.	19-11-17.	Redetermination at request of parent; time for hearing.
19-11-9.2.	Duty of employers to report hiring or rehiring of persons.	19-11-18.	Collection procedures; notice; judicial review.
19-11-9.3.	Suspension or denial of license for noncompliance with child support order; interagency agreements; report to General Assembly; duty to inform obligors.	19-11-19.	Garnishment and orders to withhold and deliver; notice and hearing; procedure; liability of employer failing to answer order to withhold and deliver.
		19-11-20.	Wage assignments.
		19-11-21.	Payment of support to department.
		19-11-22.	Article not exclusive.
		19-11-23.	Authority of district attorneys.
		19-11-24.	Conformity with federal law

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	intended; adoption of necessary regulations authorized.		support accounts; limitation.
19-11-25.	Availability of information about overdue support to consumer reporting agency; notice to debtor parent; fee.	19-11-33.	Notice.
		19-11-34.	Verification; immunity from liability.
19-11-26.	Accident and sickness insurance coverage for children; order requiring medical support.	19-11-35.	Initiation of administrative action for levy; required information in notice to financial institution.
19-11-27.	Accident and sickness insurance coverage for children; National Medical Support Notice or other notice of enrollment; establishment of coverage.	19-11-36.	Required information in notice to obligor.
		19-11-37.	Challenges to levy; mistakes; procedures; reimbursement.
19-11-28.	Accident and sickness insurance coverage for children; authorization of payments of benefits; notice of termination; immunity from liability of person or entity providing access to coverage.	19-11-38.	Required financial institution action.
		19-11-39.	Computerized central case registry for support orders.
		Article 2	
		Uniform Reciprocal Enforcement of Support Act	
19-11-29.	Accident and sickness insurance coverage for children; liability and penalty applicable to person or entity providing access to coverage and insurers.	19-11-40.	Short title.
		19-11-40.1.	Effective date for application of article.
19-11-30.	Confidentiality of information and records; safeguards against unauthorized use.	19-11-41.	Purposes of article.
19-11-30.1.	Computer based registry.	19-11-42.	Definitions.
19-11-30.2.	Information from financial institutions.	19-11-43.	Duty of support defined; criteria for determining existence of duty of support.
19-11-30.3.	Responsibility of Department of Human Services Bank Match Registry.	19-11-44.	Declaration of reciprocating status of Canadian province or territory by Attorney General.
19-11-30.4.	Disclosure of information.	19-11-45.	Remedies cumulative.
19-11-30.5.	Failure of financial institution to comply.	19-11-46.	Liability of obligor in state not dependent on obligee's presence.
19-11-30.6.	Reciprocal agreements with other states.	19-11-47.	Support proceedings when obligor and obligee are found in different counties of state.
19-11-30.7.	Construction.	19-11-48.	When extradition of obligor authorized; how extradition avoided; petition; temporary order of support; delivery of copies of order; suspension of extradition proceedings.
19-11-30.8.	Annual reports.	19-11-49.	Choice of law for determining duties of support.
19-11-30.9.	Information subject to disclosure; penalty.	19-11-50.	Remedies of state or political subdivision furnishing support; court orders for
19-11-30.10.	Authority to levy and seize deposit.		
19-11-30.11.	Fee on levied accounts.		
19-11-31.	Joint Study Committee on Child Support [Repealed].		
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	present or future support not to be jeopardized.
19-11-51.	Duties enforceable by petition; jurisdiction; venue.
19-11-52.	Contents of petition; when cause of action arises.
19-11-53.	Representation of petitioner by district attorney; fees; monthly collection reports; payment to county for services; clerk's fees.
19-11-54.	By whom petition for minor obligee brought; guardian ad litem not necessary.
19-11-55.	Duty of court of this state when acting as initiating state; transmittal of copies of petition, certificate, and article; monetary recommendation to Canadian court.
19-11-56.	Payment of costs and fees by state; issuance of execution to reimburse state.
19-11-57.	When respondent's arrest authorized.
19-11-58.	Department of Human Services designated state information agency; duties.
19-11-59.	Payment of district attorney's fee.
19-11-60.	Duty of court of this state when acting as responding state.
19-11-61.	Procedure where responding court unable to obtain jurisdiction; cooperation of police in locating respondent; transfer of documents upon location of respondent or his property.
19-11-62.	Discovery procedures.
19-11-63.	Order of support or reimbursement.
19-11-64.	Transmittal of copy of order to initiating state.
19-11-65.	Power of court to assure compliance with orders.
19-11-66.	Determination of paternity.
19-11-67.	Transmittal of payments to court of initiating state; certified statement of payments made by respondent.
19-11-68.	Duty of court of initiating

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	state to disburse payments received.
19-11-69.	Spouses competent and compellable to testify.
19-11-70.	Rules of evidence.
19-11-71.	Previous support orders not superseded; how payments credited.
19-11-72.	Jurisdiction in other proceedings not conferred.
19-11-73.	Construction of article.
19-11-74.	Temporary order.
19-11-75.	Right of appeal; effect of appeal on order of support.
19-11-76.	Additional remedies on foreign support order.
19-11-77.	Registration of foreign support order; filing in registry of foreign support orders.
19-11-78.	Application of Code Section 19-11-53.
19-11-79.	Registration procedure — Transmittal of documents to district attorney; filing; notice; docketing.
19-11-80.	Registration procedure — Hearing; defenses; grounds for stay; entry of order as registration; county's entitlement to fee; through whom payments made.
19-11-81.	Effect of registration of foreign support order.

Article 3

Uniform Interstate Family Support Act

PART 1

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19-11-100.	Short title.
19-11-101.	Definitions.
19-11-102.	Designated tribunals; support enforcement agency.
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JURISDICTION; COOPERATION BETWEEN STATES

19-11-110.	Jurisdiction.
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- retains continuing, exclusive jurisdiction.
- 19-11-112. Authority of tribunal.
- 19-11-113. Limitation on jurisdiction of Georgia tribunal if action filed in another state or foreign country.
- 19-11-114. Continuing, exclusive jurisdiction to modify support order.
- 19-11-115. Initiating tribunal; responding tribunal.
- 19-11-116. Governing tribunal when conflicting orders; determination of controlling order.
- 19-11-117. Enforcement of two or more child support orders, at least one of which was issued by another state or foreign country.
- 19-11-118. Crediting of amounts collected.
- 19-11-119. Evidentiary issues outside state; application.
- 19-11-119.1. Spousal support order; modification; initiating tribunal to request enforcement; responding tribunal to enforce or modify order.

PART 3

CIVIL PROVISIONS

- 19-11-120. Application of part; initiation of a proceeding.
- 19-11-121. Representative for minor parent.
- 19-11-122. Governing law and procedure for responding Georgia tribunal.
- 19-11-123. Information to be provided to responding tribunal.
- 19-11-124. Receipt of petition of pleading by responding Georgia tribunal; action authorized; limitations; foreign currency conversion.
- 19-11-125. Receipt by inappropriate tribunal.
- 19-11-126. Support enforcement agency's services; determining controlling order; foreign currency conversion; enforcement of support order

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- and income withholding order of another state; absence of fiduciary relationship.
- 19-11-127. Authority of Attorney General.
- 19-11-128. Employment of private counsel.
- 19-11-129. State information agency.
- 19-11-130. Filing of petition to establish, register, or modify support order; required information; relief sought.
- 19-11-131. Nondisclosure of identifying information where health, safety, or liberty at risk; disclosure of information in the interest of justice.
- 19-11-132. Fees and costs.
- 19-11-133. Personal jurisdiction.
- 19-11-134. Defense of nonparentage.
- 19-11-135. Physical presence of individual nonresident party not required; admissible evidence.
- 19-11-136. Communication between tribunals.
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- 19-11-140. Authority of tribunal upon failure to issue support order; temporary child support order.
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- 19-11-150. Issuance of income-withholding orders.
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PART 6

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- 19-11-160. Registration of orders issued by another state or foreign country.
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19-11-168. Petitions for modification.
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19-11-173. Filing requirement for modified order.
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PART 7

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- 19-11-180. Definitions.
19-11-181. Applicability of part.
19-11-182. Department of Human Services recognized as designated agency.
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19-11-184.3. Grounds for refusal of recognition and enforcement of registered convention support order.
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PART 8

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- 19-11-185. "Governor" defined; authority.
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- 19-11-190. Construction of article; uniformity.
19-11-190.1. Effective date.
19-11-191. Severability.

Cross references. — Effect on support obligation of use of income from estate or trust for support purposes, § 53-1-3. Continuing garnishment to enforce support obligations, § 18-4-130 et seq.

Law reviews. — For annual survey article on domestic relations, see 50 Mercer L. Rev. 217 (1998).

RESEARCH REFERENCES

ALR. — Postmajority disability as reviving parental duty to support child, 48 ALR4th 919.

Court's authority to reinstitute parent's support obligation after terms of prior decree have been fulfilled, 48 ALR4th 952.

ARTICLE 1

CHILD SUPPORT RECOVERY ACT

Cross references. — Temporary assistance for needy families, § 49-4-180 et seq.

Administrative rules and regulations. — Recovery and administration of child support, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Human Resources, Chapter 290-7-1.

Law reviews. — For survey article on wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982). For article, "Georgia Inheritance Rights of Children Born Out of Wedlock," see 23 Ga. St. B.J. 28 (1986). For annual survey of law of domestic relations, see 38 Mercer L. Rev. 179 (1986).

JUDICIAL DECISIONS

Cited in Collins v. Collins, 148 Ga. App. 103, 250 S.E.2d 870 (1978); Young v. Department of Human Resources, 148 Ga. App. 518, 251 S.E.2d 578 (1978); Boone v.

State, Dep't of Human Resources ex rel. Carter, 250 Ga. 379, 297 S.E.2d 727 (1982).

OPINIONS OF THE ATTORNEY GENERAL

State courts have concurrent jurisdiction with superior courts over cases brought pursuant to the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq. 1983 Op. Att'y Gen. No. U83-33.

Transfer of proceedings. — O.C.G.A. § 15-11-6(b) authorizes the superior court to transfer to the juvenile court support cases not involving a question of paternity as well as those support proceedings originating from a court-established support unit in the judicial circuit. 1989 Op. Att'y Gen. No. U89-7.

Since no provision under O.C.G.A. § 15-11-6(b) would permit the transfer of paternity questions to a juvenile court, no case in which paternity is involved may be transferred under that statute by a superior court to a juvenile court. 1989 Op. Att'y Gen. No. U89-7.

Superior court may not transfer a Uniform Reciprocal Enforcement of Support Act proceeding to juvenile court under O.C.G.A. § 15-11-6(b). 1989 Op. Att'y Gen. No. U89-7.

19-11-1. Short title.

This article shall be known and may be cited as the "Child Support Recovery Act." (Ga. L. 1973, p. 192, § 1.)

JUDICIAL DECISIONS

Modification procedure not dependent upon public assistance. — When the Department of Human Resources (DHR) petitions the superior court to adopt its recommendation, the court is not required to find a need for additional support but, without regard to whether a child is receiving public assistance, may increase child support based solely on a significant inconsistency between an existing order and the amount which would result from application of the child support guidelines; the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq., does not contain any basis for continuing to distinguish between the procedure available when the child is receiving public assistance and that which is available in the absence of any such assistance. The trial court erred in concluding that evidence of the need for additional support was necessary and that DHR lacked standing, and in failing to apply child support guidelines and to justify any departure therefrom. *Falkenberry v. Taylor*, 278 Ga. 842, 607 S.E.2d 567 (2005).

Public assistance is nondistinguishing factor. — Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq., does

not contain any basis for continuing to distinguish between the procedure available when a child is receiving public assistance and that which is available in the absence of any such assistance. *Falkenberry v. Taylor*, 278 Ga. 842, 607 S.E.2d 567 (2005) (Unpublished).

Procedure available the same when child not receiving public assistance. — In a child support modification action, the trial court erred in concluding that evidence of the need for additional support was necessary and that the Department of Human Resources (DHR) lacked standing to file a modification action on behalf of a child not receiving public assistance unless it could show the child's need for additional support; by express statutory amendment, the General Assembly no longer reserved for the private bar those modification actions which involved children who did not receive public assistance and needed no additional support, but whose court-ordered provider enjoyed an enhanced financial status. *Falkenberry v. Taylor*, 278 Ga. 842, 607 S.E.2d 567 (2005) (Unpublished).

Cited in *Phillips v. Brown*, 263 Ga. 50, 426 S.E.2d 866 (1993).

OPINIONS OF THE ATTORNEY GENERAL

Applicability of alternative dispute resolution program fees to child support recovery actions. — Civil actions brought pursuant to the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq., are subject to the fee imposed under O.C.G.A. § 15-23-7 to support alternative dispute resolution programs, but the

state, the state's agencies, and political subdivisions should not be compelled to make advance payment of the fee which should ordinarily be collected from the child support obligor upon the conclusion of the action. 1994 Op. Att'y Gen. No. U94-7.

RESEARCH REFERENCES

ALR. — Criminal responsibility for abandonment or nonsupport of children who are being cared for by charitable institution, 24 ALR 1075.

Liability of father for retroactive child support on judicial determination of paternity, 87 ALR5th 361.

19-11-2. Purposes of article; construction.

(a) The underlying purposes of this article are:

(1) To provide that public assistance to needy children is a supplement to the contribution of the responsible parents;

(2) To provide for a determination that a responsible parent is able to support his children; and

(3) To provide for the enforcement of an able parent's obligation to furnish support.

(b) This article shall be liberally construed to promote its underlying purposes. (Ga. L. 1973, p. 192, § 2.)

JUDICIAL DECISIONS

Cited in Cox v. Cox ex rel. State Dep't of Human Resources, 255 Ga. 6, 334 S.E.2d 683 (1985).

RESEARCH REFERENCES

ALR. — Criminal responsibility of parent under desertion or nonsupport statutes, as affected by child's possession of independent means, or by fact other persons supply his needs or are able to do so, 131 ALR 482.

19-11-3. Definitions.

As used in this article, the term:

(1) "Account" means a demand deposit account, checking or negotiable order of withdrawal account, savings account, time deposit account, or a money market mutual fund account.

(2) "Court order for child support" means any order for child support issued by a court or administrative or quasi-judicial entity of this state or another state, including an order in a criminal proceeding which results in the payment of child support as a condition of probation or otherwise. Such order shall be deemed to be a IV-D order for purposes of this article when either party to the order submits a copy of the order for support and a signed application to the department for IV-D services, when the right to child support has been assigned to the department pursuant to subsection (a) of Code Section 19-11-6, or upon registration of a foreign order pursuant to Article 3 of this chapter.

(3) "Department" means the Department of Human Services.

(4) "Dependent child" means any person under the age of 18 who is not otherwise emancipated, self-supporting, married, or a member of the armed forces of the United States.

(5) "Duty of support" means any duty of support imposed or imposable by law or by court order, decree, or judgment.

(6) “Financial institution” means every federal or state chartered commercial or savings bank, including savings and loan associations and cooperative banks, federal or state chartered credit unions, benefit associations, insurance companies, safe-deposit companies, trust companies, and any money market mutual fund.

(7) “IV-D” means Title IV-D of the federal Social Security Act.

(8) “IV-D agency” means the Child Support Enforcement Agency of the Department of Human Services and its contractors.

(9) “Medical insurance obligee” means any person to whom a duty of medical support is owed.

(10) “Medical insurance obligor” means any person owing a duty of medical support.

(11) “Money market mutual fund” means every regulated investment company within the meaning of Section 851(a) of the Internal Revenue Code which seeks to maintain a constant net asset value of \$1.00 in accordance with 17 C.F.R. Section 270.2A-7.

(12) “Parent” means the natural or adoptive parents of a child and includes the father of a child born out of wedlock if his paternity has been established in a judicial proceeding or if he has acknowledged paternity under oath either in open court, in an administrative hearing, or by verified writing.

(13) “TANF” means temporary assistance for needy families. (Ga. L. 1973, p. 192, § 3; Ga. L. 1976, p. 1537, §§ 1, 2; Ga. L. 1997, p. 1613, § 23; Ga. L. 2003, p. 415, § 1; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2010, p. 245, § 1/HB 1118; Ga. L. 2014, p. 457, § 10/SB 282.)

The 2014 amendment, effective July 1, 2014, added paragraph (1); redesignated former paragraphs (1) through (4) as present paragraphs (2) through (5), respectively; added paragraph (6); redesignated former paragraphs (5) through (8) as present paragraphs (7) through (10), respectively; added paragraph (11); redesignated former paragraph (9) as present paragraph (12); and added paragraph (13).

U.S. Code. — Section 851(a) of the Internal Revenue Code, referred to in paragraph (11), is codified as 26 U.S.C. § 851.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

JUDICIAL DECISIONS

“Parent.” — Divorce decree, and the decree’s finding that the parties had no children, a finding which was apparently incorporated into the decree simply because it was a provision of the parties’ agreement, was not a judicial proceeding

establishing paternity within the meaning of “parent” in the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq. Department of Human Resources v. Fleeman, 263 Ga. 756, 439 S.E.2d 474 (1994).

Grandmother was not a “parent” of the child within the meaning of O.C.G.A. § 19-8-1(8) or O.C.G.A. § 19-11-3. *Stills v. Johnson*, 272 Ga. 645, 533 S.E.2d 695 (2000).

Adopting parent on equal footing as biological. — Georgia law specifically provides that a decree of adoption creates the relationship of parent and child between each petitioner and the adopted

individual as if the adopted individual were a child of biological issue of that petitioner. *Hastings v. Hastings*, 291 Ga. 782, 732 S.E.2d 272 (2012).

Cited in *Young v. Department of Human Resources*, 148 Ga. App. 518, 251 S.E.2d 578 (1978); *Burns v. Swinney*, 252 Ga. 461, 314 S.E.2d 440 (1984); *Sutter v. Turner*, 172 Ga. App. 777, 325 S.E.2d 384 (1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Parent and Child, § 2.

19-11-4. Application of Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.”

In administering this article, the department shall be governed by Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.” (Ga. L. 1973, p. 192, § 6.)

JUDICIAL DECISIONS

Department of Human Resources may bypass administrative proceedings in favor of judicial proceedings to enforce the provisions of the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq. *Department of Human Resources v. Carlton*, 174 Ga. App. 30, 329 S.E.2d 181 (1985).

Establishing paternity and support in one judicial proceedings. — Depart-

ment of Human Resources may, in one judicial proceeding, seek to establish paternity and an obligation of support pursuant to the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq. *Department of Human Resources v. Carlton*, 174 Ga. App. 30, 329 S.E.2d 181 (1985).

19-11-5. Debt to state created by payment of public assistance; amount of debt; waiver, reduction, or negotiation of certain repayments.

(a) The payment of public assistance to or on behalf of a child creates a debt due and owing the state by the parent or parents responsible for the support of the child. The amount of the debt is the amount necessary to meet the total needs of the child or children and the person having custody, if included in the public assistance grant, as determined by the department in conformity with the federal Social Security Act; provided, however, that, where a court has ordered child support incident to a final divorce or in a criminal proceeding for nonsupport or where the responsible parent has entered into a legally enforceable and binding agreement, the debt created shall be equal to the amount set in such decree, order, hearing, or agreement.

(b) The department, in accordance with rules established by the Board of Human Services, shall be authorized to waive, reduce, or negotiate the payment of unreimbursed public assistance if it is determined that good cause for nonpayment exists or that enforcement of the claim would result in substantial and unreasonable hardship to the parent or parents responsible for the support of the child against whom the claim exists. The rules established by the Board of Human Services shall consider the ability of the responsible party to support the child or children during the period that public assistance was provided and the current history of regularity of payment by the responsible party. This subsection shall not apply to any court order or decree requiring the repayment of public assistance; however, the department is authorized to petition the court for consideration of a modification of an order or decree based on factors contained in this subsection and in the rules established by the Board of Human Services relating to such unreimbursed public assistance. (Ga. L. 1973, p. 192, § 4; Ga. L. 1976, p. 1537, § 4; Ga. L. 1977, p. 643, § 1; Ga. L. 2005, p. 1520, § 1/SB 52; Ga. L. 2009, p. 453, § 2-3/HB 228.)

U.S. Code. — The federal Social Security Act, referred to in this Code section, is codified at 42 U.S.C. § 601 et seq.

JUDICIAL DECISIONS

If there is an absent parent who does not provide support, and the payment of public assistance is for the support of both the dependent child and the custodial parent who is not able, without the benefit of public assistance, to provide support and maintenance for the child, it is inconsistent with both the goals of the Public Assistance Act and the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq., to conclude that the payment of Aid to Families with Dependent Children imposes upon the custodial parent a debt due and owing the state under O.C.G.A. § 19-11-5. *Cox v. Cox ex rel. State Dep't of Human Resources*, 255 Ga. 6, 334 S.E.2d 683 (1985).

Repayment by custodial parent excuses non-custodial's non-payment. — When uncontradicted evidence demonstrated that the custodial parent, the mother of two children, was entitled to public assistance and was repaying the state for public assistance which she received, the defendant, the children's father, could not be held liable for those public assistance payments. *Johnson v.*

Department of Human Resources, 204 Ga. App. 23, 418 S.E.2d 401 (1992).

Parent whose rights have been terminated under O.C.G.A. § 15-11-80 is not subject to an action under O.C.G.A. § 19-11-5 to provide reimbursement payments of government dispensed child assistance benefits. *Department of Human Resources v. Ammons*, 206 Ga. App. 805, 426 S.E.2d 901 (1992).

Standing of department in claim against parent. — Even though a divorce decree between the mother and alleged father stated that the parties had no minor children, the department of human resources was not collaterally estopped from asserting a claim for child support benefits against the alleged father on behalf of the child. *Department of Human Resources v. Fleeman*, 263 Ga. 756, 439 S.E.2d 474 (1994).

DHR entitled to default judgment. — Trial court erred in failing to enter a default judgment when in the court's petition the Department of Human Resources alleged that it had provided support in the form of public assistance to the

defendant's daughter and was entitled to reimbursement. *Department of Human Resources v. Hedgepath*, 204 Ga. App. 755, 420 S.E.2d 638 (1992).

Establishment of paternity. — Divorce decree, and the decree's finding that the parties had no children, a finding which was apparently incorporated into the decree simply because it was a provision of the parties' agreement, was not a judicial proceeding establishing paternity within the meaning of "parent" in the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq. *Department of Human Resources v. Fleeman*, 263 Ga. 756, 439 S.E.2d 474 (1994).

State was entitled to be reimbursed by the father for support payments made on the child's behalf even though the father had not legitimated the child and had not been ordered to pay child support since it was undisputed that he was the father of the child and therefore had an obligation to support the child. *Department of Human Resources v. Woodruff*, 234 Ga. App. 513, 507 S.E.2d 249 (1998).

"Value of caretaking services" not to reduce debt. — In the computation of the debt due under O.C.G.A. § 19-11-5 et

seq., a recipient is not entitled to a reduction of the debt for the value of his or her services as "caretaker" of the minor child. *Cox v. Department of Human Resources*, 174 Ga. App. 377, 330 S.E.2d 120, rev'd on other grounds, 255 Ga. 6, 334 S.E.2d 683 (1985).

Application for appeal. — In an action for repayment of child support expended by the Department of Human Resources, the failure to file an application for appeal required under O.C.G.A. § 5-6-35(a)(2) did not result in dismissal of the appeal; an action for repayment under O.C.G.A. § 19-11-5 is one for collection of a debt and requiring discretionary appeal procedures only when the judgment is \$2,500 or less, pursuant to O.C.G.A. § 5-6-35(a)(6). *Department of Human Resources v. Johnson*, 175 Ga. App. 610, 333 S.E.2d 845 (1985).

Cited in *Young v. Department of Human Resources*, 148 Ga. App. 518, 251 S.E.2d 578 (1978); *Burns v. Swinney*, 252 Ga. 461, 314 S.E.2d 440 (1984); *Neal v. State*, 182 Ga. App. 37, 354 S.E.2d 664 (1987); *Department of Human Resources v. Mitchell*, 232 Ga. App. 560, 501 S.E.2d 508 (1998).

19-11-6. Enforcement of child support payments and alimony for public assistance recipients.

(a) By accepting public assistance for or on behalf of a child or children, including foster care maintenance payments made pursuant to Title IV-E of the federal Social Security Act, the recipient shall be deemed to have made an assignment to the department of the right to any child support owed for the child. The department shall be subrogated to the right of the child or children or the person having custody to initiate any support action existing under the laws of this state and to recover any payments ordered by the courts of this or any other state. Amounts collected by the department shall be distributed and deposited by the department in conformity with law.

(b) Whenever a family for whom child support services have been provided ceases to receive public assistance, including medical assistance, the department shall continue to provide services and collect such support payments from the absent parent in accordance with standards prescribed pursuant to the federal Social Security Act.

(c) The department shall accept applications for child support services from any proper party or person notwithstanding the fact that the

child or children do not receive public assistance. When made, this application to the department shall constitute an assignment of the right to support to the department and the proceeds of any collections resulting from such application shall be distributed in accordance with the standards prescribed in the federal Social Security Act.

(d) The department shall accept applications for alimony enforcement services from any proper party or person if the right to alimony has been assigned to the department. The application for enforcement shall apply only to alimony while there is a court order for alimony, while the dependent child is living with the spouse or former spouse, and while a child support obligation is also being enforced by the department.

(e) The department shall accept applications for IV-D services from noncustodial parent obligors. The department, by virtue of the acceptance of such applications for IV-D services, is authorized to take any action allowed by this chapter including, but not limited to, the review and modification of support awards, whether such awards are modified upward or downward, pursuant to Code Section 19-11-12. The proceeds of any collections resulting from such applications shall be distributed in accordance with the standards prescribed in the federal Social Security Act.

(f) The department shall be authorized to charge the obligee a federal Deficit Reduction Act of 2005 fee of \$12.00 to be paid at the rate of \$1.00 per month after the IV-D agency has collected \$500.00 of child support annually for each case. The department shall retain such fee and deduct such fee from child support collections before disbursement to the obligee. Such fee shall only apply to an obligee who has never received public assistance payments pursuant to Title IV-A or Title IV-E of the federal Social Security Act.

(g) The department shall be authorized to charge the obligor a federal Deficit Reduction Act of 2005 fee of \$13.00 to be paid in 12 monthly installments after the IV-D agency has collected \$500.00 of child support annually for each case. Such fee shall only apply to an obligor when the obligee has never received public assistance payments pursuant to Title IV-A or Title IV-E of the federal Social Security Act. The department shall retain such fee and collect such fee through income withholding, as well as by any other enforcement remedy available to the IV-D agency responsible for child support enforcement. (Ga. L. 1973, p. 192, § 5; Ga. L. 1976, p. 1537, § 5; Ga. L. 1982, p. 1207, §§ 1, 4; Ga. L. 1985, p. 785, § 4; Ga. L. 1987, p. 186, § 2; Ga. L. 1992, p. 1833, § 4; Ga. L. 2003, p. 415, §§ 2, 3; Ga. L. 2007, p. 667, § 1/SB 42.)

Editor's notes. — As enacted, Ga. L. General Assembly, provided that the 1987, p. 186, § 5, not codified by the amendment of this Code section by that

Act would apply with respect to divorce decrees entered on or after July 1, 1987. However, Section 2 of Ga. L. 1987, p. 1114, not codified by the General Assembly, rewrote Section 5 of Ga. L. 1987, p. 186, to provide that the amendment of this Code section by that latter Act would apply to process served on or after July 1, 1987 in both pending and new proceedings.

U.S. Code. — Title IV-A of the federal

Social Security Act, referred to in this Code section, is codified at 42 U.S.C. § 601 et seq.

Title IV-E of the federal Social Security Act, referred to in this Code section, is codified at 42 U.S.C. § 670 et seq.

Law reviews. — For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 234 (1992).

JUDICIAL DECISIONS

Applicability of subsection (a). — In an action by the Department of Human Resources for recovery of child support from the noncustodial parent, subsection (a) of O.C.G.A. § 19-11-6 would not be applicable if the plaintiff expressly waived any right to recover public assistance paid in the past and there was no evidence of any continuing payments to the custodial parent. *Georgia Dep't of Human Resources v. Smith*, 237 Ga. App. 883, 517 S.E.2d 111 (1999).

State has a real interest in recovering payments made by the state, which would not have been made had a responsible parent lived up to that party's duty; and the purpose of O.C.G.A. §§ 19-11-6 and 19-11-8 is to secure that reimbursement. *Department of Human Resources v. Bagley*, 240 Ga. 306, 240 S.E.2d 867 (1977).

Extent of reimbursement to which state is entitled. — To the extent that the state paid public assistance on behalf of a child which would not have been made had the responsible parent been current in paying the parent's support payments, the state is entitled under assignment provided for in Ga. L. 1966, p. 1537, § 5 (see now O.C.G.A. § 19-11-6) to be reimbursed for the state's excess payments out of support payments for that child recovered from the responsible parent, upon appropriate proof of the extent of the state's claim. This right continues even if state fails to perform the state's duty to initiate the action under Ga. L. 1966, p. 1537, § 6 (see now O.C.G.A. § 19-11-8). *Department of Human Resources v. Bagley*, 240 Ga. 306, 240 S.E.2d 867 (1977).

Action on behalf of child not receiving public assistance. — Department of

Human Resources is authorized to file modification actions on behalf of children who do not receive public assistance only when the child's need for additional support can be shown; the department is not authorized to seek modification of support on behalf of a child not receiving public assistance solely on the basis of a change in either parent's financial circumstances. *Allen v. Georgia Dep't of Human Resources*, 262 Ga. 521, 423 S.E.2d 383 (1992).

Department of Human Resources was the proper party to appeal an order in a legitimation proceeding modifying a child support award since the Department's duty to enforce child support payments continues after public assistance ceases. *Department of Human Resources v. Jones*, 215 Ga. App. 322, 450 S.E.2d 339 (1994).

Loss of right to recovery by department for failure to participate in action. — Should Department of Human Resources fail to actively participate when joined by a custodial parent in an action to recover support payments, the Department may lose the Department's claim for reimbursement. *Department of Human Resources v. Bagley*, 240 Ga. 306, 240 S.E.2d 867 (1977).

Standing of department in claim against parent. — Even though a divorce decree between the mother and alleged father stated that the parties had no minor children, the Department of Human Resources was not collaterally estopped from asserting a claim for child support benefits against the alleged father on behalf of the child. *Department of Human Resources v. Fleeman*, 263 Ga. 756, 439 S.E.2d 474 (1994).

Divorce decree incorporating an agree-

ment between husband and wife that the husband did not father a child did not bind the child and, thus, the Department of Human Resources, acting on the child's behalf, was not barred from pursuing a paternity and child support action against the husband. *Department of Human Resources v. Money*, 222 Ga. App. 149, 473 S.E.2d 200 (1996).

State was entitled to seek repayment from the father of public assistance made to the mother on behalf of her child when the father acknowledged paternity, and even though the mother opposed the state's collection efforts, as the recipient of public assistance she assigned her right to child support to the state. *Department of Human Resources v. Woodruff*, 234 Ga. App. 513, 507 S.E.2d 249 (1998).

Trial court erred in ruling that the Georgia Department of Human Services could not bring an action under O.C.G.A. § 19-11-6(a) on behalf of a child to secure a support award under the provisions of O.C.G.A. § 19-6-10 because there was no dispute that the mother and the father lived separately and that there was no pending divorce action, conditions required under § 19-6-10. *Ga. Dep't of Human Servs. v. Wright*, 293 Ga. 330, 745 S.E.2d 628 (2013).

Custodial parent joining department in action. — When a custodial parent is forced to bring an action to recover support payments by failure or refusal of the state to do so, the proper procedure is for custodian to join the Department of Human Resources as plaintiff to suit. *Department of Human Resources v. Bagley*, 240 Ga. 306, 240 S.E.2d 867 (1977).

Effect of custody agreement on obligation to department. — Custody agreement between a father and his children's maternal grandmother did not relieve the father of any obligation to reimburse the Department of Human Resources for public assistance benefits payments made on behalf of his children. *Department of Human Resources v. Prince*, 198 Ga. App. 329, 401 S.E.2d 342 (1991).

Department's claim for reimbursement of public assistance paid to child support obligee in bankruptcy case. — Under O.C.G.A. § 19-11-6(a), a

parent who accepted public assistance on behalf of a child was deemed to have assigned to the Department of Human Resources the right to child support owed to the parent by a Chapter 13 debtor, and the assignment occurred by operation of law when the Department undertook to collect money from the debtor; therefore, pursuant to 11 U.S.C. § 507(a)(7)(A), the Department's claim for reimbursement of the public assistance the Department paid was not entitled to priority status. *Sys. & Servs. Techs. v. Jordan (In re Jordan)*, No. 99-11854, 2000 Bankr. LEXIS 2218 (Bankr. S.D. Ga. Sept. 27, 2000).

Department joined in action must pay costs and fees. — When custodial parent is forced to bring action to recover support payments by failure or refusal of the state to do so, the Department of Human Resources may recover its reimbursement on condition that the department agrees to reimburse the custodial parent for the costs of bringing the action, including reasonable attorney fees if approved by the court. *Department of Human Resources v. Bagley*, 240 Ga. 306, 240 S.E.2d 867 (1977).

Parent may cross-claim against Department of Human Resources for decision of what sums are due to Department for reimbursement, if there is a dispute. *Department of Human Resources v. Bagley*, 240 Ga. 306, 240 S.E.2d 867 (1977).

Income deduction order. — When the Department of Human Resources petitioned to modify a divorce decree so that the former husband's child support payments would be made directly to the child support receiver, the issuance of an income deduction order was required based on the former wife's receipt of public assistance. *Department of Human Resources v. Brandenburg*, 211 Ga. App. 715, 440 S.E.2d 498 (1994), overruled on other grounds, *Department of Human Servs. v. Offutt*, 217 Ga. App. 823, 459 S.E.2d 597 (1995).

Modification and domestication of foreign decree. — Department of Human Resources was entitled to seek domestication of a foreign divorce decree in the source action in which modification of the decree was sought. *Allen v. Georgia*

Dep't of Human Resources, 262 Ga. 521, 423 S.E.2d 383 (1992).

Support may not be modified in contempt proceedings. — In a contempt proceeding brought by the Georgia Department of Human Resources, the trial court erred in modifying a parent's child support obligation and in forgiving a portion of the arrearage because the court lacked authority to modify support orders in contempt proceedings, and O.C.G.A. § 19-6-17(e)(1)-(3) precluded retroactive modification of child support. Ga. Dep't of Human Res. v. Gamble, 297 Ga. App. 509, 677 S.E.2d 713 (2009).

Enforcement of motion to compel genetic testing. — Claims of the Department of Human Resources against a putative father for reimbursement of public assistance and future support and a contempt complaint for the father's failure to appear for a court-ordered paternity test were not barred by the equitable doctrine of laches. Department of Human Resources v. Mitchell, 232 Ga. App. 560, 501 S.E.2d 508 (1998).

Recovery from obligor who is in bankruptcy. — When the custodial parent accepted public assistance under O.C.G.A. § 19-11-6(a), and the debtor obligor failed to comply with a consent contempt order to make payments, the claim

for reimbursement to the state was a non-contingent, unsecured nonpriority claim payable by the chapter 13 trustee under 11 U.S.C. § 1326(a)(2). Ga. Dep't of Human Res. of Child Support Res. v. Spears (In re Spears), No. 05-51039, 2008 Bankr. LEXIS 4374 (Bankr. S.D. Ga. Jan. 8, 2008).

Impact of 2003 amendment. — In the 2003 amendments to the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq., the General Assembly unambiguously broadened the legislature's intent, expressly permitting the Department of Human Resources to accept applications for child support services from non-custodial parents and to review, and even to seek downward modifications of, support awards under the provisions of the Act. Falkenberry v. Taylor, 278 Ga. 842, 607 S.E.2d 567 (2005).

Cited in Owens v. Griggs, 146 Ga. App. 478, 246 S.E.2d 480 (1978); Young v. Department of Human Resources, 148 Ga. App. 518, 251 S.E.2d 578 (1978); Burns v. Swinney, 168 Ga. App. 902, 310 S.E.2d 733 (1983); Cox v. Cox ex rel. State Dep't of Human Resources, 255 Ga. 6, 334 S.E.2d 683 (1985); Neal v. State, 182 Ga. App. 37, 354 S.E.2d 664 (1987); Department of Human Resources v. Offutt, 217 Ga. App. 823, 459 S.E.2d 597 (1995).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Welfare Laws, § 6.

19-11-7. Enforcement of support payments for dependent minor child public assistance recipients; attorney's fees; interest on judgment; limited scope of action.

(a) Whenever any dependent minor child is receiving public assistance, the department may recover any sum of money due the dependent child. The action shall be brought in the name of the child for the use of the department.

(b) Pursuant to the authority provided in subsection (a) of this Code section, the department may appear in any judicial proceeding on behalf of the spouse and the dependent child to enforce the parties' right to support, including alimony as long as the provisions of subsection (d) of Code Section 19-11-6 are met.

(c) Any action initiated by the department pursuant to subsections (a) and (b) of this Code section shall be limited solely to the issue of support and shall exclude issues of visitation, custody, property settlement, or other similar matters otherwise joinable by the parties.

(d) The court may award reasonable attorney's fees to the prevailing party.

(e) The department may collect the legal rate of interest on any judgment obtained in any support action initiated by the department.

(f) Any action initiated by the department pursuant to subsections (a) and (b) of this Code section or in any action in which the department appears pursuant to subsections (a) and (b) of this Code section shall be limited solely to the issue of support and shall exclude issues of visitation, custody, property settlement, or other similar matters otherwise joinable by the parties. (Ga. L. 1973, p. 192, § 17; Ga. L. 1976, p. 1537, § 15; Ga. L. 1985, p. 785, § 5; Ga. L. 1987, p. 186, § 3.)

JUDICIAL DECISIONS

Limited scope of action. — In a child support recovery action against the purported father under the Child Support Recovery Act (O.C.G.A. § 19-11-1 et seq.), the superior court could not rule on the father's request that the child be legitimated, or given his last name, or that he be given permanent and definite visitation rights. *Department of Human Resources v. Brown*, 213 Ga. App. 42, 443 S.E.2d 685 (1994).

Support may not be modified in contempt proceedings. — In a contempt proceeding brought by the Georgia Department of Human Resources, the

trial court erred in modifying a parent's child support obligation and in forgiving a portion of the arrearage because the court lacked authority to modify support orders in contempt proceedings, and O.C.G.A. § 19-6-17(e)(1)(3) precluded retroactive modification of child support. *Ga. Dep't of Human Res. v. Gamble*, 297 Ga. App. 509, 677 S.E.2d 713 (2009).

Cited in *Burns v. Swinney*, 168 Ga. App. 902, 310 S.E.2d 733 (1983); *Pirkle v. Department of Human Resources*, 178 Ga. App. 719, 344 S.E.2d 520 (1986); *Neal v. State*, 182 Ga. App. 37, 354 S.E.2d 664 (1987).

RESEARCH REFERENCES

ALR. — Right to credit on child support payments for social security or other gov-

ernment dependency payments made for benefit of child, 34 ALR5th 447.

19-11-8. Department's duty to enforce support of abandoned minor public assistance recipient; scope of action.

(a) Whenever the department receives an application for public assistance on behalf of a child and it appears that the child has been abandoned by one or both parents or that the responsible parent has failed to provide support to the child, it is the department's responsibility to take appropriate action under this article, the child support

statutes, or other appropriate state and federal statutes to assure that the responsible parent supports the child.

(b) The department shall accept applications for child support enforcement services from a custodian of a minor child who is not a recipient of public assistance and shall take appropriate action under this article, the child support statutes, or other state and federal statutes to assure that the responsible parent supports the child. The department shall provide that a reasonable application fee be charged each individual who applies for services under this subsection. The department shall enforce an order for alimony so long as child support is being collected along with alimony and all provisions of subsection (d) of Code Section 19-11-6 are met.

(c) The department shall accept applications from noncustodial parents for services as provided for in this article and federal law and regulations. The department shall provide for a reasonable application fee for a noncustodial parent who applies for services under this subsection.

(d) Any action initiated by the department pursuant to subsection (a), (b), or (c) of this Code section shall be limited solely to the issue of support and shall exclude issues of visitation, custody, property settlement, or other similar matters otherwise joinable by the parties.

(e) The department shall be authorized to charge the obligee a federal Deficit Reduction Act of 2005 fee of \$12.00 to be paid at the rate of \$1.00 per month after the IV-D agency has collected \$500.00 of child support annually for each case. The department shall retain such fee and deduct such fee from child support collections before disbursement to the obligee. Such fee shall only apply to an obligee who has never received public assistance payments pursuant to Title IV-A or Title IV-E of the federal Social Security Act.

(f) The department shall be authorized to charge the obligor a federal Deficit Reduction Act of 2005 fee of \$13.00 to be paid in 12 monthly installments after the IV-D agency has collected \$500.00 of child support annually for each case. Such fee shall only apply to an obligor when the obligee has never received public assistance payments pursuant to Title IV-A or Title IV-E of the federal Social Security Act. The department shall retain such fee and collect such fee through income withholding, as well as by any other enforcement remedy available to the IV-D agency responsible for child support enforcement. (Ga. L. 1973, p. 192, § 7; Ga. L. 1976, p. 1537, § 6; Ga. L. 1982, p. 1207, §§ 2, 5; Ga. L. 1983, p. 1816, § 4; Ga. L. 1984, p. 567, § 1; Ga. L. 1985, p. 785, § 6; Ga. L. 1987, p. 186, § 4; Ga. L. 2003, p. 415, § 4; Ga. L. 2007, p. 667, § 2/SB 42.)

U.S. Code. — Title IV-A of the federal Social Security Act, referred to in this Code section, is codified at 42 U.S.C. § 601 et seq.

Title IV-E of the federal Social Security

Act, referred to in this Code section, is codified at 42 U.S.C. § 670 et seq.

Deficit Reduction Act of 2005, referred to in this Code section, is codified at Public Law 109-171, 120 Stat. 154.

JUDICIAL DECISIONS

State has a real interest in recovering payments by the state, which would not have been made had the responsible parent lived up to that parent's duty; and the purpose of Ga. L. 1976, p. 1537, §§ 5 and 6 (see now O.C.G.A. §§ 19-11-6 and 19-11-8) is to secure that reimbursement. *Department of Human Resources v. Bagley*, 240 Ga. 306, 240 S.E.2d 867 (1977).

Action on behalf of child not receiving public assistance. — Department of Human Resources is authorized to file modification actions on behalf of children who do not receive public assistance only in cases where the child's need for additional support can be shown; the Department is not authorized to seek modification of support on behalf of a child not receiving public assistance solely on the basis of a change in either parent's financial circumstances. *Allen v. Georgia Dep't of Human Resources*, 262 Ga. 521, 423 S.E.2d 383 (1992).

State's right to reimbursement continues although state fails to initiate action. — To the extent that the state paid public assistance on behalf of the child which would not have been made had the responsible parent been current in paying that parent's support payments, the state is entitled under assignment provided for in Ga. L. 1976, p. 1537, § 5 (see now O.C.G.A. § 19-11-6) to be reimbursed for the state's excess payments out of support payments for that child recovered from the responsible parent, upon appropriate proof of the extent of the state's claim. This right continues even if the state fails to perform the state's duty to initiate the action under Ga. L. 1976, p. 1537, § 6 (see now O.C.G.A. § 19-11-8). *Department of Human Resources v. Bagley*, 240 Ga. 306, 240 S.E.2d 867 (1977).

Loss of right by department for failure to participate in action for recovery. — Should Department of Human

Resources fail to actively participate when joined by the custodial parent in action to recover support payments, the Department may lose the Department's claim for reimbursement. *Department of Human Resources v. Bagley*, 240 Ga. 306, 240 S.E.2d 867 (1977).

Custodial parent joining department in action. — When custodial parent is forced to bring action to recover support payments by failure or refusal of state to do so, the proper procedure is for the custodian to join the Department of Human Resources as plaintiff to suit. *Department of Human Resources v. Bagley*, 240 Ga. 306, 240 S.E.2d 867 (1977).

Department joined in action must pay costs and fees. — When the custodial parent is forced to bring an action to recover support payments by failure or refusal of the state to do so, the Department of Human Resources may recover the Department's reimbursement on condition that the Department agrees to reimburse the custodial parent for the costs of bringing the action, including reasonable attorney fees if approved by the court. *Department of Human Resources v. Bagley*, 240 Ga. 306, 240 S.E.2d 867 (1977).

Parent may cross-claim against Department of Human Resources for decision of what sums are due Department for reimbursement, if there is a dispute. *Department of Human Resources v. Bagley*, 240 Ga. 306, 240 S.E.2d 867 (1977).

Department's failure to follow procedures. — The Department of Human Resources' filing of a petition to establish a child support obligation when one already existed under the divorce decree and the Department's failure to follow the specific procedures set forth in O.C.G.A. § 19-11-12 for modifying a child support obligation was not harmless error. *Ward v. Department of Human Resources*, 273 Ga. 52, 537 S.E.2d 70 (2000).

Order modified earlier support order in divorce case. — Child support order entered in a case brought against a father by the Georgia Department of Human Resources on behalf of the couple's child seeking a child support modification limited the father's support obligation despite an earlier child support order entered in the divorce case. *Louradour v. Britt*, 278 Ga. 168, 598 S.E.2d 464 (2004).

Modification and domestication of foreign decree. — Department of Human Resources was entitled to seek domestication of a foreign divorce decree in the source action in which modification of the decree was sought. *Allen v. Georgia Dep't of Human Resources*, 262 Ga. 521, 423 S.E.2d 383 (1992).

Impact of 2003 amendment. — In the

2003 amendments to the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq., the General Assembly unambiguously broadened the legislature's intent, expressly permitting the Department of Human Resources to accept applications for child support services from non-custodial parents and to review, and even to seek downward modifications of, support awards under the provisions of the Act. *Falkenberry v. Taylor*, 278 Ga. 842, 607 S.E.2d 567 (2005).

Cited in *Young v. Department of Human Resources*, 148 Ga. App. 518, 251 S.E.2d 578 (1978); *Burns v. Swinney*, 252 Ga. 461, 314 S.E.2d 440 (1984); *Cox v. Cox ex rel. State Dep't of Human Resources*, 255 Ga. 6, 334 S.E.2d 683 (1985).

OPINIONS OF THE ATTORNEY GENERAL

Application fee for support recovery services. — No application fee for child support recovery services should be

charged under O.C.G.A. § 19-11-8. 1983 Op. Att'y Gen. No. U83-67.

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Welfare Laws, § 79.

19-11-9. Location of absent parents by department; assistance of other governmental agencies; putative father registry; use of information obtained.

(a) The department shall attempt to locate absent parents.

(b) The department is to serve as a registry for the receipt of information which directly relates to the identity or location of absent parents, to assist any governmental agency or department in locating an absent parent, to answer interstate inquiries concerning deserting parents, to coordinate and supervise any activity on a state level in search for an absent parent, and to develop guidelines for coordinating activities of any governmental department, board, commission, bureau, or agency in providing information necessary for location of absent parents and is to process all requests received from an initiating county or an initiating state which has adopted the Uniform Interstate Family Support Act or a law substantially similar to the Uniform Interstate Family Support Act, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act.

(c) In order to carry out the responsibilities imposed under this article, the department may request information and assistance from

any governmental department, board, commission, bureau, or agency in locating the absent parents of children for whom the department has assignment of child support rights. The commissioner of human services or his duly authorized representative shall be entitled to have access to all pertinent information which is within the custody of any governmental department, board, commission, bureau, or agency, including, but not limited to, income tax information contained in any report or return required under Articles 1 through 6 of Chapter 7 of Title 48 by the Department of Revenue, including information from federal income tax returns required to be included as a part of any state report or return, which information but for this Code section would not be subject to disclosure pursuant to Code Section 48-7-60 and which is relative to such parents' location, income, or property, provided that any tax information secured from the federal government by the Department of Revenue, pursuant to the express provisions of Section 6103 of the Internal Revenue Code, may not be disclosed by that department pursuant to this subsection. Any person receiving any tax information or tax returns under the authority granted in this subsection shall be considered either an officer or employee as those terms are used in subsection (a) of Code Section 48-7-60; and, as such an officer or employee, any person receiving any tax information or returns under the authority of this Code section shall be subject to Code Section 48-7-61, relating to the sanctions to be imposed for the unauthorized disclosure of confidential material.

(d)(1) There is established within the department a putative father registry. For purposes of this subsection, "biological father" and "legal father" shall have the meanings set out in Code Section 19-8-1. The putative father registry shall record the name, address, and social security number of any person who claims to be the biological father but not the legal father of a child, and the date of entry of such information. Placement on the putative father registry shall not be used as an admission of guilt to any crime under Georgia law or used as evidence in any criminal prosecution under Georgia law.

(2) The putative father registry shall include two types of registrations:

(A) Persons who acknowledge paternity of a child or children before or after birth in a signed writing; and

(B) Persons who register to indicate the possibility of paternity without acknowledging paternity.

(3) Registrants shall be informed that this registration may be used to establish an obligation to support the child or children and that this registration shall be used to provide notice of adoption proceedings or proceedings to terminate the rights of a biological

father who is not a legal father but that registration without further action does not enable the registrant to prevent an adoption or termination of his rights by objecting. All registrants shall be asked to provide information regarding changes in their addresses.

(4) A voluntary acknowledgment of paternity may be rescinded pursuant to the provisions of Code Section 19-7-46.1.

(5) The department shall publicize the existence and availability of the putative father registry to the public, including but not limited to providing information disseminated in connection with certificates of live birth and through county boards of health. The department is authorized to prescribe the notices, forms, and educational materials to be used for entities that may offer voluntary paternity establishment services.

(6) The department shall keep the putative father registry as current as feasible, adding entries or information to the registry often enough that new registrations or new information regarding registrants, mothers, or children shall be added to the registry no later than two business days following receipt of the information from the registrant.

(e) The information which is obtained by the department shall only be available to:

(1) A governmental department, board, commission, bureau, agency, or political subdivision of any state for purposes of locating an absent parent or putative father to establish or to enforce his obligation of support, of enforcing a child custody determination, or of enforcing any state or federal law with respect to the unlawful taking or restraint of a child; or

(2) The department, a licensed child-placing agency, or a member in good standing of the State Bar of Georgia in response to a request for information for purposes of locating a biological father who is not the legal father to provide notice of adoption proceedings or a proceeding to terminate the rights of a biological father who is not a legal father. The request for information shall include, to the extent the information is known to the department, agency, or attorney, the name, address, and social security number of the mother of the child and of the alleged biological father who is not the legal father of the child and the child's name, sex, and date of birth. The department shall within two business days of its receipt of such a request for information issue a written certificate documenting its response.

(f) The department shall charge a fee of \$10.00 for each certification regarding entries on the putative father registry or other information provided pursuant to paragraph (2) of subsection (e) of this Code

section. The department shall waive the fee provided for in this subsection upon presentation of an affidavit of the petitioner's indigency. The department shall transmit the fees received pursuant to this subsection to the Office of the State Treasurer for deposit in the treasury of the state and shall provide an annual accounting of such fees to the Governor and the General Assembly. (Ga. L. 1973, p. 192, § 8; Ga. L. 1976, p. 1537, § 7; Ga. L. 1977, p. 1279, § 1; Ga. L. 1982, p. 1105, §§ 1, 2; Ga. L. 1987, p. 191, § 9; Ga. L. 1992, p. 1266, § 2; Ga. L. 1997, p. 1613, § 24; Ga. L. 1997, p. 1686, § 8; Ga. L. 2009, p. 453, § 2-4/HB 228; Ga. L. 2010, p. 863, § 2/SB 296.)

Editor's notes. — Ga. L. 1987, p. 191, § 10, not codified by the General Assembly, provided that this Act is applicable to taxable years ending on or after March 11, 1987, and that a taxpayer with a taxable year ending on or after January 1, 1987, and before March 11, 1987, may elect to have the provisions of that Act apply.

Ga. L. 1987, p. 191, § 10, not codified by the General Assembly, also provided that tax, penalty, and interest liabilities and refund eligibility for prior taxable years shall not be affected by that Act.

Ga. L. 1987, p. 191, § 10, not codified by the General Assembly, also provided that provisions of the federal Tax Reform Act of 1986 and of the Internal Revenue Code of 1986 which as of January 1, 1987, were not yet effective become effective for pur-

poses of Georgia taxation on the same dates as they become effective for federal purposes.

U.S. Code. — Section 6103 of the Internal Revenue Code of 1954, referred to in subsection (c), is codified at 26 U.S.C. § 6103.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997). For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417 (2008).

For comment, "The Putative Father's Right to Notice of Adoption Proceedings: Has Georgia Finally Solved the Adoption Equation?," see 47 Emory L.J. 1475 (1998).

JUDICIAL DECISIONS

Cited in *Young v. Department of Human Resources*, 148 Ga. App. 518, 251 S.E.2d 578 (1978); *Burns v. Swinney*, 252

Ga. 461, 314 S.E.2d 440 (1984); In the *Interest of T.W.*, 288 Ga. App. 386, 654 S.E.2d 218 (2007).

OPINIONS OF THE ATTORNEY GENERAL

Records of State Board of Workers' Compensation confidential. — All records of the State Board of Workers' Compensation pertaining to accidents, injuries, and settlements are confidential,

unless a party can meet the statutory requirements for access or has authority pursuant to the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq. 1991 Op. Att'y Gen. No. 91-5.

RESEARCH REFERENCES

ALR. — Requirements and effects of putative father registries, 28 ALR6th 349.

19-11-9.1. Duty to furnish information about obligor to department; use of information obtained; penalty for non-compliance.

(a) Any entity in this state including for profit, nonprofit, and governmental employers, upon the request of the department and its authorized contractors, shall provide the department with information, including the name, address, social security number, employment, compensation, and benefits regarding a person owing or allegedly owing an obligation of support for a dependent child.

(a.1)(1) In accordance with the mandate contained in 42 U.S.C. Section 666(a)(13)(A) and notwithstanding any provision of Title 40 relating to motor vehicles as now existing or hereafter amended, the Department of Driver Services shall require an applicant for a driver's license, a commercial driver's license, a learner's permit, or an identification card to provide to the Department of Driver Services the applicant's social security number or certification from the Social Security Administration that the applicant is not eligible for issuance of a social security number because he or she is an alien not authorized to work in the United States as part of the application. Notwithstanding the foregoing, nothing in this Code section shall be construed so as to authorize the issuance of any driver's license, permit, or identification card to any person who is not a resident as defined in Code Section 40-5-1. If the legal authorization of such person is terminated or expired, any Georgia driver's license issued to such person shall be revoked. The Department of Driver Services shall provide to the Department of Human Services, in addition to other information required to be provided to the Department of Human Services, such social security numbers of individuals who have been issued a driver's license, a commercial driver's license, a learner's permit, or an identification card. The Department of Human Services shall use the information provided by the Department of Driver Services pursuant to this Code section for the purpose of complying with the requirements of law concerning the enforcement of child support.

(2) In accordance with the mandate contained in 42 U.S.C. Section 666(a)(13)(A) and notwithstanding any provision of Chapter 2 of Title 27 relating to licenses and permits as now existing or hereafter amended, the Department of Natural Resources shall require an applicant for a license or permit pursuant to Chapter 2 of Title 27 to provide to the Department of Natural Resources the applicant's social security number as a part of the license or permit application. The Department of Natural Resources shall provide to the Department of Human Services, along with other information required to be provided to the Department of Human Services, the social security

numbers of individuals who have been issued a license or permit pursuant to Chapter 2 of Title 27. The Department of Human Services shall use the information provided by the Department of Natural Resources pursuant to this Code section for the purpose of complying with the requirements of law concerning the enforcement of child support.

(3) The information collected by the Department of Driver Services and the Department of Natural Resources and transmitted to the Department of Human Services pursuant to paragraphs (1) and (2) of this subsection shall be deemed confidential and not subject to public disclosure but may be shared with other state agencies as needed to comply with federal law.

(b) Except as may be prohibited under the federal Fair Credit Reporting Act, 15 U.S.C. Section 1681, et seq., the IV-D agency may require disclosure of information, including the location, employment, title to property, credit status, or professional affiliation to assist the IV-D agency in locating a custodial parent or noncustodial parent. The IV-D agency may require such disclosure from any state or local government agency; state, county, or municipal registry of deeds or titles; registry of vital records and statistics; utility company regulated by the Georgia Public Service Commission; tax assessor's office; housing authority; employer; professional or trade association; labor union; professional or trade licensing board; or credit bureau or agency. Information furnished by a telephone company, however, shall be limited to the address and telephone number of an obligor or obligee.

(c) The IV-D agency may request from any employer or other person or entity providing a source of income which the IV-D agency has reason to believe employs an obligor or obligee or otherwise provides the obligor or obligee with regular periodic income information concerning the dates and amounts of income paid, the last known address, social security number, and available health care benefits. The IV-D agency shall not inquire of an employer or other person or entity providing a source of income concerning the same obligor or obligee more than once every three months.

(d) The department upon receipt of information collected pursuant to this Code section may make such information available only to the appropriate officials or agency of this state or any other state operating a program pursuant to Title IV-D of the federal Social Security Act. Information collected by the department pursuant to this Code section shall not be subject to public inspection or disclosure under Article 4 of Chapter 18 of Title 50.

(e) No employer or other person or entity providing a source of income who complies with this Code section shall be liable in any civil

action or proceeding brought by the obligor or obligee on account of such compliance.

(f) Responses pursuant to this Code section may be made by paper, facsimile, magnetic tape, or other electronic means.

(g) The failure of any individual or entity, without reasonable cause, to provide the IV-D agency with the information requested under this Code section within 14 days after such information is requested or a willful false response to a request pursuant to this Code section shall be punishable by a penalty to be assessed by the IV-D agency or by a court of competent jurisdiction in the amount of \$100.00 for each such failure or false response. (Code 1981, § 19-11-9.1, enacted by Ga. L. 1987, p. 1114, § 1; Ga. L. 1988, p. 13, § 19; Ga. L. 1991, p. 950, § 5; Ga. L. 1997, p. 1613, § 25; Ga. L. 2002, p. 1247, § 5; Ga. L. 2003, p. 415, § 5; Ga. L. 2004, p. 631, § 19; Ga. L. 2005, p. 334, § 8-1/HB 501; Ga. L. 2009, p. 453, § 2-2/HB 228.)

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-9.2. Duty of employers to report hiring or rehiring of persons.

(a) Employers doing business in the State of Georgia shall report to the Georgia state support registry managed by the Department of Human Services:

(1) The hiring of any person who resides or works in this state to whom the employer anticipates paying earnings; and

(2) The hiring or return to work of any employee who was laid off, furloughed, separated, granted leave without pay, or terminated from employment.

(b) Reserved.

(c) Employers may report by mailing the employee's copy of the W-4 form or other means authorized by the registry which will result in timely reporting. Employers shall submit reports within ten days of the hiring, rehiring, or return to work of the employee. The report shall contain:

(1) The employee's name, address, social security number, and date of birth; and

(2) The employer's name, address, and employment security number or unified business identifier number.

An employer who fails to report as required under this Code section shall be given a written warning.

(d) Except that access to information shall be made available as provided in subsections (f), (g), and (h) of this Code section, the registry shall retain the information for a particular employee only if the registry is responsible for establishing, enforcing, or collecting a support obligation or debt of the employee. If the employee does not owe such an obligation or a debt, the registry shall not create a record regarding the employee and the information contained in the notice shall be promptly destroyed.

(e) The department in cooperation with any other affected department may adopt rules to establish additional exemptions from this Code section if needed to reduce unnecessary or burdensome reporting.

(f) The department shall be entitled to have access to this employment registry for the limited purposes of determining eligibility for needs based programs provided by the department, including, but not limited to, the Temporary Assistance for Needy Families program and the food stamp program.

(g) The Department of Labor shall be entitled to have access to this employment registry for the limited purpose of determining the employment status of persons applying for or receiving unemployment compensation benefits and for the collection of delinquent unemployment contributions and overpayment of unemployment benefits.

(h) The Department of Human Services shall administer this registry and shall provide computer access to the authorized users. The Department of Human Services shall be authorized to apportion the costs of the registry between the users. (Code 1981, § 19-11-9.2, enacted by Ga. L. 1993, p. 1983, § 2; Ga. L. 1995, p. 603, § 4.1; Ga. L. 1997, p. 1021, § 7; Ga. L. 1997, p. 1613, § 26; Ga. L. 1998, p. 567, § 1; Ga. L. 2002, p. 1247, § 6; Ga. L. 2009, p. 453, § 2-2/HB 228.)

Law reviews. — For articles commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121, 284 (1997).

section, see 10 Ga. St. U.L. Rev. 122 (1993). For note on the 1995 amendment of this Code section, see 12 Ga. St. U.L. Rev. 169 (1995).

For note on 1993 enactment of this Code

19-11-9.3. Suspension or denial of license for noncompliance with child support order; interagency agreements; report to General Assembly; duty to inform obligors.

(a) As used in this Code section, the term:

(1) “Agency” means the agency within the Department of Human Services which is responsible for enforcing orders for child support pursuant to this article.

(2) “Applicant” means any person applying for issuance or renewal of a license.

(3) “Certified list” means a list provided by the agency of the names of support obligors found to be not in compliance with an order for child support in a case being enforced under this article.

(4) “Compliance with an order for child support” means, as set forth in a court order, administrative order, or contempt order for child support, the obligor is not more than 60 calendar days in arrears in making payments in full for current support, periodic payments on a support arrearage, or periodic payments on a reimbursement for public assistance.

(5) “Delinquent obligor” means any obligor who is not in compliance with an order for child support and who appears on the agency’s certified list.

(6) “Department” means the Department of Human Services.

(7) “License” means a certificate, permit, registration, or any other authorization issued by any licensing entity that allows a person to operate a motor vehicle or to engage in a profession, business, or occupation.

(8) “Licensee” means any person holding a license.

(9) “Licensing entity” means any state agency, department, or board of this state which issues or renews any license, certificate, permit, or registration to authorize a person to drive a motor vehicle, or to engage in a profession, business, or occupation including those under Article 3 of Chapter 7 of Title 2, the “Georgia Pesticide Use and Application Act of 1976”; Article 13 of Chapter 1 of Title 7, relating to mortgage lenders and mortgage brokers; Chapter 5 of Title 10, the “Georgia Uniform Securities Act of 2008,” relating to securities salespersons and investment adviser representatives; Part 2 of Article 1 of Chapter 6 of Title 12, relating to foresters; Chapter 4 of Title 26, relating to pharmacists; Chapter 23 of Title 33, relating to insurance agents, counselors, and other personnel; Chapter 1 of Title 43, relating to professions and businesses; Chapter 39A of Title 43, relating to real estate appraisers; or Chapter 40 of Title 43, relating to real estate brokers and salespersons.

(b) The agency shall maintain a state-wide certified list of those persons included in any case enforced under this article for whom an order for child support has been rendered and who are not in compliance with that order. The certified list must be updated on a monthly basis. The agency shall submit to each licensing entity a certified list with the name, social security number, if known, date of birth, and last known address of each person on the list.

(c) On or before January 1, 1997, all licensing entities shall implement procedures to accept and process the list provided by the agency in accordance with this Code section.

(d) Promptly after receiving the certified list from the agency, all licensing entities shall determine whether an applicant or licensee is on the most recent certified list. If an applicant or licensee is on the certified list, the licensing entity shall immediately notify the agency. That notification shall include the applicant's or licensee's last known mailing address on file with the licensing entity.

(e) After receiving notice from a licensing entity of applicants or licensees who are on the certified list, the agency shall immediately notify those individuals as specified in subsection (f) of this Code section of the agency's intent to request that all pertinent licensing entities suspend all licenses or withhold issuance or renewal of any license.

(f) Notice for purposes of this Code section shall be initiated by the department. Notice to the delinquent obligor shall include the address and telephone number of the agency and shall inform the delinquent obligor of the agency's intent to submit the obligor's name to relevant licensing entities and to request that the licensing entities withhold issuance or renewal of the license, or suspend the license. Notice shall be sent by first-class mail and receipt by the delinquent obligor may be presumed if the mailing is not returned to the department within 30 days from the date of mailing. The notice must also inform the delinquent obligor of the following:

(1) The delinquent obligor has 20 days from the date of mailing to come into compliance with the order or to reach an agreement to pay the delinquency with the agency. If an agreement cannot be reached within that time or if the delinquent obligor does not respond within that time, the agency will send notice to the licensing entities requesting that the licenses be suspended or the licensure applications be denied;

(2) The obligor may request an administrative hearing and judicial review of that hearing under subsection (g) of this Code section. A request for a hearing must be made in writing and must be received by the agency within 20 days of service of notice; and

(3) If the delinquent obligor requests a hearing within 20 days of service, the department shall stay all action pending the hearing and any appeals.

(g) If no response is received from the delinquent obligor by the department within 30 days from the date of mailing of the notice and the delinquent obligor is still shown as delinquent on the next month's list prepared pursuant to subsection (b) of this Code section, the department shall request one or more licensing entities to deny or suspend a license of the delinquent obligor. Each licensing entity shall notify the delinquent obligor by certified mail or statutory overnight delivery of the date that the license has been denied or suspended.

(h) All delinquent obligors subject to the sanctions imposed in this Code section shall have the right to a hearing before an administrative law judge of the Office of State Administrative Hearings pursuant to Article 2 of Chapter 13 of Title 50. A delinquent obligor who requests a hearing within the time prescribed in subsection (f) of this Code section shall have the right to a hearing. The hearing shall be conducted as provided in Article 2 of Chapter 13 of Title 50 within 45 days after such demand is received. The only issues at the hearing will be the following:

- (1) Whether there is an order for child support being enforced pursuant to this article;
- (2) Whether the licensee or applicant is the obligor covered by that order;
- (3) Whether the support obligor is or is not in compliance with the order for child support;
- (4) Whether the support obligor shall be entitled to pay past due child support in periodic payments; and
- (5) Whether the support obligor has been able and willing to comply with such order for support.

With respect to the issues listed in this subsection, evidence relating to the ability and willingness of an obligor to comply with such order for support shall be considered in making the decision to either suspend a license or deny the issuance or renewal of a license under this Code section. The administrative law judge shall be authorized to enter into an agreement or enter an order requiring such periodic payments and, in each event, the administrative law judge shall be authorized to issue a release for the obligor to obtain each license or licenses. Such an agreement will not act to modify an existing child support order, but rather only affects the payment of the arrearage.

(i) The decision at the hearing shall be subject to appeal and judicial review pursuant to Article 2 of Chapter 13 of Title 50 but only as to those issues referred to in subsection (h) of this Code section. Notwithstanding any hearing requirements for suspension and denials within each licensing entity, the hearing and appeal procedures outlined in this Code section shall be the only hearing required to suspend a license or deny the issuance or renewal of a license under this Code section.

(j) The department shall prescribe release forms for use by the agency. When the obligor is determined to be in compliance with an order for child support or is determined to be not in compliance with such order but has been determined in a hearing pursuant to subsection (h) of this Code section to be unable to comply with the order or to be not willfully out of compliance with such order, the agency shall mail to the delinquent obligor and the appropriate licensing entity a notice of

release stating such determination. The receipt of a notice of release shall serve to notify the delinquent obligor and the licensing entity that, for the purpose of this Code section, he or she is in compliance with an order for child support, and the licensing entity shall promptly thereafter issue or reinstate the license, unless the agency, pursuant to subsection (b) of this Code section, certifies subsequent to the issuance of a notice of release that the delinquent obligor is once again not in compliance with an order for child support.

(k) Any payments received by the department on behalf of a child support recipient under this Code section shall be forwarded to such recipient within 15 days after any such payment is received by the department.

(l) The department may enter into interagency agreements with state agencies that have responsibility for the administration of licensing entities as necessary to implement this Code section. Those agreements shall provide for the receipt by other state agencies and boards of federal funds to cover that portion of costs allowable under federal law and regulation and incurred by state agencies and boards in implementing this Code section.

(m) In furtherance of the public policy of increasing child support enforcement and collections, on or before January 1, 1998, the department shall make a report to the General Assembly and the Governor based on data collected by the boards and the department in a format prescribed by the department. The report shall contain all of the following:

(1) The number of delinquent obligors certified by the agency under this Code section;

(2) The number of delinquent obligors who also were applicants for issuance or renewal of a license or licensees subject to this Code section;

(3) The number of new licenses and renewals that were denied subject to this Code section and the number of new licenses issued and renewals granted following a licensing entity's receipt of releases;

(4) The number of licenses suspended subject to this Code section, and the number of licenses reissued following the licensing entity's receipt of releases; and

(5) The amount of revenue collected by the department after sending notices pursuant to this Code section.

(n) Any licensing entity receiving an inquiry as to the license status of an applicant who has had an application for issuance or renewal of a

license denied under this Code section shall respond only that the license was suspended or the licensure application was denied pursuant to this Code section.

(o) The department shall, and the licensing entities as appropriate may, adopt regulations necessary to implement this Code section.

(p) The department shall inform delinquent obligors of resources available which may remedy such delinquent obligor's license suspension. (Code 1981, § 19-11-9.3, enacted by Ga. L. 1996, p. 453, § 7; Ga. L. 1999, p. 81, § 19; Ga. L. 1999, p. 329, § 5; Ga. L. 2000, p. 1589, § 3; Ga. L. 2004, p. 631, § 19; Ga. L. 2008, p. 381, § 10/SB 358; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2015, p. 60, § 2-1/SB 100.)

The 2015 amendment, effective July 1, 2015, added subsection (p). See editor's note for applicability.

Cross references. — Failure to pay child support prohibits licensure as money transmitter or payment instrument seller, § 7-1-693. Failure to pay child support prohibits licensure for cash payment instrument, § 7-1-708.1.

Code Commission notes. — Pursuant

to Code Section 28-9-5, in 1996, "subsection (h)" was substituted for "subsection (g)" in the first sentence in subsections (i) and (j).

Editor's notes. — Ga. L. 2015, p. 60, § 6-1/SB 100, not codified by the General Assembly, provides, in part, that the amendment by this Act shall apply to offenses which occur on or after July 1, 2015.

JUDICIAL DECISIONS

Driver's license suspension. — In a case charging the defendant with driving with a suspended license, the defendant's argument that the state failed to prove that the defendant had notice of the defendant's driver's license suspension under O.C.G.A. § 19-11-9.3(f), (f)(1) of the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq., was without merit since the offense of driving while suspended was separate and distinct from the of-

fenses which led to the suspension and since any challenge to the Georgia Department of Human Resources' suspension of the defendant's license was governed by the Administrative Procedure Act and O.C.G.A. § 19-11-9.3(f)(2), (h). *Fannin v. State*, 267 Ga. App. 413, 599 S.E.2d 355 (2004).

Cited in Department of Human Resources v. West, 241 Ga. App. 677, 527 S.E.2d 280 (1999).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state statutes providing for

revocation of driver's license for failure to pay child support, 30 ALR6th 483.

19-11-10. Investigation to determine ability to support; notification of parent; information forms; penalty for falsifying parents' report.

(a) In cases in which a parent's obligation to support has not already been established by a court order, the department may conduct investigations to determine whether a responsible parent is able to support

the dependent child receiving public assistance. The department shall notify the parents of any such planned investigation.

(b) The department shall notify the parent of his legal duty to support his child or children and shall request information concerning his financial status in order to determine whether he is financially able to provide support.

(c) The notice shall inform the parent that he may be liable for reimbursement of any support furnished prior to determination of his financial circumstances as well as future support.

(d) Information requested shall be submitted on forms prescribed by the department and shall contain a sworn declaration of income, resources, and other matters bearing on the parent's ability to provide support. The department shall review the forms returned by each obligor and supplement the information provided therein, where required.

(e) Any person who knowingly falsifies the parent's report of his income and resources shall be punished as for false swearing. (Ga. L. 1973, p. 192, §§ 9, 10; Ga. L. 1976, p. 1537, § 8.)

Cross references. — Penalty for false swearing, § 16-10-71.

law of domestic relations, see 38 Mercer L. Rev. 179 (1986).

Law reviews. — For annual survey of

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Parent must be informed of duty to support. — When parents are divorced and custody is awarded to one parent, the parent not having custody must be notified by the state of his or her duty to support and of the application for Aid to Families with Dependent Children payments even when the department does not make an investigation of the parent's ability to support under O.C.G.A. § 19-11-10. *Burns v. Swinney*, 252 Ga. 461, 314 S.E.2d 440 (1984).

When parents are divorced and custody is awarded to one parent, when the parent not having custody has not been ordered by any court to pay child support, and when the nonpaying parent's address is known or can be ascertained, the state must notify the parent of the duty of support and of the application for Aid to Family for Dependent Children payments before such parent becomes obligated to reimburse the state for such payment. *Department of Human Resources v. John-*

son, 175 Ga. App. 610, 333 S.E.2d 845 (1985).

No recovery by department against putative father. — Department was not entitled to recover public assistance payments from putative father since his obligation to support had not been established by a court order, and there had not even been an adjudication of paternity. *Gresham v. Georgia Dep't of Human Resources*, 257 Ga. 747, 363 S.E.2d 544 (1988).

Notice to alleged father of duty to support. — Department of Human Resources may not recover public assistance payments made on the child's behalf prior to the defendant's first receiving notice that the Department of Human Resources intends to hold him liable. *Gresham v. Georgia Dep't of Human Resources*, 257 Ga. 747, 363 S.E.2d 544 (1988).

Agreement that each parent supports only child in his/her custody not enforceable. — When divorced par-

ents agree to the terms of a divorce settlement in which each parent has custody of one of two children and therefore no obligation to pay child support, this term of the agreement is not enforceable, and the Department of Human Resources may obtain reimbursement from the father for aid to families with dependent children payments for maintenance of the child in

the mother's custody. *Collins v. Collins*, 172 Ga. App. 748, 324 S.E.2d 475 (1985).

Cited in *Young v. Department of Human Resources*, 148 Ga. App. 518, 251 S.E.2d 578 (1978); *Cox v. Cox ex rel. State Dep't of Human Resources*, 255 Ga. 6, 334 S.E.2d 683 (1985); *Pirkle v. Department of Human Resources*, 178 Ga. App. 719, 344 S.E.2d 520 (1986).

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Welfare Laws, §§ 17 et seq., 80.

ALR. — Power of divorce court, after

child attained majority, to enforce by contempt proceedings payment of arrears of child support, 32 ALR3d 888.

19-11-11. Issuance of subpoenas by department; court order requiring compliance.

The department may examine any books, papers, or memoranda bearing upon the determination of the ability to support and for this purpose may, by means of subpoenas issued by its commissioner or his duly authorized representative, compel the attendance of witnesses and the production of relevant documents. Subpoenas of witnesses shall be served in the same manner as if issued by a superior court. If any person fails to obey a subpoena issued and served under this Code section with respect to any matter germane to the department's investigation, on application of the department, through the commissioner of human services or his duly authorized representative, the superior court of the county in which the person was required to appear may issue an order requiring the person to comply with the subpoena and to testify and to produce the relevant documents. (Ga. L. 1973, p. 192, § 10; Ga. L. 1976, p. 1537, § 9; Ga. L. 2009, p. 453, § 2-4/HB 228.)

OPINIONS OF THE ATTORNEY GENERAL

Compelling disclosure of employment information. — Office of child support recovery must obtain an administrative subpoena or use the discovery provisions of the Civil Practice Act,

O.C.G.A. Ch. 11, T. 9, in order to examine documents in the possession of employers when the employer will not voluntarily release the information. 1984 Op. Att'y Gen. No. U84-33.

19-11-12. Review of orders for child support; review procedures; order adjusting support award amount; no release from liability due to subsequent financial obligation.

(a) The IV-D agency shall review orders for child support in accordance with the guidelines prescribed in Code Section 19-6-15.

(b)(1) The IV-D agency shall periodically give notice to the obligor and obligee who are subject to a IV-D court order for child support of the right of each to request a review of the order by the IV-D agency for possible recommendation for adjustment of such order. Such notification should be provided within 36 months after the establishment of the order or the most recent review; however, failure to provide the notice within 36 months shall not affect the right of either party to request, in writing, a review nor the right of the IV-D agency to conduct a review and to recommend an adjustment to the order. Such notice may be included in the initial order or review recommendation.

(2) The establishment of a child support order or the entry of an order to modify a child support order or a determination of no change to a child support order under this Code section shall commence a 36 month cycle, the purpose of which is to provide the parties the right to a review of the order at least every 36 months or in such shorter cycle as the IV-D agency may determine. The failure of either party to request a review at least once every 36 months shall not affect the right of either party to request a review nor the right of the IV-D agency to conduct a review and to recommend an adjustment to the order at any time beyond the 36 month cycle.

(c)(1) All IV-D agency orders that are active TANF cases shall be reviewed under this Code section following the expiration of the thirty-sixth month after the order was issued, without a request from the obligor or obligee. All other orders for support being enforced by a IV-D agency shall be eligible for review pursuant to this Code section upon application and payment of fees required by the IV-D agency at the completion of the review.

(2) If the request for the review occurs less than 36 months since the last issuance or last review of the order, the IV-D agency shall review, and if the requesting party demonstrates a substantial change in circumstances, seek to modify the order in accordance with the guidelines as provided by paragraph (2) of subsection (d) of this Code section.

(3) If the request for the review occurs at least 36 months after the last issuance or last review, the requesting party shall not be required to demonstrate a substantial change in circumstances, the need for additional support, or that the needs of the child have decreased. The sole basis for a recommendation for a change in the award of support under this paragraph shall be a significant inconsistency between the existing child support order and the amount of child support which would result from the application of Code Section 19-6-15.

(d)(1) The IV-D agency shall notify the obligor and obligee at least 30 days before the commencement of a review of a child support order.

(2) The IV-D agency shall review and, if there is a significant inconsistency between the amount of the existing child support order and the amount of child support which would result from the application of Code Section 19-6-15, the agency shall make a recommendation for an increase or decrease in the amount of an existing order for support. The IV-D agency shall not be deemed to be representing either the obligee or obligor in a proceeding under this Code section.

(3) Upon completion of a review, the IV-D agency shall send notice by first-class mail to the obligor and obligee at their last known addresses of a proposed adjustment or a determination that there should be no change in the child support award amount.

(4)(A) In the case of an administrative order, the agency shall request the administrative law judge to increase or decrease the amount in the existing order in accordance with the agency recommendation. If either the obligor or the obligee files with the agency written objections to the agency's proposed child support order adjustment or determination of no change to the child support order within 33 days of the mailed notice, the matter shall be scheduled for an administrative hearing within the Office of State Administrative Hearings. The administrative order adjusting the child support award amount which results from a hearing or the failure to object to the agency's proposed adjustment or determination of no change shall, upon filing with the local clerk of the court, have the full effect of a modification of the original order or decree of support. As part of the order adjusting the child support award the administrative law judge shall issue an income and earnings deduction order which shall also be filed with the court pursuant to Code Sections 19-6-30 through 19-6-33.

(B) In the case of a judicial order, the agency shall file a petition asking the court to adopt the agency's proposed adjustment or determination of no change to the child support order which shall be filed contemporaneously with the agency's mailed notice and shall serve such petition upon the obligor and obligee in the manner provided in subsection (e) of Code Section 9-11-4. Upon the filing of a written objection to the agency's proposed adjustment or determination of no change with the clerk of the superior court and with the agency, a de novo proceeding shall be scheduled with the court on the matter. If neither party files an objection within 30 days from the service of the petition, the court shall issue an order adopting the recommendation of the IV-D agency. As part of the order adjusting the child support award, the court shall issue an income and earnings deduction order pursuant to Code Sections 19-6-30 through 19-6-33.

(e) When the trier of fact, the administrative law judge for administrative orders, or a judge of the superior court for court orders, as the case may be, determines that there is a significant inconsistency between the existing child support order and the amount of child support which would result from the application of Code Section 19-6-15, the trier of fact may use this inconsistency as the basis to increase or decrease the amount of support ordered. The trier of fact may also address the repayment of any arrears accumulated under the existing order.

(f) An obligor shall not be relieved of his or her duty to provide support when such obligor has brought about his or her own unstable financial condition by voluntarily incurring subsequent obligations.

(g) The department shall be authorized to promulgate rules and regulations to implement the provisions of this Code section. (Ga. L. 1973, p. 192, § 11; Ga. L. 1976, p. 1537, § 10; Ga. L. 1989, p. 861, § 4; Ga. L. 1996, p. 412, § 3; Ga. L. 1997, p. 1021, § 8; Ga. L. 1999, p. 81, § 19; Ga. L. 1999, p. 906, § 1; Ga. L. 2003, p. 415, §§ 6, 7, 8; Ga. L. 2004, p. 631, § 19; Ga. L. 2010, p. 245, § 2/HB 1118.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1999, “paragraph” was inserted near the end of paragraph (c)(2).

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 284 (1997). For survey article on domestic relations law, see 59 Mercer L. Rev. 139 (2007). For survey article on domestic relations law, see 60 Mercer L. Rev. 121

(2008). For annual survey of law on appellate practice and procedure, see 62 Mercer L. Rev. 25 (2010). For annual survey of law on domestic relations, see 62 Mercer L. Rev. 105 (2010).

For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 227 (1989). For review of 1996 domestic relations legislation, see 13 Ga. St. U.L. Rev. 155 (1996).

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Regulation inconsistent with section. — A regulation of the Department of Human Resources (DHR) requiring the court to enter an order adopting an administrative order adjusting an existing court award of child support was inconsistent with the clear authority of O.C.G.A. § 19-11-12 and, thus, the court did not err by denying a petition by DHR for an order adopting an administrative order as provided by the regulation. *Department of Human Resources v. Anderson*, 218 Ga. App. 528, 462 S.E.2d 439 (1995).

Construction with § 19-6-19. — Fact that jury trials are allowed in private child support modification proceedings under O.C.G.A. § 19-6-19, but denied in

modification proceedings under O.C.G.A. § 19-11-12, does not create a separate classification for litigants in proceedings under that section in violation of equal protection rights. *Kelley v. Georgia Dep’t of Human Resources ex rel. Kelley*, 269 Ga. 384, 498 S.E.2d 741 (1998).

Modification of child support arising out of a Department of Human Resources review under O.C.G.A. § 19-11-12 invokes the supreme court’s divorce and alimony jurisdiction because appeals from orders in proceedings for modification of a child support award which arose from a prior divorce or alimony action, regardless of the code section under which the modifi-

cation was pursued, are subject to the jurisdiction of the supreme court, and an action for child support modification under § 19-11-12 is neither inconsistent with, nor materially distinguishable from, a modification action under O.C.G.A. § 19-6-19, such that the former, unlike the latter, does not invoke the supreme court's jurisdiction; an award of child support always constitutes alimony if it is made in a divorce decree proceeding, but it may or may not represent alimony outside the divorce context, and the supreme court has jurisdiction over a case involving an original claim for child support that arose in either a divorce or alimony proceeding. *Spurlock v. Dep't of Human Res.*, 286 Ga. 512, 690 S.E.2d 378 (2010).

Department's modification of a court-ordered child support obligation was not authorized by O.C.G.A. § 19-11-12. *Department of Human Resources v. Siggers*, 219 Ga. App. 1, 463 S.E.2d 544 (1995); *Department of Human Resources v. Jones*, 219 Ga. App. 580, 472 S.E.2d 331 (1996).

Modification below guidelines permitted, but no forgiveness of arrearages. — While the trial court did not erroneously set a mother's child support obligation at a percentage well below the guidelines, the court lacked the authority to completely forgive the mother's arrearage as the General Assembly did not intend to permit forgiveness of past-due child support arrearage, regardless of whether the modification proceeding fell under the general statutory scheme or the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq. *Ga. Dep't of Human Res. v. Prater*, 278 Ga. App. 900, 630 S.E.2d 145 (2006).

State agency's standing to seek downward child support modification. — State legislature did not intend to give a state agency the power to seek child support to the same extent that a parent can do so; thus, there existed a total absence of any statutory authority or case law to permit the state agency's initial participation in a case for the purpose of a downward modification action on behalf of a non-custodial parent. Accordingly, the state agency's authority to bring a downward modification action under O.C.G.A.

§ 19-11-12 is limited to cases in which there is a prior court order establishing or enforcing a child support obligation which the state agency participated in obtaining. *Dep't of Human Res. v. Allison*, 276 Ga. 175, 575 S.E.2d 876 (2003).

Department's failure to follow procedures. — Department of Human Resources' filing of a petition to establish a child support obligation when one already existed under the divorce decree and the department's failure to follow the specific procedures set forth in O.C.G.A. § 19-11-12 for modifying a child support obligation was not harmless error. *Ward v. Department of Human Resources*, 273 Ga. 52, 537 S.E.2d 70 (2000).

Jury trial. — There is neither a fundamental constitutional nor a statutory right to a trial by jury in a child support modification proceeding brought under O.C.G.A. § 19-11-12. *Kelley v. Georgia Dep't of Human Resources ex rel. Kelley*, 269 Ga. 384, 498 S.E.2d 741 (1998).

Appeal. — Father's appeal from the superior court's order under O.C.G.A. § 19-11-12, modifying the amount of his child support obligation, should have been brought as a discretionary appeal under O.C.G.A. § 5-6-35. *Fitzgerald v. Department of Human Resources*, 231 Ga. App. 129, 497 S.E.2d 659 (1998).

Impact of 2003 amendment. — In the 2003 amendments to the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq., the General Assembly unambiguously broadened the legislature's intent, expressly permitting the Department of Human Resources to accept applications for child support services from non-custodial parents and to review, and even to seek downward modifications of, support awards under the provisions of the Act. *Falkenberry v. Taylor*, 278 Ga. 842, 607 S.E.2d 567 (2005).

Need for additional support not required. — When the Department of Human Resources petitions the superior court to adopt the department's recommendation, the court is not required to find a need for additional support but, without regard to whether the child is receiving public assistance, may increase child support based solely on a significant inconsistency between the existing order

and the amount which would result from application of the child support guidelines. *Falkenberry v. Taylor*, 278 Ga. 842, 607 S.E.2d 567 (2005).

In a child support modification action, the trial court erred in concluding that evidence of the need for additional support was necessary and that the Department of Human Resources (DHR) lacked standing to file a modification action on behalf of a child not receiving public assistance unless it could show the child's need for additional support, and in failing to apply the child support guidelines of O.C.G.A. § 19-6-15 and to justify any departure therefrom; by express statutory amendment, the General Assembly no longer reserved for the private bar those modification actions which involved children who did not receive public assistance and needed no additional support, but whose court-ordered provider enjoyed an enhanced financial status. *Falkenberry v. Taylor*, 278 Ga. 842, 607 S.E.2d 567 (2005) (Unpublished).

Written findings insufficient. — Trial court erred in not fully adopting the recommendation of the Department of Human Resources to reduce a father's

child support obligation to \$718 per month and in ordering that the father's child support obligation be reduced to \$1,000 per month because the trial court's written order failed to state how application of the presumptive amount of child support would be unjust or inappropriate and how the best interest of the children for whom support was being determined would be served by the deviation pursuant to O.C.G.A. § 19-6-15(c)(2)(E) and (i)(1)(B); O.C.G.A. § 19-11-12(e) does not authorize the trial court to refrain from written findings or any other compliance with § 19-6-15 because like § 19-6-15(d), § 19-11-12(e) serves to emphasize that the qualitative determinations of whether special circumstances make the presumptive amount of child support excessive or inadequate and whether deviating from the presumptive amount serves the best interest of the child are committed to the discretion of the court. *Spurlock v. Dep't of Human Res.*, 286 Ga. 512, 690 S.E.2d 378 (2010).

Cited in *Young v. Department of Human Resources*, 148 Ga. App. 518, 251 S.E.2d 578 (1978); *Cox v. Cox ex rel. State Dep't of Human Resources*, 255 Ga. 6, 334 S.E.2d 683 (1985).

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Constitutionality. — Administrative review does not, in and of itself, work a modification of a pre-existing child support order; rather, modification occurs only upon judicial adoption of the administrative decision. Thus, O.C.G.A. § 19-11-12 does not violate the separation of powers provision of the Georgia Constitution of 1983. 1990 Op. Att'y Gen. No. U90-24.

Because O.C.G.A. § 19-11-12 provides that the modification process be made available to both the absent parent and the custodial parent, and that adjustment of the child support award may be either upward or downward, the equal protection requirements of both the federal and state constitutions are met. 1990 Op. Att'y Gen. No. U90-24.

Construed with § 19-6-19. — O.C.G.A. § 19-11-12 and its provisions do

not prejudice or otherwise affect a right to employ the modification of child support remedy available under O.C.G.A. § 19-6-19. 1990 Op. Att'y Gen. No. U90-24.

O.C.G.A. § 19-11-12 does not create a conflict of interest for public employees participating in modification of child support orders because department employees are presumed to do their duty. Any bias which might appear in a particular case may be challenged by the aggrieved person either through a fair hearing or in superior court. 1990 Op. Att'y Gen. No. U90-24.

Upon proper disclosure to both the absent parent and the custodial parent that a district attorney represents the department in child support matters, there is no legal conflict of interest. 1990 Op. Att'y Gen. No. U90-24.

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Welfare Laws, § 15 et seq.

19-11-13. Determination of paternity; acknowledgment under oath; legal proceedings.

Whenever the department receives an application for services under this article on behalf of a child born out of wedlock and the child's mother identifies in writing the putative father of the child, the department may make an investigation of the surrounding circumstances and may request that the putative father acknowledge paternity under oath. If the department is unable to secure such an acknowledgment, the department may initiate legal proceedings to establish the paternity of the child, unless the department determines, in accordance with standards prescribed pursuant to the federal Social Security Act, that it is against the best interests of the child to do so. (Ga. L. 1976, p. 1537, § 3.)

Cross references. — Proceedings to determine paternity, § 19-7-40 et seq.

U.S. Code. — The federal Social Security Act, referred to in this Code section, is codified at 42 U.S.C. § 601 et seq.

Law reviews. — For survey article on domestic relations cases for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 223 (2003).

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Establishment of paternity is not jurisdictional under the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq., but rather it is only an essential element without proof of which recovery may not be effected. Department of Human Re-

sources v. Carlton, 174 Ga. App. 30, 329 S.E.2d 181 (1985).

Cited in Peterson v. Moffitt ex rel. Dep't of Human Resources, 253 Ga. 253, 319 S.E.2d 449 (1984).

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No right to a jury trial exists in a civil action for the establishment of paternity. 1997 Op. Att'y Gen. No. 97-5.

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Welfare Laws, § 65.

C.J.S. — 10 C.J.S., Bastards, §§ 15, 16.

19-11-14. Father's liability for support of child born out of wedlock; full faith and credit to paternity determination by another state.

(a) Whenever a man has been adjudicated by a court of competent jurisdiction or an administrative tribunal as the father of a child born out of wedlock or whenever he has acknowledged paternity under oath in an administrative hearing, in court, or by verified writing, he shall be legally liable for the support of the child in the same manner as he would owe the duty of support if the child were his child born in wedlock. The right of the child born out of wedlock to receive such support is enforceable in a civil action, notwithstanding any other provision of law.

(b) For the purposes of this chapter only, the courts of this state shall give full faith and credit to a determination of paternity made by another state whether established through voluntary acknowledgment or through administrative or judicial processes. (Ga. L. 1973, p. 192, § 17; Ga. L. 1976, p. 1537, § 15; Ga. L. 1983, p. 1816, § 1; Ga. L. 1994, p. 1270, § 6; Ga. L. 1999, p. 81, § 19.)

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Effect of conviction of abandonment on subsequent paternity suit. — Adjudication of paternity by conviction of abandonment is conclusive in subsequent civil proceeding for child support. *Cummings v. Carter*, 155 Ga. App. 688, 272 S.E.2d 552 (1980).

Liability for period prior to paternity adjudication. — Trial court erred in refusing to award back support to the mother of a child for those periods prior to an adjudication of paternity when she had been supporting the child without the benefit of public assistance payments. *Weaver v. Chester*, 195 Ga. App. 471, 393 S.E.2d 715 (1990).

Support unavailable for non-acknowledged paternity. — Temporary child support was improperly ordered absent a finding of paternity as revealed by a document, which though containing the defendant's signature identifying himself as the child's father for purposes of adoption-release, did not contain a sworn admission to that effect. *Hughes v. Dulock*, 207 Ga. App. 492, 428 S.E.2d 406 (1993).

Cited in Department of Human Resources v. Woodruff, 234 Ga. App. 513, 507 S.E.2d 249 (1998).

19-11-15. Voluntary support agreement; notice and hearing; notice of final determination; information to be included therein.

(a) When the department has completed its investigation, has determined the ability of the absent parent to support his or her child or children in accordance with guidelines prescribed in Code Section 19-6-15, and believes that the absent parent is able to furnish a certain amount of support, the department may, as an exception to Code Section 9-12-18, request the absent parent to enter into a proposed

consent order and income deduction order to provide the support amount and accident and sickness insurance coverage consistent with Code Section 19-11-26 prior to the filing of an action with the superior court. The orders may not be set aside on the grounds that the parties consented thereto prior to the filing of the action. An income deduction order shall issue consistent with Code Sections 19-6-30 through 19-6-34. If the department is unable to secure a proposed consent order from the parent, the department may file an action in superior court or may initiate an administrative action pursuant to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(b) The administrative hearing shall be conducted within 20 days of the filing date, the absent parent shall be notified of the hearing at least ten days before it is held, and the hearing decision shall issue not more than ten days after the hearing.

(c) The determination of the administrative law judge regarding the ability to provide support and the ability to provide accident and sickness insurance coverage shall be delivered to the absent parent personally or shall be sent by regular mail. The final order shall include an order for income deduction consistent with Code Sections 19-6-30 through 19-6-34, and shall inform the absent parent in plain language:

(1) That failure to support may result in the foreclosure of liens on his or her personal or real property, in garnishment of his or her wages or other personalty, or in other collection actions; and

(2) That the absent parent has the right to appeal the determination within 30 days.

(d) The final administrative order for support shall have the full force and effect of an order of a superior court of this state and shall be enforceable upon filing with such court under an action for contempt. All other remedies available under the law shall be available for the enforcement of such administrative orders. (Ga. L. 1973, p. 192, §§ 11, 12; Ga. L. 1976, p. 1537, § 12; Ga. L. 1989, p. 861, § 5; Ga. L. 1997, p. 1613, § 27.)

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997). For survey article on domestic relations law, see 59 Mercer L. Rev. 139 (2007).

JUDICIAL DECISIONS

Cited in *Burns v. Swinney*, 252 Ga. 461, 314 S.E.2d 440 (1984).

19-11-15.1. Information required to be given to individuals receiving services.

The IV-D agency shall provide individuals who are applying for or receiving services under this article, or who are parties to cases in which services are being provided under this article, with the following:

(1) Notice, pursuant to Title IV-D of the Social Security Act and regulations thereunder, of all proceedings in which support obligations might be established or modified; and

(2) A copy of any order establishing or modifying a child support obligation or, in the case of a request for review or modification, a notice of determination that there should be no change in the amount of the child support award within 14 days after issuance of such order or determination. (Code 1981, § 19-11-15.1, enacted by Ga. L. 1997, p. 1613, § 27.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-16. Periodic redeterminations and reinvestigations.

The department may conduct periodic redeterminations and reinvestigations of the ability of the parent to furnish support. Any initial determination of the ability to support or any increase in the amount of support shall be subject to the same procedure as determinations under Code Section 19-11-15. (Ga. L. 1973, p. 192, § 13.)

19-11-17. Redetermination at request of parent; time for hearing.

Whenever a parent has been determined able to support his child pursuant to Code Section 19-11-15 or 19-11-16 but is unable to provide the support because of a change in circumstances, he may demand a hearing for redetermination. The department shall hold the hearing within 30 days after receiving the request. (Ga. L. 1973, p. 192, § 14.)

19-11-18. Collection procedures; notice; judicial review.

(a) The IV-D agency, in accordance with Title IV, Part D of the federal Social Security Act, is authorized to institute collection procedures for all arrearages which have accrued against child support payments owed pursuant to a judgment or support order of a court or an order from a IV-D agency of competent jurisdiction. These collection procedures shall include, but not be limited to, notification of employers that a wage assignment is in effect and not suspended; notification of

obligors; demand letters; use of state and federal income tax refund intercept programs; initiation of contempt proceedings; the use of liens, levies, and seizures as provided in subsections (b) and (c) of this Code section; the use of the services of any person providing collection services to the department; seeking warrants in appropriate situations; attachment or lien against property; civil actions to reach and apply; and any other civil or administrative remedy available for the enforcement of judgments or for the enforcement of support or custody orders.

(b)(1) A child support obligation which is unpaid in whole or in part shall, as of the date on which it was due, be a lien in favor of the obligee in an amount sufficient to satisfy unpaid child support, whether the amount due is a fixed sum or is accruing periodically. An amount of restitution established by a court or an administrative agency of competent jurisdiction shall be due and payable as of the date such amount is established. Such lien shall incorporate any additional child support obligation on the date it becomes due and shall not terminate except as provided in paragraph (5) of this subsection. Upon recordation or registration in accordance with paragraph (3) of this subsection, such lien shall encumber all tangible and intangible property, whether real or personal, and any interest in property, whether legal or equitable, belonging to the obligor. An interest in property acquired by the obligor after the child support lien arises shall be subject to such lien, subject to the limitations provided in paragraphs (3) and (5) of this subsection.

(2) When the IV-D agency determines that child support is unpaid, it shall send written notice to the obligor by first-class mail, if the address is known to the IV-D agency, no less frequently than once a year. The notice shall specify the amount unpaid as of the date of the notice or other date certain and the right of the obligor to request an administrative review by filing a written request with the IV-D agency within 30 days of the date of the notice. If the obligor files a timely written request for an administrative review, the IV-D agency shall conduct the review within 21 days of said request and shall not conduct further administrative enforcement action under this subsection until the review is completed. If the obligor has failed to keep the IV-D agency informed of his or her address as required by Code Section 19-6-32 and the agency cannot otherwise determine the current address of the obligor from other available information, the agency may proceed under the provisions of paragraph (4) of this subsection.

(3) The filing of a notice of a lien or of a waiver or release of a lien shall be received and registered or recorded without payment of a fee. The IV-D agency may file notice of a lien or waiver or release of a lien or may transmit information to, or receive information from, any

registry of deeds or other office or agency responsible for the filing or recording of liens by any means, including electronic means. The perfected lien shall not be subordinate to any recorded lien except a lien that has been perfected before the date on which the child support lien was perfected; provided, however, that the IV-D agency may, upon request of the obligor, subordinate the child support lien to a subsequently perfected lien, security deed, or mortgage. To assist in the collection of a debt, the IV-D agency may disclose the name of an obligor against whom a lien has arisen and other identifying information including the existence of the lien and the amount of the outstanding obligation. A notice of a lien shall be filed as follows:

(A) With respect to real property, the IV-D agency shall file notice of a lien in the county where property is located or in the county where the obligor resides. The social security number of the obligor shall be noted on the notice of lien. The filing shall operate to perfect a lien when duly recorded and indexed in the grantor index or when registered, as the case may be, as to any interest in real property owned by the obligor that is located in the county where the lien is recorded or registered. A special index for liens created under this chapter shall be maintained in each registry of deeds. If the obligor subsequently acquires an interest in real property, the lien shall be perfected upon the recording or registering of the instrument by which such interest is obtained in the registry of deeds in the county where the notice of the lien was filed within six years prior thereto. A child support lien shall be perfected as to real property when both the notice thereof and a deed or other instrument in the name of the obligor are on file in the registry of deeds where the obligor owns property without respect to whether the lien or the deed or other instrument was recorded or registered first;

(B) With respect to personal property except motor vehicles, the IV-D agency may also file notice of a child support lien with the social security number of the obligor noted thereon with the Secretary of State or office or agency responsible for the filing or recording of liens; and

(C) With respect to motor vehicles for which a certificate of title is required pursuant to Chapter 3 of Title 40, the IV-D agency may file notice of a child support lien with the social security number of the obligor noted thereon with the Department of Revenue. A child support lien shall become perfected as of the date a certificate of title showing the child support lien is issued by the department and the permanent records of the department are changed to reflect such lien. A filed or recorded but unperfected child support lien shall be valid against the obligor. A filed or recorded but

unperfected child support lien shall not constitute actual or constructive notice to and shall not be valid against owners of the motor vehicle who are not the obligor and shall not constitute actual or constructive notice to and shall not be valid against individuals or entities which become transferees of the motor vehicle prior to perfection, creditors of the obligor, or holders of security interests or liens in the motor vehicle which have been perfected in accordance with Chapter 3 of Title 40 prior to perfection of the child support lien. A child support lien perfected as provided in this subparagraph shall be subordinate to any security interest or lien which has been perfected prior to the perfection of the child support lien and shall be subordinate to mechanic's liens regardless of when perfected.

(4) If the collection of any unpaid child support will be jeopardized by delay as determined by the commissioner of human services or his or her designee, the IV-D agency shall proceed forthwith to collect such unpaid child support by perfecting a lien under paragraph (3) of this subsection or by executing levy or seizure of property under paragraph (1) of subsection (c) of this Code section or by any other available remedy without respect to the 30 day notice period provided in paragraph (2) of this subsection.

(5) A lien under this chapter shall expire upon payment in full of the unpaid child support covered by the lien, upon release of the lien by the IV-D agency, or six years from the date on which such lien was first perfected, whichever is earlier. Expiration of the lien shall not terminate the underlying order or judgment of child support. Liens may be extended for additional periods of six years each by recording or registering, within one year before the expiration of the unexpired lien, a further notice of the lien, as provided in paragraph (3) of this subsection, without affecting the priority of such lien. The IV-D agency may issue a full or partial waiver or release of any lien imposed under this Code section. Such waiver or release shall be conclusive evidence that the lien upon the property covered by the waiver or release is extinguished. The IV-D agency shall issue a release of any lien imposed under this Code section within 30 days of payment in full of the unpaid child support covered by the lien.

(c)(1) If any obligor against whom a lien has arisen and has been perfected under paragraph (3) of subsection (b) of this Code section neglects or refuses to pay the sum due after the expiration of the 30 day notice period specified in paragraph (2) of subsection (b) of this Code section, the IV-D agency may collect such unpaid child support and levy upon all property as provided in this subsection. For the purposes of this subsection, the word "levy" shall include the power of distraint and seizure by any means. A person in possession of

property upon which a lien has priority under paragraph (3) of subsection (b) of this Code section which has been perfected shall, upon demand, surrender the property to the IV-D agency as provided in this subsection. A levy on property held by an organization with respect to a life insurance or endowment contract shall, without necessity for surrender of the contract document, constitute a demand by the IV-D agency for payment of the amount of the lien and the exercise of the right of the obligor to the advance of such amount. Such organization shall pay the amount 90 days after service of notice to levy. The levy shall be deemed to be satisfied if the organization pays to the IV-D agency the full amount which the obligor could have had advanced to him or her, provided that the amount does not exceed the amount of the lien.

(2) Whenever any property upon which levy has been made is not sufficient to satisfy the claim of the IV-D agency for which levy is made, the IV-D agency may thereafter, as often as may be necessary, proceed to levy, without further notice, upon any other property of the obligor liable to levy upon first perfecting its lien as provided in paragraph (3) of subsection (b) of this Code section, until the amount due, together with expenses, is fully paid. With respect to a seizure or levy of real property or tangible personal property, the IV-D agency shall proceed in the manner prescribed by Chapter 13 of Title 9 to the extent that such statutes are not inconsistent with the provisions of this subsection. The IV-D agency shall have any rights to property remaining after satisfying superior perfected liens, as provided in paragraph (3) of subsection (b) of this Code section.

(3) Upon demand by the IV-D agency, a person who fails or refuses to surrender property subject to levy pursuant to this subsection shall be liable in his or her own person and estate to the state in a sum equal to the value of the property not so surrendered but not exceeding the amount of the lien, together with costs and interest at the rate due on a judgment from the date of the levy. The interest or costs incurred under this paragraph shall be paid to the state and shall not be credited against the child support liability.

(4) Any person in possession of, or obligated with respect to, property who upon demand by the IV-D agency surrenders the property or discharges the obligation to the IV-D agency or who pays a liability to the obligor under this subsection, shall be discharged from any obligation or liability to the obligor arising from the surrender or payment. In the case of a levy on an organization with respect to a life insurance or endowment contract which is satisfied pursuant to this subsection, the organization shall be discharged from any obligation or liability to any beneficiary arising from the surrender or payment.

(5) In any case where there has been a refusal or neglect to pay child support or to discharge any liability in respect thereto, whether or not a levy has been made, the IV-D agency, in addition to other forms of relief, may file a civil action in the superior court which originally entered the order for child support to enforce the lien under this subsection. The filing of a civil action shall not preclude the IV-D agency from enforcing the child support order through the use of any administrative means permitted by federal or state law.

(d) The IV-D agency shall send timely written notice to the obligor by first-class mail of any action taken to perfect a lien, execute a levy, or seize any property. The notice shall specify the amount due, the steps to be followed to release the property so placed under lien, levied, or seized, the time period within which to respond to such notice, and include the name of the court or administrative agency of competent jurisdiction which entered the child support order.

(e) Any person aggrieved by a determination of the IV-D agency pursuant to paragraph (2) or (4) of subsection (b) of this Code section may, upon exhaustion of the procedures for administrative review provided in subsection (b) of this Code section, seek judicial review in the court where the order or judgment was issued or registered. Commencement of the review shall not stay enforcement of child support under this Code section. The court may review the proceedings taken by the agency under the provisions of this Code section and may correct any mistakes of fact, but the court shall not reduce or retroactively modify child support arrears.

(f) Notwithstanding any other provision of this title to the contrary, any child support being held by the Child Support Enforcement Agency of the department shall be paid to the custodial parent, legal guardian, or caretaker relative having custody of or responsibility for a child within two days from receipt of same by the enforcement agency. (Ga. L. 1973, p. 192, § 15; Ga. L. 1997, p. 1613, § 28; Ga. L. 1998, p. 1179, §§ 1, 2; Ga. L. 2002, p. 415, § 19; Ga. L. 2005, p. 334, § 8-2/HB 501; Ga. L. 2009, p. 453, §§ 2-2, 2-4/HB 228; Ga. L. 2009, p. 1001, § 4/HB 189.)

Cross references. — Liens generally, § 44-14-320 et seq.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1998, the spelling of the words “constitute” and “constructive” were corrected in subparagraph (b)(3)(C).

The amendment of subsection (f) of this Code section by Ga. L. 2009, p. 453, § 2-2 irreconcilably conflicted with and was treated as superseded by Ga. L. 2009, p. 1001, § 4. See *County of Butts v. Strahan*, 151 Ga. 417 (1921).

Editor’s notes. — Ga. L. 2009, p. 1001, § 6, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall be applicable to all contracts for private collection of child support payments entered into on or after July 1, 2009.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

OPINIONS OF THE ATTORNEY GENERAL

Disbursement of child support monies to private collection agency prohibited. — Georgia law prohibits the Office of Child Support Services from honoring a request from a custodial par-

ent to disburse any portion of child support monies it receives to a private collection agency. 2008 Op. Att’y Gen. No. U2008-2.

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Welfare Laws, §§ 81, 83, 97 et seq.

19-11-19. Garnishment and orders to withhold and deliver; notice and hearing; procedure; liability of employer failing to answer order to withhold and deliver.

(a) For purposes of this Code section, the term:

(1) “Disposable earnings” shall be construed to mean that part of the earnings of an individual remaining after the deduction from those earnings of the amounts otherwise required by law to be withheld plus any premium for group accident and health insurance offered by the employer, if any.

(2) “Earnings” shall be construed to mean compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to pension or retirement programs or insurance policies of any type and includes unemployment compensation.

(b) If, after a court has issued a civil order directing child support be paid, or having received notice of the final determination of his support obligation, or having entered into a written agreement with the department to provide child support as provided in Code Section 19-11-15, the responsible parent fails to make the support payments within 30 days of the due date specified by the court order for child support of a civil nature, by the final determination or by a court order in affirmance of the final determination, or by the written support agreement, then the department shall be entitled to the process of garnishment of disposable earnings as in cases where judgment has been obtained or shall be authorized to issue an order to withhold and deliver.

(c) Except in cases of a court order for child support of a civil nature, prior to the institution of garnishment proceedings or the issuance of an order to withhold and deliver, the department shall conduct a hearing to determine finally:

(1) Whether the responsible parent has a defense or other legal excuse for his failure to make support payments; and

(2) The amount of support payments which are due and owing.

(d) The responsible parent shall be given at least 15 days' notice of the hearing required by subsection (c) of this Code section, which notice shall specify the amount of support payments claimed to be overdue.

(e) After a final determination required by subsection (c) of this Code section that the responsible parent had no legal excuse for failing to make support payments when due, the department shall be authorized to initiate garnishment proceedings of disposable earnings under subsection (f) of this Code section or issue an order to withhold and deliver disposable earnings under subsection (g) of this Code section.

(f) Pursuant to subsection (e) of this Code section, the department may initiate garnishment proceedings by causing to be made an affidavit stating the amount claimed to be due and attaching thereto a certified copy of the final determination. Bond shall not be required. All subsequent proceedings shall be the same as provided by law in relation to garnishments in other cases where judgment has been obtained.

(g)(1) Pursuant to subsection (e) of this Code section, the department may issue to any employer of the responsible parent an order to withhold and deliver to the department the disposable earnings which are due, owing, or belonging to the responsible parent; provided, however, that the maximum part of the aggregate disposable earnings of the responsible parent which may be subject to such an order shall not exceed that amount which is allowed by law to be subject to garnishment. The order to withhold and deliver shall be served at the same time on the employer and on the responsible parent either personally or by certified mail or statutory overnight delivery, return receipt requested, and shall include a statement as to the legal authority of the department to make such an order, the amount of the debt owing to the department, the amount of disposable earnings to be withheld and delivered to the department, and a summary of subsection (a) of this Code section and paragraph (2) of this subsection. Any employer of the responsible parent upon whom service is made is required to answer the order to withhold and deliver within 20 days, exclusive of the day of service, under oath and in writing, and shall file true answers to the matters inquired of therein. Based upon the answer filed by the employer, the department shall determine whether to rescind or continue the order to withhold and deliver. In the event there is in the possession of the employer any portion of the disposable earnings of the responsible parent which may be subject to the claim of the department under this article, the amount shall be withheld immediately upon receipt of the order to withhold and deliver and shall, after the 20 day period, be delivered forthwith to the department. The order to withhold and deliver shall continue to operate and require each employer to

withhold and deliver to the department such amount of disposable earnings at each succeeding earnings disbursement interval until the entire overdue amount of the child support debt has been paid or until the department, after a redetermination based on change of circumstances, shall release the employer from the order to withhold and deliver. Delivery by the employer to the department of disposable earnings ordered to be withheld shall serve as full compliance with this article.

(2) Any employer which fails to answer an order to withhold and deliver within the time prescribed in this subsection or fails or refuses to deliver money pursuant to the order shall be liable to the department in an amount equal to 100 percent of the value of the debt which is the basis of the order, together with costs, interest, and reasonable attorney fees. (Ga. L. 1976, p. 1537, § 13; Ga. L. 1981, p. 796, § 1; Ga. L. 1982, p. 1204, §§ 1, 3; Ga. L. 1983, p. 1816, § 2; Ga. L. 2000, p. 1589, § 3.)

Cross references. — Garnishment generally, T. 18, C. 4.

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assem-

bly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

JUDICIAL DECISIONS

Husband not a necessary party. — Parents who live together are jointly entitled to any proceeds of litigation, whether or not they both participated in a lawsuit. Under this construction of O.C.G.A. § 19-7-1 (parental power), the husband is not a necessary party under O.C.G.A. § 19-11-19. Complete relief may be af-

forded to the parties without detriment to the husband, if the husband is bound and shares jointly in any proceeds of the litigation; therefore, the trial court erred in dismissing the wife's claim for failing to join her husband as a party plaintiff. *Blanton v. Moshev*, 262 Ga. 254, 416 S.E.2d 506 (1992).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 1 et seq.

C.J.S. — 27C C.J.S., Divorce, § 694 et seq.

ALR. — Employee retirement pension benefits as exempt from garnishment, attachment, levy, execution, or similar proceedings, 93 ALR3d 711.

19-11-20. Wage assignments.

(a) A parent responsible for child support payments may make an assignment of a portion of his wages to the department in order to fulfill his obligations under this article. The employer shall recognize and comply with any wage assignment executed for the purpose of meeting child support obligations and the wage assignment shall be enforceable.

(b) Employers may not terminate the services of an employed parent who executes a wage assignment for child support purposes, solely because of the assignment.

(c) In addition to other remedies provided at law, courts may require wage assignments, if accepted by the employer, as a condition of probation or at such other times as appropriate to ensure the regular availability of support to a dependent child.

(d) The payor may collect up to \$25.00 against the obligor's income to reimburse the payor for administrative costs for the first income deduction and up to \$3.00 for each deduction thereafter. (Ga. L. 1977, p. 897, § 1; Ga. L. 1985, p. 785, § 7; Ga. L. 1989, p. 861, § 6.)

Law reviews. — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 227 (1989).

RESEARCH REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d, Attachment and Garnishment, § 1 et seq.

C.J.S. — 27C C.J.S., Divorce, § 694 et seq.

19-11-21. Payment of support to department.

Payment of support pursuant to an administrative determination or a voluntary agreement shall be made to the department. In non-TANF cases, where the department deems it appropriate, it may authorize distribution of the actual payment by other individuals, agencies, or entities and utilize certification schedules reflecting such payments or distributions which the department requires, in accordance with the federal Social Security Act, as amended. Child support which is ordered by a court pursuant to a divorce decree or in any other proceeding in which the responsible parent is required to pay support for his or her child or children, whether the proceeding is civil or criminal, shall be paid by the responsible parent, the clerk of court, the juvenile probation officer, the community supervision officer, the child support receiver, or a similar official who is collecting support to the department upon the department's certification that the child is a recipient of public assistance or upon the department's certification that an application has been filed with the department for enforcement of support in accordance with the provisions of the federal Social Security Act. (Ga. L. 1973, p. 192, § 16; Ga. L. 1976, p. 1537, § 14; Ga. L. 1982, p. 1207, §§ 3, 6; Ga. L. 1997, p. 1021, § 8; Ga. L. 2015, p. 422, § 5-44/HB 310.)

The 2015 amendment, effective July 1, 2015, in the middle of the third sentence, inserted "or her" and substituted

"juvenile probation officer, the community supervision officer," for "probation officer." See editor's note for applicability.

Cross references. — Collection of support payments by child support receivers, T. 15, C. 15.

Editor’s notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that the

amendment by this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 284 (1997).

JUDICIAL DECISIONS

Cited in Department of Human Resources v. Bagley, 240 Ga. 306, 240 S.E.2d 867 (1977); Young v. Department of Hu-

man Resources, 148 Ga. App. 518, 251 S.E.2d 578 (1978).

OPINIONS OF THE ATTORNEY GENERAL

Payment to department upon certification of receipt of public assistance. — Upon certification by the Department of Human Resources that the child is the recipient of public assistance, the clerk of court or probation officer must remit all child support money paid as a condition of probation to the Department. 1974 Op. Att’y Gen. No. 74-38.

Department may delegate power to collect child support payments. — Department of Human Resources is authorized to delegate to an appropriate agency the power to collect child support recovery unit payments from the responsible parent. 1982 Op. Att’y Gen. No. 82-99.

Department may not delegate power to employees of local probation offices. — Department of Offender Rehabilitation (now Department of Corrections) may not enter into an arrangement with the Department of Human Resources in which employees of local probation offices, other than probation supervisors, may collect child support recovery unit money which arises from civil proceedings brought by the Department of Human Resources on behalf of errant fathers. 1982 Op. Att’y Gen. No. 82-99.

RESEARCH REFERENCES

ALR. — Right to credit on child support payments for social security or other gov-

ernment dependency payments made for benefit of child, 34 ALR5th 447.

19-11-22. Article not exclusive.

The procedures, actions, and remedies provided in this article shall in no way be exclusive but shall be in addition to and not in substitution of other proceedings provided by law. (Ga. L. 1973, p. 192, § 18.)

JUDICIAL DECISIONS

Department of Human Resources may bypass administrative proceedings in favor of judicial proceedings to enforce the provisions of the Child Support Recovery Act, O.C.G.A. § 19-11-1 et seq. Department of Human Resources v.

Carlton, 174 Ga. App. 30, 329 S.E.2d 181 (1985).

Department of Human Resources may, in one judicial proceeding, seek to establish paternity and an obligation of support pursuant to the Child Support Recovery

Act, O.C.G.A. § 19-11-1 et seq. Department of Human Resources v. Carlton, 174 Ga. App. 30, 329 S.E.2d 181 (1985).

Cited in Burns v. Swinney, 252 Ga. 461, 314 S.E.2d 440 (1984).

19-11-23. Authority of district attorneys.

(a) The district attorneys of this state shall be authorized to render such assistance to the department as the department may request and to file and prosecute, in any of the several courts of this state or of the United States, such civil or criminal actions on behalf of the department as may be necessary to ensure the proper enforcement of this article.

(b) When acting pursuant to subsection (a) of this Code section, the district attorney shall represent the department and the department shall be the sole client of the district attorney. (Ga. L. 1977, p. 722, § 1; Ga. L. 1983, p. 1816, § 3; Ga. L. 1989, p. 861, § 7; Ga. L. 1992, p. 1833, § 5.)

Cross references. — Supplemental compensation for district attorney rendering assistance under section, § 15-18-11.

Law reviews. — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 227 (1989).

JUDICIAL DECISIONS

Cited in Boone v. State, Dep't of Human Resources ex rel. Carter, 250 Ga. 379, 297 S.E.2d 727 (1982); Cox v. Department of

Human Resources, 174 Ga. App. 377, 330 S.E.2d 120 (1985); Neal v. State, 182 Ga. App. 37, 354 S.E.2d 664 (1987).

OPINIONS OF THE ATTORNEY GENERAL

Employment of personnel by district attorney not specifically authorized. — Statute constitutes specific authorization for district attorneys to provide assistance to the Department of

Human Resources but does not specifically authorize the district attorney to employ personnel for that purpose. 1979 Op. Att'y Gen. No. U79-12.

RESEARCH REFERENCES

Am. Jur. 2d. — 79 Am. Jur. 2d, Welfare Laws, § 111.

19-11-24. Conformity with federal law intended; adoption of necessary regulations authorized.

Nothing in this article is intended to conflict with any federal law or to result in the loss of federal funds. The department may adopt regulations necessary to prevent conflict with federal law or the loss of federal funds. (Ga. L. 1973, p. 192, § 19.)

JUDICIAL DECISIONS

Cited in Peterson v. Moffitt ex rel. Dep't of Human Resources, 253 Ga. 253, 319 S.E.2d 449 (1984); Cox v. Department of Human Resources, 174 Ga. App. 377, 330 S.E.2d 120 (1985).

19-11-25. Availability of information about overdue support to consumer reporting agency; notice to debtor parent; fee.

(a) In accordance with Section 466(a) of the federal Social Security Act, the department shall make available information regarding the amount of overdue support owed by an absent parent residing in the state to any consumer reporting agency, as defined in Section 603(f) of the federal Fair Credit Reporting Act, upon the request of such agency.

(b) If the amount of overdue support involved in any case is less than \$1,000.00, information regarding such overdue support may be made available in the discretion of the department.

(c) Any information with respect to an absent parent shall be made available only after notice of the proposed action has been sent by the department to such absent parent and such absent parent has been given a reasonable opportunity to contest the accuracy of such information.

(d) The department may collect a fee from the recipient for furnishing such information not to exceed the actual cost thereof. (Code 1981, § 19-11-25, enacted by Ga. L. 1985, p. 785, § 8.)

U.S. Code. — Section 466 of the federal Social Security Act, referred to in subsection (a), is codified at 42 U.S.C. § 666. Section 603 of the federal Fair Credit Reporting Act, referred to in subsection (a), is codified at 15 U.S.C. § 1681.

19-11-26. Accident and sickness insurance coverage for children; order requiring medical support.

(a) In all cases involving the assignment and collection of child support, or where medical assistance benefits are being provided, the department or court may determine, as a regular part of its investigation and inquiry, whether accident and sickness coverage for the child or children involved is reasonably available to a party to a court order at a reasonable cost in connection with the party's employment or union. For purposes of this article, the term "person or entity providing access to coverage" shall mean an employer or union which offers a group insurance plan, as defined in Section 607(b) of the federal Employee Retirement Income Security Act of 1974, a health maintenance organization or a service benefit plan, or any other policy of health insurance under Title 33. If it is determined that such coverage

is reasonably available in connection with the medical insurance obligor's employment or union, the department is authorized to petition for modification of any existing order of support to include the provision of such coverage, to intervene in any pending action to have such coverage included, or to include the request for such coverage in any action brought by the department.

(b) Upon petition by the department to have accident and sickness insurance coverage included, any court or administrative hearing officer having jurisdiction over the matter may include the provision of medical support in any order of support it may enter, if such medical support is found to be available to the medical insurance obligor in connection with his or her employment or union at a reasonable cost consistent with subsection (a) of this Code section.

(c) Any order requiring medical support under this Code section shall contain language notifying the medical insurance obligor that failure to provide accident and sickness insurance coverage may result in direct enforcement of the order. Any order of medical support entered or modified prior to April 1, 1994, shall be construed as a matter of law to contain this notice.

(d) Any order requiring medical support under this Code section shall remain in effect until:

- (1) A further order of the court or hearing officer;
- (2) The child is emancipated, if there is no express language to the contrary in the order; or
- (3) Coverage is no longer available and no conversion privileges exist at a reasonable cost to continue coverage beyond the termination date of the policy.

(e) Any order requiring medical support under this Code section shall not require a plan to provide any type or form of benefit, or any option not otherwise provided under the plan, except to the extent necessary to meet the requirements of this Code section. (Code 1981, § 19-11-26, enacted by Ga. L. 1985, p. 785, § 8; Ga. L. 1994, p. 1728, § 2; Ga. L. 2010, p. 245, § 3/HB 1118.)

19-11-27. Accident and sickness insurance coverage for children; National Medical Support Notice or other notice of enrollment; establishment of coverage.

(a) Whenever a party to a court order who is required to maintain accident and sickness insurance fails to provide such coverage as ordered, or allows such coverage to lapse, the department, the Department of Community Health, or the other party may compel the medical

insurance obligor to obtain insurance coverage as provided in this Code section. The remedies provided in this Code section shall be in addition to and not in lieu of any other remedies available to the department, the Department of Community Health, or the other party.

(b) The National Medical Support Notice as prescribed under 42 U.S.C. Section 666(a)(19) shall be issued, when appropriate, by the IV-D agency to notify employers and health insurers of an order entered or being enforced by the IV-D agency pursuant to Code Section 19-11-8 and to enforce the accident and sickness coverage provisions of such order. The IV-D agency is not required to issue the National Medical Support Notice in cases where the court or administrative order stipulates alternative accident and sickness coverage that is not employer based.

(c) Upon failure of a medical insurance obligor to obtain accident and sickness insurance coverage as ordered, or upon the lapse of coverage required to be provided, the department, the Department of Community Health, or the other party may issue and send a notice of enrollment or National Medical Support Notice by certified mail or statutory overnight delivery, return receipt requested, to the person or entity providing access to such coverage on behalf of the medical insurance obligor. The notice shall include a certified copy of the latest order requiring health insurance coverage and the return address of the sender.

(d) In all IV-D cases, the IV-D agency shall notify the medical insurance obligor in writing that the National Medical Support Notice has been sent to the medical insurance obligor's employer or union, and the written notification shall include the medical insurance obligor's rights and duties under the National Medical Support Notice. The medical insurance obligor has the right to contest the withholding required by the National Medical Support Notice based on a mistake of fact. To contest, the medical insurance obligor must file a written notice of contest with the IV-D agency within 15 business days from the date of the National Medical Support Notice. Filing with the IV-D agency shall be deemed complete when the notice is received by the person designated by the IV-D agency in the written notification. Upon the timely filing of a notice of contest, the IV-D agency shall, within five business days, schedule an informal conference with the medical insurance obligor to discuss the medical insurance obligor's factual dispute. If the informal conference resolves the dispute to the medical insurance obligor's satisfaction, or if the medical insurance obligor fails to attend the informal conference, the notice of contest shall be deemed withdrawn. If the informal conference does not resolve the dispute, the medical insurance obligor has the right to request an administrative hearing before an administrative law judge pursuant to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," within five

business days after being notified of the results of the review by the IV-D agency. However, neither a request for informal review nor the filing of a notice of contest for an administrative hearing by the medical insurance obligor shall delay the withholding of premium payments by the union, employer, or health plan administrator. The union, employer, or health plan administrator must implement the withholding as directed by the National Medical Support Notice unless notified by the IV-D agency, court, or the Office of Administrative Hearings that the National Medical Support Notice is terminated.

(e) Any person or entity providing access to accident and sickness insurance coverage on behalf of the medical insurance obligor pursuant to a notice of enrollment or National Medical Support Notice shall withhold from the medical insurance obligor's income the amount necessary to pay the premium for the insurance coverage, provided that the amount deducted does not exceed the limitations of Section 303(b) of the federal Consumer Credit Protection Act, as amended.

(f) The department is authorized to adopt rules and regulations to implement the child support enforcement provisions of this Code section that affect IV-D cases.

(g) Upon receipt of a notice of enrollment or National Medical Support Notice:

(1) The employer and plan administrator shall comply with the provisions in the notice;

(2) The employer and plan administrator shall treat the notice as an application for health coverage for the dependent by the person or entity sending the notice to the extent such application is required by the plan;

(3) If the medical insurance obligor named in the notice is not an employee of the employer or if a health benefit plan is not offered or available to the employee, the employer shall notify the person or entity sending the notice, as provided in the notice, within 20 business days after the date of the notice;

(4) If a health benefit plan is offered or available to the employee, the employer shall send the plan administrator's portion of the notice to each appropriate plan administrator within 20 business days after the date of the notice;

(5) Upon notification from the plan administrator that the dependent is enrolled, the employer shall either withhold and transfer the premiums to the plan or notify the person or entity sending the notice that enrollment cannot be completed because of prioritization or limits on withholding as provided in subsection (e) of this Code section or as provided in the notice;

(6) Upon notification from the plan administrator that the medical insurance obligor is subject to a waiting period that expires more than 90 days from the date of receipt of the notice by the plan administrator, or whose duration is determined by a measure other than the passage of time, the employer shall notify the plan administrator when the medical insurance obligor is eligible to enroll in the plan and that this notice requires enrollment of the dependent named in the notice in the plan;

(7) The plan administrator shall enroll the dependent and if necessary the medical insurance obligor in the plan selected under this paragraph. The plan administrator shall enroll the medical insurance obligor if enrollment of the medical insurance obligor is necessary to enroll the dependent. All the following shall apply in the selection of the plan:

(A) If the medical insurance obligor is enrolled in a health benefit plan that offers dependent coverage, the dependent shall be enrolled in the plan in which the medical insurance obligor is enrolled;

(B) If the medical insurance obligor is not enrolled in a plan or is not enrolled in a plan that offers dependent coverage, and if only one plan with dependent coverage is offered by the employer, that plan shall be selected;

(C) If the medical insurance obligor is not enrolled in a health benefit plan that offers dependent coverage, and if more than one plan with dependent coverage is offered by the employer, and if the notice is issued by the IV-D agency, all of the following shall apply:

(i) If only one of the plans is accessible to the dependent, that plan shall be selected. If none of the plans with dependent coverage is accessible to the dependent, the IV-D agency shall amend or terminate the notice;

(ii) If more than one of the plans is accessible to the dependent, the plan selected shall be the plan for basic coverage for which the employee's share of the premium is lowest;

(iii) If more than one of those plans is accessible to the dependent, but none of the accessible plans is for basic coverage, the plan selected shall be an accessible plan for which the employee's share of the premium is the lowest; and

(iv) If the employee's shares of the premiums are the same, the IV-D agency shall consult the medical insurance obligee and select a plan. If the medical insurance obligee does not respond within ten days, the IV-D agency shall select a plan which shall

be the plan's default option, if any, or the plan with the lowest deductibles and copayment requirements; and

(D) If the medical insurance obligor is not enrolled in a plan or is not enrolled in a plan that offers dependent coverage, and if more than one plan with dependent coverage is offered by the employer, and if the notice is issued by a IV-D child support enforcement agency of another state, that agency shall select the plan as provided in paragraph (8) of this subsection; and

(8) Within 40 business days after the date of the notice, the plan administrator shall do all of the following as directed in the notice:

(A) Complete the appropriate portion of the notice and return to the person or entity sending the notice;

(B) If the dependent is enrolled or is to be enrolled, notify the medical insurance obligor, the medical insurance obligee, and the child and furnish the medical insurance obligee with necessary information including any necessary claim forms or enrollment membership cards necessary to obtain benefits and provide the person or entity sending the notice with the type of health benefit plan under which the dependent has been enrolled, including whether dental, optical, office visits, and prescription drugs are covered services, and with a brief description of the applicable deductibles, coinsurance, waiting period for preexisting medical conditions, and other significant terms or conditions which materially affect the coverage;

(C) If more than one plan is available to the medical insurance obligor and the medical insurance obligor is not enrolled, forward plan descriptions and documents to the person or entity sending the notice and enroll the dependent, and if necessary the medical insurance obligor, in the plan selected by the person or entity sending the notice or any default option if the plan administrator has not received a selection from the person or entity sending the notice within 20 business days of the date the plan administrator returned the National Medical Support Notice response to the person or entity sending the notice;

(D) If the medical insurance obligor is subject to a waiting period that expires more than 90 days from the date the plan administrator received the notice or has not completed a waiting period whose duration is determined by a measure other than the passage of time, notify the employer, the person or entity sending the notice, the medical insurance obligor, and the medical insurance obligee; and upon satisfaction of the period or requirement, complete the enrollment;

(E) Upon completion of the enrollment, notify the employer for a determination of whether the necessary employee share of the premium is available; and

(F) If the plan administrator is subject to the federal Employee Retirement Income Security Act, as codified in 29 U.S.C. Section 1169, and the plan administrator determines the notice does not constitute a qualified medical child support order, complete and send the response to the person or entity sending the notice and notify the medical insurance obligor, the medical insurance obligee, and the child of the specific reason for the determination. (Code 1981, § 19-11-27, enacted by Ga. L. 1991, p. 950, § 6; Ga. L. 1994, p. 1728, § 3; Ga. L. 1999, p. 296, § 24; Ga. L. 2000, p. 1589, § 3; Ga. L. 2002, p. 1247, § 7; Ga. L. 2004, p. 631, § 19; Ga. L. 2010, p. 245, § 4/HB 1118.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2002, in paragraph (g)(5), commas were deleted following “premiums to the plan” and following “entity sending the notice”.

Editor’s notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that this Code section is applicable with respect to notices delivered on or after July 1, 2000.

19-11-28. Accident and sickness insurance coverage for children; authorization of payments of benefits; notice of termination; immunity from liability of person or entity providing access to coverage.

(a) The signature of the medical insurance obligee or an agent of the department shall constitute a valid authorization to any insurer to process benefits and to make payments to a health care provider or the medical insurance obligee in accordance with any accident and sickness insurance policy.

(b) An order of medical support shall operate as an assignment to the medical insurance obligee of any right to benefits under a policy of accident and sickness coverage maintained by the medical insurance obligor insofar as dependent coverage is available. The medical insurance obligee shall be subrogated to the rights of the medical insurance obligor to the extent necessary to pursue any claim against the insurer under such policy.

(c) Within ten business days after termination of a policy of accident and sickness insurance established pursuant to Code Section 19-11-27, or the termination of employment of the medical insurance obligor, the person or entity providing access to such coverage on behalf of a medical insurance obligor shall mail a termination notice to the person or entity which initially sent a notice of enrollment or National Medical Support Notice and provide the medical insurance obligor’s last known address

and, if known, the address of the medical insurance obligor's new employer.

(d) Any person or entity providing access to accident and sickness coverage on behalf of a medical insurance obligor shall be immune from any civil or criminal liability while complying in good faith with the provisions of this Code section and Code Section 19-11-27.

(e) Any person or entity acting as a plan fiduciary who makes payment pursuant to this Code section discharges to the extent of any payment the plan's obligation. (Code 1981, § 19-11-28, enacted by Ga. L. 1994, p. 1728, § 4; Ga. L. 2002, p. 1247, § 8; Ga. L. 2010, p. 245, § 5/HB 1118.)

19-11-29. Accident and sickness insurance coverage for children; liability and penalty applicable to person or entity providing access to coverage and insurers.

(a) Any person or entity providing access to accident and sickness insurance coverage on behalf of a medical insurance obligor in connection with the medical insurance obligor's employment or union shall be liable for a civil penalty not to exceed \$1,000.00 per occurrence for willful failure to enroll promptly, without regard to enrollment season restrictions, a dependent in an accident and sickness insurance plan under an order of medical support or a notice of enrollment; provided, however, that no liability shall exist where such person or entity acts in accordance with subsection (g) of Code Section 19-11-27.

(b) Insurers shall not deny enrollment of a child under subsection (a) of this Code section in a parent's health insurance coverage on the ground that the child was born out of wedlock, is not claimed as a dependent on the parent's federal income tax return, or does not reside with the parent or in the insurer's service area.

(c) Any person or entity providing access to accident and sickness insurance coverage on behalf of a medical insurance obligor shall be liable for a civil penalty not to exceed \$1,000.00 per occurrence for the disenrollment by the medical insurance obligor, or elimination of coverage of the child, unless the medical insurance obligor provides written proof that the child has been enrolled or will be enrolled in comparable insurance coverage, with the coverage to take effect no later than the effective date of disenrollment; provided, however, that no liability shall exist where such person or entity acts in accordance with subsection (d) of Code Section 19-11-26.

(d) The department may recover the civil penalty provided for in this Code section by civil action or pursuant to any remedy otherwise available for the enforcement of court orders. (Code 1981, § 19-11-29,

enacted by Ga. L. 1994, p. 1728, § 4; Ga. L. 2002, p. 1247, § 9; Ga. L. 2010, p. 245, § 6/HB 1118.)

19-11-30. Confidentiality of information and records; safeguards against unauthorized use.

(a)(1) Information and records obtained by the department pursuant to any provision of this article or Title IV-D of the federal Social Security Act shall be deemed to be confidential and shall be released only by permission of the party or parties named in the information or records, by order of the court, or for those purposes specifically authorized by this article. Any person who violates this Code section shall be guilty of a misdemeanor.

(2) The department shall provide to an attorney representing an obligee or to a private child support collector, as defined in Code Section 10-1-392, hired by an obligee and acting pursuant to a power of attorney signed by such obligee, any documents which such obligee would be entitled to request and receive from the Child Support Enforcement Agency of the department.

(b) The department shall establish safeguards against the unauthorized use or disclosure of information relating to:

(1) Proceedings or actions to establish paternity;

(2) Proceedings to establish or enforce support;

(3) The whereabouts of one party to another party against whom a protective order with respect to the former party has been entered; and

(4) The whereabouts of one party to another party if the department has reason to believe that the release of the information may result in physical or emotional harm to the former party. (Code 1981, § 19-11-30, enacted by Ga. L. 1994, p. 1728, § 4; Ga. L. 1997, p. 1613, § 29; Ga. L. 2009, p. 1001, § 5/HB 189.)

Editor's notes. — Ga. L. 2009, p. 1001, § 6, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall be applicable to all contracts for private collection of child support payments entered into on or after July 1, 2009.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-30.1. Computer based registry.

The department shall establish a computer based registry of account data obtained from financial institutions doing business in this state. Such registry shall include only identifying information for obligors

whom the IV-D agency believes owe child support and who are not under a child support order, and for obligors who are delinquent in an amount equal to or in excess of their support payment for one month. Such registry shall be known as the Department of Human Services Bank Match Registry. The IV-D agency shall be the sole agency with access to this data. Access shall be for the purpose of establishing and enforcing orders for support. The department is authorized to establish the procedures and the costs to be paid for performing the data searches and for providing the data to the department's IV-D agency. (Code 1981, § 19-11-30.1, enacted by Ga. L. 1997, p. 1613, § 30; Ga. L. 2002, p. 1247, § 10; Ga. L. 2009, p. 453, § 2-2/HB 228.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-30.2. Information from financial institutions.

(a) As used in this Code section, the term “for cause” means that the department has reason to believe that an individual has opened an account at a financial institution.

(b) The department shall, pursuant to the provisions of subsection (f) of this Code section, request from each financial institution, not more frequently than on a quarterly basis, the name, record address, social security number, and other identifying data for each person listed in such request who maintains an account at such financial institution. The data provided shall be sent to the Department of Human Services Bank Match Registry. Such registry shall include only identifying information for obligors whom the IV-D agency believes owe child support and who are not under a child support order, and for obligors who are delinquent in an amount equal to or in excess of their support payment for one month. The department shall update such listing every calendar quarter by removing the names of all persons who have had no prior matches in the two immediately preceding quarters.

(c) The department may continue to request account matches on such removed names once a year for the two calendar years immediately following the year in which the names are removed or for cause.

(d) All requests made by the department pursuant to subsection (b) or (c) of this Code section shall be in machine readable form unless a financial institution expressly requests the department to submit the request in writing. The financial institution shall furnish all such information in machine readable form, which meets criteria established by the department, within 30 days of such request. Each financial institution shall furnish all such information on those persons whose accounts bear a residential address within the state at the time such request is processed by the financial institution.

(e) In no event shall a request for identifying information be made to a financial institution on anyone other than an obligor whom the Department of Human Services has a good reason to believe owes child support and who is not under a child support order, or an obligor who is delinquent in an amount equal to or in excess of his or her support payment for one month.

(f) The Department of Human Services shall enter into agreements with financial institutions doing business in this state to develop and operate a data match system to the maximum extent feasible for the providing of the needed information to the department by the financial institution. At a minimum, the department shall identify the obligor by name and social security number or other taxpayer identification number. If the geographic region of an obligor is known by the Department of Human Services, and that department shall make an effort to determine the geographic region of an obligor, the department shall initially limit its request to the financial institution or institutions within that geographic region prior to making additional requests to other financial institutions in other geographic regions of the state. The department may pay a reasonable fee to the financial institution for conducting the searches required herein not to exceed the actual costs incurred by the financial institution. (Code 1981, § 19-11-30.2, enacted by Ga. L. 1997, p. 1613, § 30; Ga. L. 1999, p. 81, § 19; Ga. L. 2002, p. 1247, § 11; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2014, p. 457, § 11/SB 282; Ga. L. 2014, p. 866, § 19/SB 340.)

The 2014 amendments. — The first 2014 amendment, effective July 1, 2014, substituted the present provisions of subsection (a) for the former provisions, which read: “As used in Code Section 19-11-30.1, this Code section, and Code Sections 19-11-30.3 through 19-11-30.11, the term:

“(1) ‘Account’ means a demand deposit account, checking or negotiable order of withdrawal account, savings account, time deposit account, or a money market mutual fund account.

“(2) ‘Financial institution’ means every federal or state chartered commercial or savings bank, including savings and loan associations and cooperative banks, federal or state chartered credit unions, benefit associations, insurance companies, safe-deposit companies, trust companies, and any money market mutual fund.

“(3) ‘For cause’ means that the department has reason to believe that an individual has opened an account at a financial institution listed in paragraph (3) of this subsection.

“(4) ‘Money market mutual fund’ means every regulated investment company within the meaning of Section 851(a) of the Internal Revenue Code which seeks to maintain a constant net asset value of \$1.00 in accordance with 17 CFR 270.2A-7.” The second 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, deleted “listed in paragraph (3) of this subsection” at the end of former paragraph (a)(3).

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-30.3. Responsibility of Department of Human Services Bank Match Registry.

The Department of Human Services Bank Match Registry shall examine the data provided, make positive identification of cases submitted by the IV-D agency for child support enforcement purposes, and report the matched accounts in machine readable form. Upon the receipt of such information, the department, and where appropriate local contractors, shall seek to verify the accuracy of the information presented. (Code 1981, § 19-11-30.3, enacted by Ga. L. 1997, p. 1613, § 30; Ga. L. 2002, p. 1247, § 12; Ga. L. 2009, p. 453, § 2-2/HB 228.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-30.4. Disclosure of information.

No employee or agent of the state shall divulge any information collected pursuant to Code Sections 19-11-30.1 through 19-11-30.3 or Code Section 19-11-30.6 to any public or private agency or individual except in the manner prescribed in this Code section. Information may be disclosed and shared by and between any employee of an administering agency and any subgrantee, local administering agency, or contractor performing child support enforcement functions under the provisions of Title IV-D of the federal Social Security Act. Unauthorized disclosure shall be punished pursuant to Code Section 19-11-30. (Code 1981, § 19-11-30.4, enacted by Ga. L. 1997, p. 1613, § 30; Ga. L. 1999, p. 81, § 19.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-30.5. Failure of financial institution to comply.

Any financial institution required to submit a report pursuant to Code Section 19-11-30.2 which fails without reasonable cause as determined by the department to comply with such reporting requirements and which, after notification by certified mail or statutory overnight delivery by the department, return receipt requested, of such failure, continues for more than 15 business days after the mailing of such notification to fail to comply without reasonable cause shall be liable for a penalty of \$1,000.00. Any financial institution which willfully provides false information in reply to such notification shall be liable for a penalty of \$1,000.00. (Code 1981, § 19-11-30.5, enacted by Ga. L. 1997, p. 1613, § 30; Ga. L. 2000, p. 1589, § 3; Ga. L. 2002, p. 1247, § 13.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that this Code section is applicable with respect to notices delivered on or after July 1, 2000.

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-30.6. Reciprocal agreements with other states.

The commissioner of human services, in cooperation with the IV-D agency, shall establish a program of wage and bank information sharing with other states. The commissioner is authorized to enter into reciprocal agreements with other states to share lists of absent parents who owe support payments to the IV-D agency. Such reciprocal agreements shall only be made with states which administer programs that the commissioner of human services, in consultation with the IV-D agency, determines are substantially similar. The wage and bank information sharing program shall apply only to states which have similar prohibitions and penalties for disclosure of information. The prohibitions and penalties of Code Section 19-11-30.4 shall also apply to any such information received from any other state under a reciprocal agreement. (Code 1981, § 19-11-30.6, enacted by Ga. L. 1997, p. 1613, § 30; Ga. L. 2002, p. 1247, § 14; Ga. L. 2009, p. 453, § 2-4/HB 228.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-30.7. Construction.

Code Sections 19-11-30, 19-11-30.4, and 19-11-30.6 shall not be construed to prevent the release by the commissioner of human services of such wage and bank information data for the purposes described in Title IV-D of the federal Social Security Act. (Code 1981, § 19-11-30.7, enacted by Ga. L. 1997, p. 1613, § 30; Ga. L. 2002, p. 1247, § 15; Ga. L. 2009, p. 453, § 2-4/HB 228.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-30.8. Annual reports.

The commissioner of human services shall file an annual report describing the status of the wage reporting and bank match systems. The report shall be filed with the Clerk of the House of Representatives and the Secretary of the Senate for the previous state fiscal year no later than September 30 of each year. (Code 1981, § 19-11-30.8, enacted by Ga. L. 1997, p. 1613, § 30; Ga. L. 2002, p. 1247, § 16; Ga. L. 2009, p. 453, § 2-4/HB 228.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-30.9. Information subject to disclosure; penalty.

As an exception to Code Section 7-1-360, a financial institution furnishing a report or providing information for the commissioner of human services under Code Section 19-11-30.2 shall not disclose to a depositor or an account holder that the name of such person has been received from or furnished to the department; provided, however, that a financial institution may disclose to its depositors or account holders that under the bank match system the department has the authority to request certain identifying information on certain depositors or account holders. If a financial institution willfully violates the provisions of this Code section, such institution shall pay to the department the lesser of \$1,000.00 or the amount on deposit or in the account of the person to whom such disclosure was made. A financial institution shall incur no obligation or liability to a depositor or account holder or any other person arising from the furnishing of a report or information to the department pursuant to Code Section 19-11-30.2 or from the failure to disclose to a depositor or account holder that the name of such person was included in a list furnished by the department or in a report furnished by the financial institution to the department. (Code 1981, § 19-11-30.9, enacted by Ga. L. 1997, p. 1613, § 30; Ga. L. 2002, p. 1247, § 17; Ga. L. 2009, p. 453, § 2-4/HB 228.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-30.10. Authority to levy and seize deposit.

The IV-D agency shall have the authority to levy and seize a deposit or account in accordance with Code Section 19-11-32. (Code 1981, § 19-11-30.10, enacted by Ga. L. 1997, p. 1613, § 30.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-30.11. Fee on levied accounts.

A financial institution may charge an account levied on by the commissioner of human services a fee, as determined by the commissioner, of not less than \$20.00 nor more than \$50.00 which shall be deducted from such account prior to remitting funds to the department. The commissioner of human services requesting bank or account

information under Code Section 19-11-30.2 shall not be liable for costs otherwise assessable pursuant to Code Section 7-1-237. (Code 1981, § 19-11-30.11, enacted by Ga. L. 1997, p. 1613, § 30; Ga. L. 2002, p. 1247, § 18; Ga. L. 2009, p. 453, § 2-4/HB 228.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-31. Joint Study Committee on Child Support.

Reserved. Repealed by Ga. L. 1994, p. 1728, § 4, effective January 1, 1995.

Editor's notes. — This Code section was based on Code 1981, § 19-11-31, enacted by Ga. L. 1994, p. 1728, § 4.

Ga. L. 2010, p. 878, § 19, effective June 3, 2010, reserved the designation of this Code section.

19-11-32. Process to collect delinquent support accounts; limitation.

(a) Notwithstanding other statutory provisions which provide for the execution, attachment, or levy against accounts, the IV-D agency, including its authorized contractors, may utilize the process established in this Code section and Code Sections 19-11-33 through 19-11-39 to collect delinquent support payments, provided that any exemptions or exceptions which specifically apply to enforcement of support obligations pursuant to other statutory provisions shall also apply.

(b) An obligor is subject to the provisions of this Code section and Code Sections 19-11-33 through 19-11-39 if the obligor's support obligation is being enforced by the IV-D agency and if the support payments ordered pursuant to Georgia law or under a comparable statute of a foreign jurisdiction, as certified to the IV-D agency, are delinquent in an amount equal to the support payment for one month.

(c) Any amount forwarded by a financial institution under this Code section and Code Sections 19-11-33 through 19-11-39 shall not exceed the delinquent or accrued amount of support owed by the obligor. (Code 1981, § 19-11-32, enacted by Ga. L. 1997, p. 1613, § 31; Ga. L. 2014, p. 457, § 12/SB 282; Ga. L. 2014, p. 866, § 19/SB 340.)

The 2014 amendment, effective July 1, 2014, deleted the former second sentence of subsection (c), which read: "Financial institutions subject to administrative levy are defined in paragraph (3) of subsection (a) of Code Section 19-11-30.2."

Editor's notes. — Ga. L. 2014, p. 866, § 54(e)/SB 340, not codified by the General

Assembly, provides: "In the event of a conflict between a provision in Sections 1 through 53 of this Act and a provision of another Act enacted at the 2014 regular session of the General Assembly, the provision of such other Act shall control over the conflicting provision in Sections 1 through 53 of this Act to the extent of the

conflict.” Accordingly, the amendment to subsection (c) of this Code section by Ga. L. 2014, p. 866, § 19(2)/SB 340 was not given effect.

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-33. Notice.

The IV-D agency may proceed under Code Section 19-11-32, this Code section, and Code Sections 19-11-34 through 19-11-38 only if notice has been provided to the obligor in one of the following manners:

(1) The obligor is provided notice of the provisions of this Code section in the court order establishing the support obligation. The IV-D agency or court or administrative law judge may include language in any new or modified support order issued on or after July 1, 1997, notifying the obligor that the obligor is subject to the provisions of Code Section 19-11-32, this Code section, and Code Sections 19-11-34 through 19-11-39; or

(2) The IV-D agency may send a notice by regular mail to the last known address of the obligor. (Code 1981, § 19-11-33, enacted by Ga. L. 1997, p. 1613, § 31; Ga. L. 1998, p. 128, § 19.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-34. Verification; immunity from liability.

(a) The IV-D agency may contact a financial institution to obtain verification of the account number, the names and social security numbers listed for the account, and the account balance of any account held by an obligor. A financial institution may require positive voice recognition and the telephone number of the authorized person from the IV-D agency before releasing an obligor’s account information by telephone.

(b) The financial institution is immune from any liability, civil or criminal, which might otherwise be incurred or imposed for any information released by the financial institution to the IV-D agency pursuant to this Code section.

(c) Neither the financial institution nor the IV-D agency is liable for the cost of any early withdrawal penalty of an obligor’s certificate of deposit. (Code 1981, § 19-11-34, enacted by Ga. L. 1997, p. 1613, § 31.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-35. Initiation of administrative action for levy; required information in notice to financial institution.

(a) If an obligor is subject to the provisions of Code Section 19-11-32, the IV-D agency may initiate an administrative action to levy against the account or accounts of the obligor. If notice has previously been provided pursuant to Code Section 19-11-33, further notice is not required prior to such action.

(b) The IV-D agency may send a notice to the financial institution with which the account is placed directing that the financial institution forward all or a portion of the moneys in the obligor's account or accounts to the IV-D agency or its collection services center. The notice shall be sent by certified mail or statutory overnight delivery.

(c) The notice to the financial institution shall contain all of the following information:

(1) The name and social security number of the obligor;

(2) A statement that the obligor is believed to have one or more accounts at the financial institution;

(3) A statement that, pursuant to the provisions of Code Sections 19-11-32 through 19-11-34, this Code section, and Code Sections 19-11-36 through 19-11-39, the obligor's accounts are subject to seizure and the financial institution is authorized and required to forward moneys to the IV-D agency or its collection services center;

(4) The maximum amount that shall be forwarded by the financial institution, which shall not exceed the delinquent or accrued amount of support owed the obligor;

(5) The prescribed time frame which the financial institution must meet in forwarding amounts;

(6) The address of the IV-D agency which will process the moneys forwarded; and

(7) A telephone number, address, and contact name of the child support enforcement office contact initiating the action. (Code 1981, § 19-11-35, enacted by Ga. L. 1997, p. 1613, § 31; Ga. L. 2000, p. 1589, § 3.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-36. Required information in notice to obligor.

The IV-D agency shall notify an obligor subject to an administrative levy, as well as any other party known to have an interest in the account, of the action taken. The notice shall contain all of the following information:

- (1) The name and social security number of the obligor;
- (2) A statement that the obligor is believed to have one or more accounts at a specified financial institution;
- (3) A statement that, pursuant to the provisions of Code Sections 19-11-32 through 19-11-35, this Code section, and Code Sections 19-11-37 through 19-11-39, the obligor's accounts are subject to seizure and the financial institution is authorized and required to forward moneys to the IV-D agency or its collection services center;
- (4) The maximum amount to be forwarded by the financial institution, which shall not exceed the delinquent or accrued amount of support owed by the obligor;
- (5) The prescribed time frame within which the financial institution must comply;
- (6) A statement that any challenge to the action shall be in writing and must be received by the IV-D agency within ten days of the date of the notice to the obligor;
- (7) The address of the IV-D agency which will process the moneys forwarded; and
- (8) A telephone number, address, and contact name of the child support enforcement office contact initiating the action. (Code 1981, § 19-11-36, enacted by Ga. L. 1997, p. 1613, § 31.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-37. Challenges to levy; mistakes; procedures; reimbursement.

(a) Challenges to the administrative levy for child support arrearage may be initiated only by an obligor or by an account holder of interest. Actions initiated by the IV-D agency pursuant to Code Sections 19-11-32 through 19-11-36, this Code section, and Code Sections 19-11-38 and 19-11-39 are not subject to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," and the only hearing following notice to the financial institution directing the levy shall be in superior court pursuant to this Code section.

(b) If a person decides to challenge the action taken by the IV-D agency, he or she must submit a written challenge within ten working days of the date of the notice, and the challenge must be directed to the person identified in the notice as the contact with the IV-D agency.

(c) The IV-D agency shall, upon receipt of a written challenge, review the facts of the case with the challenging party. Only a mistake of fact, including but not limited to a mistake in the identity of the obligor or ownership of funds or a mistake in the amount of delinquent support due, shall be considered as a reason to dismiss or modify the proceeding. A rebuttable presumption shall exist in a joint account that the funds belong to the obligor, which presumption may only be rebutted by clear and convincing evidence.

(d) If the IV-D agency determines that a mistake of fact has occurred, the agency shall proceed as follows:

(1) If a mistake in identity has occurred or the obligor is not delinquent in an amount equal to the payment for one month, the IV-D agency shall notify the financial institution that the administrative levy has been released. The IV-D agency shall provide a copy of the notice to the support obligor by regular mail; or

(2) If the obligor is delinquent but the amount of the delinquency is less than the amount indicated in the notice, the IV-D agency shall notify the financial institution of the revised amount with a copy to the obligor by regular mail. Upon written receipt of instructions from the IV-D agency, the financial institution shall release the funds in excess of the revised amount to the obligor and the moneys in the amount of the debt shall be processed according to Code Section 19-11-38.

(e) If the IV-D agency finds no mistake of fact, the IV-D agency shall so notify the challenging party by regular mail. Upon a subsequent written request of the challenging party, the IV-D agency shall request a hearing before the superior court in the county in which the underlying support order is filed.

(f) Once such a hearing has been requested, the IV-D agency shall proceed as follows:

(1) Require the financial institution to encumber moneys; and

(2) Request that the clerk of the superior court schedule a hearing for a time not later than 30 calendar days after the filing of the request for hearing. The time for hearing shall not be extended unless good cause for a later date is found by the court, in which event the time for a hearing may be extended for up to 30 days. The clerk shall mail copies of the request for hearing and the order scheduling the hearing to the IV-D agency and to all account holders of interest.

(g) Once such a hearing has concluded, the IV-D agency shall proceed as follows:

(1) If the superior court finds that there is a mistake of identity or that the obligor does not owe the delinquent support, the IV-D agency shall notify the financial institution that the administrative levy has been released;

(2) If the superior court finds that the obligor has an interest in the account and the amount of support due was incorrectly overstated, the IV-D agency shall notify the financial institution to release the excess moneys to the obligor and remit the remaining moneys in the amount of the debt to the IV-D agency for disbursement to the appropriate recipient; or

(3) If the superior court finds that the obligor has an interest in the account and the amount of support due is correct, the financial institution shall forward the moneys to the IV-D agency for disbursement to the appropriate recipient.

(h) If the obligor or any other party known to have an interest in the account fails to appear at the hearing, the court may find the challenging party in default, shall ratify the administrative levy, if valid upon its face, and shall enter an order directing the financial institution to release the moneys to the IV-D agency.

(i) Issues related to visitation, custody, or other provisions not related to levies against accounts are not grounds for a hearing under this Code section.

(j) Support orders shall not be modified pursuant to this Code section, and any findings in the challenge of an administrative levy related to the amount of the accruing or accrued support obligation do not modify the underlying support order.

(k) An order entered under this Code section for a levy against an account of a support obligor has priority over a levy for a purpose other than the support of the dependents in the order being enforced.

(l) The support obligor may withdraw the request for challenge by submitting a written withdrawal to the person identified as the contact for the IV-D agency in the notice, or the IV-D agency may withdraw the administrative levy at any time prior to the court hearing and provide notice of the withdrawal to the obligor and any account holder of interest and to the financial institution by regular mail.

(m) If the financial institution has forwarded moneys to the IV-D agency and has deducted a fee from the moneys of the account, or if any additional fees or costs are levied against the account, and all funds are subsequently refunded to the account due to a mistake of fact or ruling

of the court, the IV-D agency shall reimburse the account for any fees assessed by the financial institution. If the mistake of fact is a mistake in the amount of support payments, however, the IV-D agency is not required to reimburse the account for any fees or costs levied against the account. Additionally, for the purposes of reimbursement to the account for any fees or costs, each certificate of deposit is considered a separate account. (Code 1981, § 19-11-37, enacted by Ga. L. 1997, p. 1613, § 31.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-38. Required financial institution action.

(a) Upon receipt of a notice under Code Section 19-11-35, the financial institution shall do all of the following:

(1) Immediately encumber funds in all accounts in which the obligor has an interest to the extent of the debt indicated in the notice; and

(2) Forward the moneys encumbered to the IV-D agency no sooner than 15 days and no later than 20 days from the date the financial institution receives the notice pursuant to Code Section 19-11-35. Such money shall not be forwarded, however, if the IV-D agency notifies the financial institution of a challenge by an obligor or an account holder of interest. All encumbered moneys that are forwarded must be accompanied by the obligor's name and social security number, child support enforcement account number, and any other information required in the notice.

(b) The financial institution may assess a fee against the obligor, not to exceed \$10.00, for forwarding of moneys to the IV-D agency. This fee is in addition to the amount of support due. In the event that there are insufficient moneys to cover the fee and the support due, the institution may deduct the fee amount prior to forwarding moneys to the IV-D agency or its collection services center, and the amount credited to the support obligation shall be reduced by the fee amount. (Code 1981, § 19-11-38, enacted by Ga. L. 1997, p. 1613, § 31.)

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

19-11-39. Computerized central case registry for support orders.

(a) The department shall create by contract, cooperative agreement, or otherwise a computerized central case registry for all support orders entered by any court or administrative tribunal of this state. All IV-D agency orders as well as those not within the IV-D agency shall be registered in this data base. The department may enter into a cooperative agreement with the Administrative Office of the Courts so as to obtain information needed to create and maintain the state registry of orders as required by federal law.

(b) The registry of orders shall include the following information for each case: the full names of each party and minor child, the date of birth and social security number for each such person, the last known address for each person at the time the order was entered, the name of the county in which the order was entered, any and all case identification numbers, including civil action filing numbers and IV-D agency assigned case numbers, and any such information as may be later required under federal law.

(c) In any case handled by the IV-D agency, the registry shall include payment records as well as the amount of child support liens. The payment record shall include:

(1) The amount of monthly or other periodic support owed under the order and other amounts including arrearages, interest or late payment penalties, and fees due or overdue under the order;

(2) Any amount described in paragraph (1) of this subsection that has been collected;

(3) The distribution of such collected amounts;

(4) The birth date of any child for whom the order requires the provision of support; and

(5) The amount of any lien imposed with respect to a child support order.

(d) The state agency operating the state case registry shall promptly establish and update, maintain, and regularly monitor case records in the state case registry with respect to which services are being provided by the IV-D agency. Services to be monitored include: information on administrative actions and administrative and judicial proceedings and orders related to paternity and support; information obtained from comparison with federal, state, or local sources of information; information on support collections and distributions; and any other relevant information.

(e) The information contained in the state case registry shall be available to state and federal agencies as authorized by law for the enforcement of support orders. The information shall be available for data comparisons with case registries of other states. (Code 1981, § 19-11-39, enacted by Ga. L. 1997, p. 1613, § 31; Ga. L. 2014, p. 457, § 13/SB 282.)

The 2014 amendment, effective July 1, 2014, in subsection (c), substituted “The” for “the” at the beginning of paragraphs (c)(1) and (c)(3) through (c)(5); in paragraph (c)(2), substituted “Any” for “any” at the beginning and substituted

“paragraph” for “item”; and in paragraph (c)(3) substituted “amounts” for “accounts”.

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

ARTICLE 2

UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT

Editor’s notes. — See O.C.G.A. § 19-11-40.1 for applicability of this article.

Law reviews. — For article, “Georgia Inheritance Rights of Children Born Out

of Wedlock,” see 23 Ga. St. B.J. 28 (1986). For article, “Georgia’s Constitutional Scheme for State Appellate Jurisdiction,” see 6 Ga. St. B.J. 24 (2001).

JUDICIAL DECISIONS

Constitutionality. — Ga. L. 1958, p. 34 (see now O.C.G.A. Art. 2, Ch. 11, T. 19) does not deny due process of law in violation of federal and state Constitutions. *Dansby v. Dansby*, 222 Ga. 118, 149 S.E.2d 252 (1966).

Support award in URESA action may vary from prior decree. — Since the Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., is an independent proceeding which does not affect, and is not bound by, prior

foreign judgments, a responding court may enter a support order that is greater than, as well as less than, a prior judgment. *State ex rel. McKenna v. McKenna*, 253 Ga. 6, 315 S.E.2d 885 (1984).

Cited in *Lamb v. Lamb*, 241 Ga. 545, 246 S.E.2d 665 (1978); *Helms v. Jones*, 621 F.2d 211 (5th Cir. 1980); *Woodes v. Morris*, 247 Ga. 771, 279 S.E.2d 704 (1981); *East v. Pike*, 163 Ga. App. 375, 294 S.E.2d 597 (1982).

OPINIONS OF THE ATTORNEY GENERAL

Treaty not prerequisite to recognizing foreign country as reciprocating state. — Treaty between United States and a foreign country permitting reciprocal enforcement of child support obligations is not a prerequisite to recognizing that country as a reciprocating state under O.C.G.A. Art. 2, Ch. 11, T. 19. 1981 Op. Att’y Gen. No. 81-12.

Reciprocal child support enforcement acts not violative of U.S. Constitution treaty provisions. — So long as a

reciprocal child support enforcement statute does not require more than a routine review of foreign laws, does not directly affect United States foreign policy, and does not have the potential for disruption of foreign policy or embarrassment to the United States government, the statute does not violate treaty provisions of the United States Constitution (U.S. Const., Art. I, Sec. X, Cl. I and U.S. Const., Art. II, Sec. II, Cl. II). 1981 Op. Att’y Gen. No. 81-12.

Superior court may not transfer proceeding to juvenile court. — Superior court may not transfer a Uniform Reciprocal Enforcement of Support Act,

O.C.G.A. § 19-11-40 et seq., proceeding to the juvenile court under O.C.G.A. § 15-11-6(b). 1989 Op. Att’y Gen. No. U89-7.

19-11-40. Short title.

This article may be cited as the “Uniform Reciprocal Enforcement of Support Act.” (Ga. L. 1958, p. 34, § 34.)

Editor’s notes. — Ga. L. 1958, p. 34, §§ 29 and 30, not codified by the General Assembly, provide that judgments, decrees, or orders issued under the authority

of laws utilized prior to initial passage in 1958 of this article shall continue in validity.

JUDICIAL DECISIONS

Ga. L. 1958, p. 34 (see now O.C.G.A. § 19-11-40 et seq.) does not apply merely in cases of actual nonsupport. Zimmerman v. Zimmerman, 131 Ga. App. 567, 206 S.E.2d 583 (1974).

Counterclaim for modification not permitted in contempt proceeding. — Counterclaim for modification of a Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., support order may not be asserted by the defendant in a URESA contempt proceeding. The only issue for determination in a URESA contempt proceeding is the enforcement of the support obligation previously established by the URESA order. State v. Garrish, 197 Ga. App. 816, 399 S.E.2d 572 (1990).

Spousal consent precluded arrears recovery. — When wife consented to allowing the minor child of the parties to

live with the husband in Germany for a three-year period and did not provide any support for the child during that three year period; the husband provided all of the support for the child during that period and not until three years after the child had returned from Germany did the wife seek to recover any child support for the time the child spent in Germany, the wife could be said to have consented to the husband’s voluntary expenditures as an alternative to his child support obligation and, as a result, the trial court erred in concluding that the husband was in arrears in the payment of child support for the three-year period at issue. Brown v. Georgia Dep’t of Human Resources ex rel. Brown, 263 Ga. 53, 428 S.E.2d 81 (1993).

Cited in Jones v. Helms, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981); Francis v. Pittman, 162 Ga. App. 40, 290 S.E.2d 288 (1982).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, § 72.

C.J.S. — 41 C.J.S., Husband and Wife, §§ 214, 215, 219, 220-223. 67A C.J.S., Parent and Child, § 73. 82 C.J.S., Statutes, § 486 et seq.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 42.

19-11-40.1. Effective date for application of article.

No new petition may be filed, nor may any type of proceeding be initiated, under this article on or after January 1, 1998. It is the intent

of the General Assembly that any petitions filed or proceedings initiated on or after January 1, 1998, be governed by the provisions of Article 3 of this chapter, the "Uniform Interstate Family Support Act." The provisions of this article shall apply only to proceedings pending prior to January 1, 1998. (Code 1981, § 19-11-40.5, enacted by Ga. L. 1997, p. 1613, § 32.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1997, this Code section, enacted as Code Section 19-11-40.5 was redesignated as Code Section 19-11-40.1.

Law reviews. — For article commenting on the enactment of this Code section, see 14 Ga. St. U.L. Rev. 121 (1997).

JUDICIAL DECISIONS

Act does not apply retroactively. — Uniform Interstate Family Support Act, O.C.G.A. § 19-11-160 et seq., cannot be applied retroactively because of the lan-

guage of O.C.G.A. § 19-11-40.1. *Georgia Dep't of Human Resources v. Deason*, 238 Ga. App. 853, 520 S.E.2d 712 (1999).

19-11-41. Purposes of article.

The purposes of this article are to improve and extend by reciprocal legislation the enforcement of duties of support and to make uniform the law with respect thereto. (Ga. L. 1958, p. 34, § 1.)

JUDICIAL DECISIONS

Purpose of O.C.G.A. § 19-11-40 et seq. — Purpose of O.C.G.A. Art. 2, Ch. 11, T. 19 is to improve enforcement of duty of support, not to impair that duty. *Ray v. Ray*, 247 Ga. 467, 277 S.E.2d 495 (1981); *Bisno v. Biloon*, 161 Ga. App. 351, 291 S.E.2d 66 (1982), overruled on other grounds, *State ex rel. McKenna v. McKenna*, 253 Ga. 6, 315 S.E.2d 885 (1984).

Intent of the General Assembly in enacting the Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., was not that resident obligors on prior judicial awards of child support be denied the right to a jury trial on the issue of change of condition by being "prosecuted" in a quasi-criminal hearing at which a law enforcement official of this state represents the obligee. *Bisno v. Biloon*, 161 Ga. App. 351, 291 S.E.2d 66 (1982), overruled on other grounds, *State ex rel. McKenna v. McKenna*, 253 Ga. 6, 315 S.E.2d 885 (1984).

Article has intrastate as well as interstate use. — While O.C.G.A. § 19-11-40 et seq. has been thought of as being primarily for use interstate, it has intrastate application as well. *Ray v. Ray*, 247 Ga. 467, 277 S.E.2d 495 (1981).

Intrastate support obligor cannot obtain modification by action. — If an intrastate support obligor wants modification of child support provisions of divorce and alimony decree, the obligor can bring a suit for modification, but the obligor is not entitled to precipitate an action under O.C.G.A. § 19-11-40 et seq. in order to obtain modification. *Ray v. Ray*, 247 Ga. 467, 277 S.E.2d 495 (1981); *Bisno v. Biloon*, 161 Ga. App. 351, 291 S.E.2d 66 (1982), overruled on other grounds, *State ex rel. McKenna v. McKenna*, 253 Ga. 6, 315 S.E.2d 885 (1984).

Cited in *Balasco v. County of San Diego*, 140 Ga. App. 482, 231 S.E.2d 485 (1976); *Hethcox v. Hethcox*, 146 Ga. App. 430, 246 S.E.2d 444 (1978); *Earley v.*

Earley, 165 Ga. App. 483, 300 S.E.2d 814 (1983); Evans v. State, 178 Ga. App. 1, 341 S.E.2d 865 (1986).

OPINIONS OF THE ATTORNEY GENERAL

Reciprocal features of Act not extended to foreign countries. — Uniform Reciprocal Enforcement of Support Act is effective between Georgia and all other states and territories of the United

States where a similar act has been enacted but reciprocal features are not extended to foreign countries. 1962 Op. Att'y Gen. p. 348.

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, § 72 et seq.

C.J.S. — 41 C.J.S., Husband and Wife, §§ 16, 66 et seq., 214, 215, 219, 220. 67A C.J.S., Parent and Child, §§ 175, 203.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 1.

19-11-42. Definitions.

As used in this article, the term:

(1) "Certification" means certification in accordance with the laws of the certifying state.

(2) "Court" means the superior court of this state and, when the context requires, means the court of any other state as defined in a substantially similar reciprocal law.

(3) "Initiating state" means any state in which a proceeding pursuant to this article or a substantially similar reciprocal law is commenced.

(4) "Law" includes both common law and statute law.

(5) "Obligee" means any person to whom a duty of support is owed.

(6) "Obligor" means any person owing a duty of support.

(7) "Register" means the entry of an order by a superior court of this state making a foreign support order a support order of this state.

(8) "Registering court" means any superior court of this state in which the support order of the rendering state is registered.

(9) "Responding state" means any state in which any proceeding pursuant to the proceeding in the initiating state is or may be commenced.

(10) "State" includes:

(A) The District of Columbia and any state, territory, or possession of the United States or any foreign jurisdiction in which this article or a substantially similar reciprocal law has been enacted; and

(B) Any province or territory of the Dominion of Canada declared to be a reciprocating state by the Attorney General pursuant to Code Section 19-11-44.

(11) "Support order" means any judgment, decree, or order of support, whether temporary or final and whether subject to modification, revocation, or remission, regardless of the kind of action in which it is entered, provided that custody, visitation rights, property settlement, and all matters other than support are specifically excluded from enforcement under this article. (Ga. L. 1958, p. 34, § 2; Ga. L. 1975, p. 818, § 1; Ga. L. 1979, p. 938, § 2; Ga. L. 1982, p. 3, § 19; Ga. L. 1984, p. 613, § 1.)

19-11-43. Duty of support defined; criteria for determining existence of duty of support.

"Duty of support" includes any duty of support imposed or imposable by law or by any court order, decree, or judgment, whether interlocutory or final, and whether incidental to a proceeding for divorce, judicial (legal) separation, separate maintenance, or otherwise; for purposes of this article, in determining the existence of a duty of support, the following criteria may be considered, without limitation:

(1) A person in one state is declared to be liable for the support of the person's spouse, in conformity with the support laws of this state, and for the support of any child or children of his under 18 years of age and residing or found in the same state or in another state having substantially similar or reciprocal laws; and, if the person is possessed of sufficient means or is able to earn such means, he may be required to pay for this support a fair and reasonable sum according to his means, as may be determined by the court having jurisdiction of the respondent in a proceeding instituted under this article. Notwithstanding the fact that either spouse has obtained in any state or county a final decree of divorce or separation from the other spouse or a decree dissolving their marriage, the obligor under this Code section shall be deemed legally liable for the support under this article of any dependent child of the marriage, whether or not there has been an award of alimony or support for the child or children;

(2) The parents in one state are declared to be severally liable for the support of a child 18 years of age or older, residing or found in the same state or in another state having substantially similar or reciprocal laws, whenever the child is unable to maintain himself and is likely to become a public charge;

(3) A child or children born of parents who, at any time prior or subsequent to the birth of the child, have entered into a civil or religious marriage ceremony shall be deemed the legitimate child or children of both parents, regardless of the validity of the marriage;

(4) A child or children born to parents who held or hold themselves out as husband and wife by virtue of a common-law marriage recognized as valid by the laws of the initiating state and of the responding state shall be deemed the legitimate child or children of both parents;

(5) A common-law marriage recognized as valid by the laws of the initiating state and of the responding state shall be deemed to be a valid marriage for purposes of this article;

(6) Whenever a person has been adjudicated by a court of competent jurisdiction as the parent of a child born out of wedlock, the person shall be legally liable for the support of the child in the same manner in which the person would owe the duty of support if the child were a legitimate child. (Ga. L. 1958, p. 34, § 2; Ga. L. 1979, p. 466, § 45; Ga. L. 1988, p. 1720, § 12.)

Law reviews. — For annual survey of law of domestic relations, see 38 Mercer L. Rev. 179 (1986).

For comment on *Connell v. Connell*, 119

Ga. App. 485, 167 S.E.2d 686 (1969), as to enforcement of a foreign modification of a Georgia child support decree, see 21 Mercer L. Rev. 675 (1970).

JUDICIAL DECISIONS

Ordering putative father to support illegitimate children. — It is not contrary to public policy for a putative father to be ordered to support his illegitimate children, and provision is specifically made for compelling him to do so. *Wilson v. Chumney*, 96 Ga. App. 258, 99 S.E.2d 736 (1957).

Determining duty of support does not require formal paternity adjudication. — While a formal adjudication of paternity “may be considered” in determining the existence of a duty of support, the trial court is expressly not limited to this criterion. *Evans v. State*, 178 Ga. App. 1, 341 S.E.2d 865 (1986).

Although, under O.C.G.A. § 19-11-43, a formal adjudication of paternity is not required for prosecution of support claims under the Uniform Reciprocal Enforcement of Support Act (URESA), O.C.G.A. § 19-11-40 et seq., an adjudication may be considered by a court in determining whether support obligations exist. De-

partment of Human Resources v. *McCormick*, 208 Ga. App. 751, 431 S.E.2d 740 (1993).

Effect of URESA action support award on prior decree. — Under the Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., the court having jurisdiction in the responding state makes an independent determination of a “fair and reasonable sum” irrespective of whether there is a prior decree; and if a different amount is ordered paid, the other judgment is not modified but sums paid under either are credited to the other. *State ex rel. McKenna v. McKenna*, 253 Ga. 6, 315 S.E.2d 885 (1984); *Baird v. Herrmann*, 181 Ga. App. 579, 353 S.E.2d 75 (1987).

Out-of-state resident's URESA remedy in Georgia. — Initiating proceedings in one state to modify an original decree does not preclude initiating proceedings in Georgia under the Uniform Reciprocal Enforcement of Support Act, O.C.G.A.

§ 19-11-40 et seq., and pursuing that remedy to satisfaction. *State v. Chase*, 195 Ga. App. 806, 395 S.E.2d 284 (1990).

Neither the existence of a foreign child support judgment nor the terms thereof have any bearing whatsoever on an obligee's right to initiate and pursue an Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., action to enforce an obligor's duty to provide child support. *State v. Chase*, 195 Ga. App. 806, 395 S.E.2d 284 (1990).

Petition under the Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., by the Department of Human Resources, on behalf of an Ohio resident, to collect child support and arrearages from a Georgia resident was erroneously dismissed on the grounds that the Ohio court lacked jurisdiction over the Georgia resident when the court

entered the original support order; the Georgia court was required to make its own determination, applying Georgia law, as to the Georgia resident's duty of support and the amount to be paid. *Department of Human Resources v. Pruitt*, 223 Ga. App. 126, 476 S.E.2d 764 (1996).

Arrearages may be collected after child obtains majority. — Contempt action to collect arrearages which accrued while a child was under 18 may be filed even though the child on whose behalf the action is brought is legally an adult at the time of the action. *Johnson v. State*, 167 Ga. App. 508, 306 S.E.2d 756 (1983).

Cited in *Henry v. Henry*, 115 Ga. App. 211, 154 S.E.2d 298 (1967); *Crane v. Crane*, 225 Ga. 605, 170 S.E.2d 392 (1969); *Dill v. Dill*, 232 Ga. 231, 206 S.E.2d 6 (1974); *Weaver v. Chester*, 195 Ga. App. 471, 393 S.E.2d 715 (1990).

OPINIONS OF THE ATTORNEY GENERAL

Reciprocal features of article do not extend to foreign countries. — Uniform Reciprocal Enforcement of Support Act is effective between Georgia and all other states and territories of the United States where a similar act has been enacted but reciprocal features are not extended to foreign countries. 1962 Op. Att'y Gen. p. 348.

Parents severally liable for support until child's eighteenth birthday. — Parents of a child are severally liable for

the child's support until the child attains 18 years of age. 1962 Op. Att'y Gen. p. 346.

Duty to support illegitimate children requires paternity finding. — Duty of support does not extend to illegitimate child absent adjudication of paternity. 1970 Op. Att'y Gen. No. U70-73.

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, *Illegitimate Children*, §§ 47, 48, 90 et seq. 23 Am. Jur. 2d, *Desertion and Nonsupport*, § 74. 59 Am. Jur. 2d, *Parent and Child*, § 46.

C.J.S. — 14 C.J.S., *Children Out-of-Wedlock*, § 39 et seq. 41 C.J.S., *Husband and Wife*, §§ 16, 66 et seq., 214, 215, 219, 220. 67A C.J.S., *Parent and Child*, §§ 162 et seq., 175, 203.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 2.

ALR. — Extraterritorial effect of provi-

sion in decree of divorce for support of child, 90 ALR 939.

Construction and application of state statutes providing for reciprocal enforcement of duty to support dependents, 42 ALR2d 768.

Validity, construction, and application of statute imposing upon stepparent obligation to support child, 75 ALR3d 1129.

Father's liability for support of child furnished after divorce decree which awarded custody to mother but made no provision for support, 91 ALR3d 530.

Parent's obligation to support unmar-

ried minor child who refuses to live with parent, 98 ALR3d 334.

19-11-44. Declaration of reciprocating status of Canadian province or territory by Attorney General.

Where the Attorney General is satisfied that reciprocal provisions will be made by any province or territory of the Dominion of Canada, the Attorney General may declare the province or territory to be a reciprocating state for the purpose of this article. Any such order declaring that a province or territory is a reciprocating state may be revoked by the Attorney General; and thereupon the province or territory with respect to which the order was made shall cease to be a reciprocating state for the purpose of this article; provided, however, that the revocation shall not affect any actions which have been adjudicated in the responding state or which have been received by this state as the responding state. (Ga. L. 1975, p. 818, § 2.)

19-11-45. Remedies cumulative.

The remedies provided in this article are in addition to and not in substitution of any other remedies. (Ga. L. 1958, p. 34, § 3.)

JUDICIAL DECISIONS

Purpose of article. — Uniform Reciprocal Enforcement of Support Act (URESA), O.C.G.A. § 19-11-40 et seq., was designed to facilitate collection of support from parents residing in distant states without compelling the custodial parent to incur excessive transportation and litigation expenses. *Department of Human Resources v. Westmoreland*, 210 Ga. App. 603, 436 S.E.2d 706 (1993).

Remedies not exclusive. — Procedures set forth in the Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 9-11-40 et seq., and the Uniform Interstate Family Support Act, O.C.G.A. § 19-11-100 et seq., for registering and enforcing foreign support judgments are in addition to and not exclusive of the procedures in O.C.G.A. § 9-12-130 et seq. to file and domesticate judgments for enforcement; therefore, a trial court had jurisdiction to consider a mother's petition seeking interest due on child support owing on a Tennessee divorce decree. *Dial v. Adkins*, 265 Ga. App. 650, 595 S.E.2d 332 (2004).

Concurrent remedies. — Various remedies for enforcement and collection of a child support order, including contempt, execution by writ of fieri facias, and garnishment, may generally be pursued either singly or concurrently. *Department of Human Resources v. Chambers*, 211 Ga. App. 763, 441 S.E.2d 77 (1994).

Effect on orders previously issued in divorce of separate maintenance action. — Any order of support issued by a court of this state, entered in an action filed under the Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., shall not supersede any previous order of support issued in divorce or separate maintenance action, and the latter order will not constitute a modification of the former order; thus, amounts for a particular period paid pursuant to either order shall be credited against amounts accruing or accrued for the same period under both. *Ray v. Ray*, 247 Ga. 467, 277 S.E.2d 495 (1981); *Bisno v. Biloon*, 161 Ga. App. 351, 291 S.E.2d 66 (1982), overruled on other grounds, *State*

ex rel. McKenna v. McKenna, 253 Ga. 6, 315 S.E.2d 885 (1984).

Payment of arrearages wrongly postponed. — Court erred by ordering postponement of payment on the child support arrearage until a child reached the age of 18. Department of Human Resources v. Chambers, 211 Ga. App. 763, 441 S.E.2d 77 (1994).

Contempt order upon divorce decree not bar to URESA action. — When the mother had previously obtained a contempt order which required the father to comply with the original divorce decree,

the trial court erroneously denied a petition for an order of support under the Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., because a complaining spouse is not required to make an election of remedies but may pursue any number of remedies until the judgment is satisfied. State v. Overstreet, 170 Ga. App. 635, 318 S.E.2d 65 (1984).

Cited in Zimmerman v. Zimmerman, 131 Ga. App. 567, 206 S.E.2d 583 (1974); State ex rel. McKenna v. McKenna, 253 Ga. 6, 315 S.E.2d 885 (1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, §§ 175, 203.

C.J.S. — 41 C.J.S., Husband and Wife, § 214, 215, 219, 220. 67A C.J.S., Parent and Child, § 73.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 3.

ALR. — Liability of parent for dental services to minor child, 7 ALR 1070.

19-11-46. Liability of obligor in state not dependent on obligee's presence.

Duties of support arising under the law of this state, when applicable under Code Section 19-11-49, bind the obligor, present in this state, regardless of the presence or residence of the obligee. (Ga. L. 1958, p. 34, § 4.)

JUDICIAL DECISIONS

Effect on orders previously issued in divorce or separate maintenance action. — Any order of support issued by a court of this state, entered in an action filed under the Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., shall not supersede any previous order of support issued in a divorce or separate maintenance action, and the latter order will not constitute a

modification of the former order; thus, amounts for a particular period paid pursuant to either order shall be credited against amounts accruing or accrued for the same period under both. Ray v. Ray, 247 Ga. 467, 277 S.E.2d 495 (1981); Bisno v. Biloon, 161 Ga. App. 351, 291 S.E.2d 66 (1982), overruled on other grounds, State ex rel. McKenna v. McKenna, 253 Ga. 6, 315 S.E.2d 885 (1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, § 74.

C.J.S. — 41 C.J.S., Husband and Wife, §§ 4, 10. 67A C.J.S., Parent and Child, § 156.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 4.

19-11-47. Support proceedings when obligor and obligee are found in different counties of state.

A proceeding to compel support under this article may be maintained where both the obligee and the obligor are residents of or are domiciled or found in different counties of this state. Whenever a proceeding under this article is so used, what has been written in other parts of this article as "initiating state" shall be read as if written "initiating county" and what has been written as "responding state" shall be read as if written "responding county." (Ga. L. 1958, p. 34, § 4A.)

JUDICIAL DECISIONS

Effect of orders previously issued in divorce or separate maintenance action. — Any order of support issued by a court of this state, entered in an action filed under the Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., shall not supersede any previous order of support issued in a divorce or separate maintenance action, and the latter order will not constitute a

modification of the former order; thus, amounts for a particular period paid pursuant to either order shall be credited against amounts accruing or accrued for the same period under both. *Ray v. Ray*, 247 Ga. 467, 277 S.E.2d 495 (1981); *Bisno v. Biloon*, 161 Ga. App. 351, 291 S.E.2d 66 (1982), overruled on other grounds, *State ex rel. McKenna v. McKenna*, 253 Ga. 6, 315 S.E.2d 885 (1984).

19-11-48. When extradition of obligor authorized; how extradition avoided; petition; temporary order of support; delivery of copies of order; suspension of extradition proceedings.

(a) The Governor of this state may:

(1) Demand from the governor of any other state the surrender of any person found in the other state who is charged in this state with the crime of failing to provide for the support of any person in this state; and

(2) Surrender, on demand by the governor of any other state, any person found in this state who is charged in the other state with the crime of failing to provide for the support of a person in the other state.

(b) The provisions for extradition of criminals not inconsistent with this Code section shall apply to any such demand, even if the person whose surrender is demanded was not in the demanding state at the time of the commission of the crime and although he had not fled therefrom. Neither the demand, the oath, nor any proceedings for extradition pursuant to this Code section need state or show that the person whose surrender is demanded has fled from justice or that at the time of the commission of the crime he was in the demanding or other state.

(c) When the extradition of an obligor in this state has been demanded by the governor of any other state, the obligor may be relieved of extradition to the other state if he submits himself to the jurisdiction of the superior court of this state in the county where he is found and complies with the court's order of support.

(d) In order to submit himself to the jurisdiction of the superior court of this state, the obligor shall file with the court a verified petition containing the following information:

- (1) His name and permanent address;
- (2) The names, addresses, and ages of his obligees in the demanding state;
- (3) His financial circumstances;
- (4) That he is willing to submit himself to the jurisdiction of the court of this state and to comply with its order of support; and
- (5) Such other information as he believes to be pertinent and material.

(e) The court shall make a temporary order of support and shall continue the matter pending the receipt of such further information as the court may deem necessary or advisable. Two certified copies of the temporary order of support shall be delivered to the office of the Governor and one plain copy shall be delivered to the district attorney. Upon receipt of the certified copies of the order of support, the Governor may, in his discretion, suspend extradition proceedings so long as the obligor complies with the temporary order of support and with any other orders of support which may thereafter be entered. (Ga. L. 1958, p. 34, § 5.)

Cross references. — Extradition generally, T. 17, C. 13.

JUDICIAL DECISIONS

O.C.G.A. Art. 2, Ch. 11, T. 19 and O.C.G.A. Art. 2, Ch. 13, T. 17 should be construed together. — Inasmuch as provisions of Ga. L. 1958, p. 34, § 1 et seq. provide for interstate extradition or rendition of persons failing to comply with the law in regard to support of minor children, that article should be construed together with the Uniform Criminal Extradition Act, Ga. L. 1951, p. 726. *Aikens v. Turner*, 241 Ga. 401, 245 S.E.2d 660 (1978).

Section applies to extradition for crime of nonsupport. — Extradition

provisions of O.C.G.A. § 19-11-48 apply in criminal extradition proceedings for the crime of nonsupport. *In re Pace*, 250 Ga. 276, 297 S.E.2d 255 (1982).

Extradition procedure for nonsupport. — For a discussion of the procedure to be followed in extradition for the crime of nonsupport, see *In re Pace*, 250 Ga. 276, 297 S.E.2d 255 (1982).

Cited in *Johnstone v. Deyton*, 233 Ga. 146, 210 S.E.2d 692 (1974); *Helms v. Jones*, 621 F.2d 211 (5th Cir. 1980).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, § 82 et seq.

C.J.S. — 35 C.J.S., Extradition and Detainers, §§ 1 et seq., 9 et seq., 11, 25 et seq. 67A C.J.S., Parent and Child, § 359 et seq.

U.L.A. — Uniform Reciprocal Enforce-

ment of Support Act (1958 Act) (U.L.A.) §§ 5, 6.

ALR. — Long-arm statutes: obtaining jurisdiction over nonresident parent in filiation or support proceeding, 76 ALR3d 708.

19-11-49. Choice of law for determining duties of support.

Duties of support applicable under this article are those imposed or imposable under the laws of any state in which the obligor was present during the period for which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown. (Ga. L. 1958, p. 34, § 6.)

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Cited in Bisno v. Biloon, 161 Ga. App. 351, 291 S.E.2d 66 (1982); Earley v. Earley, 165 Ga. App. 483, 300 S.E.2d 814 (1983); Evans v. State, 178 Ga. App. 1, 341

S.E.2d 865 (1986); Department of Human Resources v. Pruitt, 223 Ga. App. 126, 476 S.E.2d 764 (1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, § 74.

C.J.S. — 41 C.J.S., Husband and Wife, § 2. 67A C.J.S., Parent and Child, § 156 et seq.

U.L.A. — Uniform Reciprocal Enforce-

ment of Support Act (1958 Act) (U.L.A.) § 7.

ALR. — Conflict of laws as to right of child or third person against parent for support of child, 34 ALR2d 1460.

19-11-50. Remedies of state or political subdivision furnishing support; court orders for present or future support not to be jeopardized.

(a) Except as otherwise specified in subsection (b) of this Code section, whenever the state or a political subdivision thereof furnishes support to an obligee, it has the same right as the obligee to whom the support was furnished to invoke this article for the purpose of securing reimbursement of expenditures so made and of obtaining continuing support.

(b) Subsection (a) of this Code section shall not be invoked unless the court having jurisdiction of the matter is satisfied that efforts on the part of the state or political subdivision to secure reimbursements for previous support shall not jeopardize the enforcement of the court's orders for present or future support of the dependent or dependents

involved. The court shall have the right at any time to enter appropriate orders to carry out this subsection. (Ga. L. 1958, p. 34, § 7.)

JUDICIAL DECISIONS

To receive support payments custodian must have lawful custody. — If statute requires furnishing of support for dependent children to person having custody of those children, the statute reasonably is restricted to that person having lawful custody by virtue of a court order or with the consent of the obligor parent. To hold otherwise would be to reward a phys-

ical custodian who is acting in actual defiance of and contrary to an order of the court of the responding state. *Hethcox v. Hethcox*, 146 Ga. App. 430, 246 S.E.2d 444 (1978).

Cited in *Balasco v. County of San Diego*, 140 Ga. App. 482, 231 S.E.2d 485 (1976).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, *Illegitimate Children*, § 45. 23 Am. Jur. 2d, *Desertion and Nonsupport*, § 75.

C.J.S. — 67A C.J.S., *Parent and Child*, §§ 175, 203.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 8.

ALR. — Right of state or its political subdivision to maintain action in another state for support and maintenance of defendant's child, parent, or dependent in plaintiff's institution, 67 ALR2d 771.

19-11-51. Duties enforceable by petition; jurisdiction; venue.

All duties of support, including the duty to pay arrearages or reimbursement, are enforceable by petition irrespective of relationship between the obligor and obligee. Jurisdiction of all proceedings hereunder shall be vested in the superior courts of the various counties of this state. The petition must be commenced in the county of residence of the obligee. (Ga. L. 1958, p. 34, § 8; Ga. L. 1979, p. 941, § 1.)

JUDICIAL DECISIONS

Right to jury trial. — Uniform Reciprocal Enforcement of Support Act, Ga. L. 1951, p. 726, does not expressly provide right of trial by jury as to support by parent of minor children in custody of other parent in another state. *Strange v. Strange*, 222 Ga. 44, 148 S.E.2d 494 (1966).

Uniform Reciprocal Enforcement of Support Act (see now O.C.G.A. § 19-11-40 et seq.) is not unconstitutional for failure to provide jury trial for parent sued by former spouse for future support of minor children in her custody. *Strange v.*

Strange, 222 Ga. 44, 148 S.E.2d 494 (1966).

Petition under article is not divorce or alimony case. — Petition for support of minor children brought under the Uniform Reciprocal Enforcement of Support Act (see now O.C.G.A. § 19-11-40 et seq.) is not a divorce or alimony case within the meaning of Ga. Const. 1976, Art. VI, Sec. II, Para. IV (see now Ga. Const. 1983, Art. VI, Sec. VI, Para. II, III, V; Ga. Const. 1983, Art. VI, Sec. 1, Para. VIII; Ga. Const. 1983, Art. VI, Sec. V, Para. V) which provides that the Supreme

Court "shall be a court alone for the trial and correction of errors of law ... in all divorce and alimony cases." *O'Quinn v. O'Quinn*, 217 Ga. 431, 122 S.E.2d 925 (1961).

Lawful custodian need not pay support to mother wrongfully taking children. — There is no duty on a father to make payments to a mother for support of minor children when the father has obtained a prior order of custody, and the mother, contrary to such order, has removed the children out of the court's jurisdiction. *Hethcox v. Hethcox*, 146 Ga. App. 430, 246 S.E.2d 444 (1978).

Arrearages only recoverable after amendment by Ga. L. 1979, p. 941, §§ 1, 2. — Arrearages were not specifically recoverable under the Georgia Uniform Reciprocal Enforcement of Support Act (see now O.C.G.A. § 19-11-40 et seq.) until O.C.G.A. §§ 19-11-51 and 19-11-63 were amended by Ga. L. 1979, p. 941,

§§ 1, 2. *State ex rel. Brookins v. Brookins*, 257 Ga. 205, 357 S.E.2d 77 (1987).

Effect of order under URESA in subsequent arrearage action. — An order rendered by a responding court in a Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., proceeding is not res judicata in a subsequent action for arrearage under the original support order, subject to a setoff of any such arrearages already paid to prevent a double recovery. *State ex rel. Brookins v. Brookins*, 257 Ga. 205, 357 S.E.2d 77 (1987).

Arrearages may be collected after child obtains majority. — Contempt action to collect arrearages which accrued while a child was under 18 may be filed even though the child on whose behalf the action is brought is legally an adult at the time of the action. *Johnson v. State*, 167 Ga. App. 508, 306 S.E.2d 756 (1983).

Cited in *Evans v. State*, 178 Ga. App. 1, 341 S.E.2d 865 (1986).

RESEARCH REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d, Parent and Child, § 73.

U.L.A. — 67A C.J.S., Parent and Child, §§ 175, 203.

Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) §§ 9, 10.

19-11-52. Contents of petition; when cause of action arises.

The petition shall be verified and shall state the name and, so far as known to the petitioner, the address and circumstances of the respondent and the names of his dependents for whom support is sought and all other pertinent information. The petitioner may include in or attach to the petition any information which may help in locating or identifying the respondent, including, but without limitation by enumeration, a photograph of the respondent, a description of any distinguishing marks of his person, other names and aliases by which he has been or is known, the name of his employer, his fingerprints, and his social security number. However, no cause of action shall arise unless the obligee is in need of support or the obligor has failed and refused to support the obligee. (Ga. L. 1958, p. 34, § 9.)

Law reviews. — For note discussing counterclaims and defenses under the

Uniform Reciprocal Enforcement of Support Act, see 15 Ga. L. Rev. 143 (1980).

JUDICIAL DECISIONS

Uniform Reciprocal Enforcement of Support Act actions not limited. — Provisions of O.C.G.A. § 19-6-19 are not intended to and do not provide any limitation on the filing of subsequent Uniform Reciprocal Enforcement of Support Act (URESA), O.C.G.A. § 19-11-40 et seq., actions. Department of Human Resources v. Westmoreland, 210 Ga. App. 603, 436 S.E.2d 706 (1993).

When cause of action arises. — A cause of action arises if either the obligee is in need of support or the obligor has failed and refused to support the obligee.

Evans v. State, 178 Ga. App. 1, 341 S.E.2d 865 (1986).

Fact the father has been diligent in making past support payments would not preclude a Uniform Reciprocal Enforcement of Support Act (URESA), O.C.G.A. § 19-11-40 et seq., action in those instances when the obligee child is in need of support. Department of Human Resources v. Westmoreland, 210 Ga. App. 603, 436 S.E.2d 706 (1993).

Cited in Thibadeau v. Thibadeau, 133 Ga. App. 154, 210 S.E.2d 340 (1974).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Illegitimate Children, § 57. 23 Am. Jur. 2d, Desertion and Nonsupport, § 75.

C.J.S. — 67A C.J.S., Parent and Child, §§ 175, 203.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 11.

19-11-53. Representation of petitioner by district attorney; fees; monthly collection reports; payment to county for services; clerk’s fees.

- (a) The district attorney of each superior court shall be authorized to represent the petitioner in any proceeding under this article. Otherwise, at the option of the district attorney, actions under this article shall be brought as provided in Article 1 of this chapter. The district attorney shall be authorized to require the completion of an application. Fees for such services shall be charged as part of the application in accordance with subsection (b) of Code Section 19-11-8. The department shall be entitled to receive monthly reports concerning collections under this provision pursuant to Code Section 19-11-21.
- (b) For such services by the district attorney there shall be paid to the county in which the petition is handled the sum of \$50.00 for each petition handled, whether this state is the initiating or the responding state. In all counties in which the clerk of the superior court is on a fee basis, the district attorney shall pay from the sum so received by him to the clerk the fees as are allowed by law for the filing of petitions and service of processes filed under this article. However, before the sum shall be paid, an order granting or denying support must have been entered.
- (c) When acting pursuant to subsection (a) of this Code section, the district attorney shall represent the petitioner to the extent that the

interests of the petitioner do not conflict with the interests of the department. (Ga. L. 1958, p. 34, § 10; Ga. L. 1975, p. 781, § 1; Ga. L. 1985, p. 785, § 9; Ga. L. 1990, p. 1832, § 1; Ga. L. 1992, p. 1833, § 6.)

JUDICIAL DECISIONS

District attorney required to represent Virginia resident in support action. — Statute clearly makes it mandatory upon the district attorney to represent resident of Virginia in action brought by her against her husband under the Uniform Reciprocal Enforcement of Support Act (see now O.C.G.A. § 19-11-40 et seq.). Fact that his work load is heavy does not relieve him of this duty. *Slaton v. Campbell*, 229 Ga. 59, 189 S.E.2d 69 (1972).

To receive support payments custodian must have lawful custody. — When statute requires furnishing of sup-

port for dependent children to person having custody of those children, it is reasonably restricted to that person having lawful custody by virtue of a court order or with the consent of the obligor parent. To hold otherwise would be to reward a physical custodian who is acting in actual defiance of and contrary to an order of the court of the responding state. *Hethcox v. Hethcox*, 146 Ga. App. 430, 246 S.E.2d 444 (1978).

OPINIONS OF THE ATTORNEY GENERAL

Types of fee under article. — Filing fee and service fee are only fees contemplated by wording of the Uniform Reciprocal Enforcement of Support Act (see now O.C.G.A. § 19-11-40 et seq.). 1957 Op. Att'y Gen. p. 47.

Use of assistant by district attorney. — Assistant whose duties are general does not disqualify solicitor general (now district attorney) from receiving fee. 1957 Op. Att'y Gen. p. 75.

Collection of fee not prohibited by § 45-7-3. — Prohibition contained in Ga. L. 1973, p. 701, § 1 as amended by Ga. L. 1978, p. 4, § 1 (see now O.C.G.A. § 45-7-3) forbidding the district attorney from receiving compensation out of state funds, other than the district attorney's salary and county supplements, does not prohibit state's paying \$50.00 to county for every petition filed pursuant to the Uniform Reciprocal Enforcement of Support Act (see now O.C.G.A. § 19-11-40 et seq.) which had been handled by the district attorney in that county and for which an order granting or denying support had been entered. 1979 Op. Att'y Gen. No. U79-16.

No additional fee in contempt proceeding for violation of support order. — Contempt proceeding for violating an order of support issued in a case under the Uniform Reciprocal Enforcement of Support Act (see now O.C.G.A. § 19-11-40 et seq.) is in the nature of a civil contempt proceeding to obtain compliance with an order of support for the benefit of the plaintiff, and as such would be a continuation of the main cause; being a continuation of the main cause, a solicitor (now district attorney) would not be entitled to receive an additional fee of \$50.00 for successfully representing the plaintiff. 1957 Op. Att'y Gen. p. 76.

When and how fee is received. — Solicitor general (now district attorney) is entitled to payment of fee provided in Ga. L. 1958, p. 34, § 10 (see now O.C.G.A. § 19-11-53) when the case has been successfully concluded, and an order for payment of the fee has been processed as provided in Ga. L. 1958, p. 34, §§ 15 and 15A (see now O.C.G.A. §§ 19-11-58 and 19-11-59). 1957 Op. Att'y Gen. p. 75.

RESEARCH REFERENCES

C.J.S. — 43 C.J.S., Infants, § 322 et seq. 67A C.J.S., Parent and Child, §§ 175, 203.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 12.

19-11-54. By whom petition for minor obligee brought; guardian ad litem not necessary.

A petition on behalf of a minor obligee may be brought by a person having custody of the minor without appointment as guardian ad litem. (Ga. L. 1958, p. 34, § 11.)

JUDICIAL DECISIONS

To receive support payments custodian must have lawful custody. — When statute requires furnishing of support for dependent children to person having custody of those children, it is reasonably restricted to that person having lawful custody by virtue of a court order or with the consent of the obligor parent. To hold otherwise would be to reward the physical custodian who is acting in actual defiance of and contrary to an order of the court of the responding state. *Hethcox v. Hethcox*, 146 Ga. App. 430, 246 S.E.2d 444 (1978).

Cited in *Evans v. State*, 178 Ga. App. 1, 341 S.E.2d 865 (1986).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, § 129.

C.J.S. — 43 C.J.S., Infants, § 322 et seq. 67A C.J.S., Parent and Child, §§ 175, 203.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 13.

ALR. — Maintenance of suit by child, independently of statute, against parent for support, 13 ALR2d 1142.

19-11-55. Duty of court of this state when acting as initiating state; transmittal of copies of petition, certificate, and article; monetary recommendation to Canadian court.

(a) If a court of this state, acting as an initiating state, finds that the petition sets forth facts from which it may be determined that the respondent owes a duty of support and that a court of the responding state may obtain jurisdiction of the respondent or his property, it shall so certify and shall cause three copies of the petition, its certificate, and this article to be transmitted to the court in the responding state. If the name and address of the court are unknown and the responding state has an information agency comparable to that established in the initiating state it shall cause the copies to be transmitted to the state information agency or other proper officials of the responding state, with a request that it or they forward the copies to the proper court and that the court of the responding state acknowledge their receipt to the court of the initiating state.

(b) If the responding state is a province or territory of the Dominion of Canada, the court of this state shall also set forth in its certificate the weekly or monthly amount in United States money which, in the court's opinion, the respondent should be required to pay for support of the petitioner; but such recommendation is provisional only and is subject to confirmation or modification by the court of the responding state. (Ga. L. 1958, p. 34, § 12; Ga. L. 1975, p. 818, § 3.)

JUDICIAL DECISIONS

Cited in Ray v. Ray, 247 Ga. 467, 277 S.E.2d 495 (1981).

OPINIONS OF THE ATTORNEY GENERAL

Copies of petition transmitted to responding state must be certified. — Copies of petition in action under the Uniform Reciprocal Enforcement of Support Act (see now O.C.G.A. § 19-11-40 et

seq.) need only be certified and not exemplified when transmitting copies to the responding state when the action was initiated in Georgia and Georgia is the initiating state. 1957 Op. Att'y Gen. p. 74.

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, §§ 127, 131, 139.

C.J.S. — 67A C.J.S., Parent and Child, §§ 175, 203.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 14.

19-11-56. Payment of costs and fees by state; issuance of execution to reimburse state.

A court of this state, whether the state is acting as an initiating or a responding state, may, in its discretion, direct that any part of or all fees and costs incurred in this state, including, without limitation by enumeration, fees for filing, service of process, seizure of property, and stenographic service of both petitioner and respondent, or either, shall be paid by the state and shall direct that the district attorney's fee be paid by the state. The court may order that when the state has paid the costs above that a fi. fa. be issued against the respondent to reimburse the state for its expenditures. Where the action is brought by or through the state or an agency thereof, there shall be no filing fee. (Ga. L. 1958, p. 34, § 13.)

OPINIONS OF THE ATTORNEY GENERAL

State does not pay court costs under the Uniform Reciprocal Enforcement of Support Act (see now O.C.G.A. § 19-11-40 et seq.). 1962 Op. Att'y Gen. p. 92.

State can only pay district attorney's fee. — State cannot pay clerk's cost, or any of the costs and fees provided in the Uniform Reciprocal Enforcement of Support Act, except the fee of the solicitor

general (now district attorney), as no appropriation has been made for that purpose. 1957 Op. Att'y Gen. p. 48.

Payment of fee under § 19-11-59 requires court order. — Fee referred to in Ga. L. 1958, p. 34, § 15 (see now O.C.G.A. § 19-11-59) can only be paid as a result of a court order as provided in that section and direction of the commanding officer to the officer's subordinate to make payments does not fall within the purview of Ga. L. 1958, p. 34, § 13 or § 15A (see now O.C.G.A. § 19-11-56 or § 19-11-59). 1965-66 Op. Att'y Gen. No. 66-248.

When and how district attorney collects fee. — Solicitor general (now district attorney) is entitled to payment of fee when case has been successfully con-

cluded, and an order for payment of fee has been processed as provided in Ga. L. 1958, p. 34, §§ 15 and 15A (see now O.C.G.A. §§ 19-11-58 and 19-11-59). 1957 Op. Att'y Gen. p. 75.

Fees payable by Department of Administrative Services. — Department of Administrative Services is not authorized to reimburse a superior court law clerk's travel expense from funds appropriated for the operation of the superior courts, but may use those funds to pay a court reporter's fee in a Uniform Reciprocal Enforcement of Support Act (URESA), O.C.G.A. § 19-11-40 et seq., action if so ordered by the court. 1983 Op. Att'y Gen. No. 83-46.

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, § 142.

C.J.S. — 67A C.J.S., Parent and Child, §§ 211, 212.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 15.

19-11-57. When respondent's arrest authorized.

(a) When a court of this state, acting as an initiating state, has reason to believe that the respondent may flee the jurisdiction, it may request in its certificate that the court of the responding state obtain the body of the respondent by appropriate process, if that is permissible under the law of the responding state.

(b) When a court of this state, acting as a responding state, has reason to believe that the respondent may flee the jurisdiction, it may obtain the body of the respondent by appropriate process. (Ga. L. 1958, p. 34, § 14.)

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, § 140.

C.J.S. — 67A C.J.S., Parent and Child, §§ 175, 203.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 16.

19-11-58. Department of Human Services designated state information agency; duties.

The Department of Human Services is designated as the state information agency under this article and it shall be its duty:

(1) To compile a list of the courts in this state having jurisdiction under this article and their addresses and to transmit the same to the state information agency of every other state which has adopted this article or a substantially similar act;

(2) To maintain a register of such lists received from other states and to transmit copies thereof, as soon as possible after receipt, to every court in this state having jurisdiction under this article;

(3) To approve as to form all orders for payment of the district attorneys' fees and forward same to the Prosecuting Attorneys' Council of the State of Georgia for payment; and

(4) To furnish to the district attorneys necessary forms, information, and assistance in proceedings under this article. (Ga. L. 1958, p. 34, § 15; Ga. L. 1975, p. 1141, § 1; Ga. L. 1993, p. 1402, § 19; Ga. L. 1994, p. 97, § 19; Ga. L. 1999, p. 81, § 19; Ga. L. 2008, p. 577, § 17/SB 396; Ga. L. 2009, p. 453, § 2-2/HB 228.)

OPINIONS OF THE ATTORNEY GENERAL

When and how district attorney collects fee. — Solicitor general (now district attorney) is entitled to payment of fee when case has been successfully concluded, and order for payment of fee has

been processed as provided in Ga. L. 1958, p. 34, §§ 15 and 15A (see now O.C.G.A. §§ 19-11-58 and 19-11-59). 1957 Op. Att'y Gen. p. 75.

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, § 77.

C.J.S. — 67A C.J.S., Parent and Child, §§ 175, 203.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 17.

19-11-59. Payment of district attorney's fee.

The fee of the district attorney arising under this article shall be paid by the Prosecuting Attorneys' Council of the State of Georgia upon receipt of the order for the payment of such fees that has been approved by the state information agency. Payment shall be made from funds appropriated for the operation of the district attorneys. (Ga. L. 1958, p. 34, § 15A; Ga. L. 1975, p. 1141, § 2; Ga. L. 1993, p. 1402, § 19; Ga. L. 1994, p. 97, § 19; Ga. L. 2008, p. 577, § 18/SB 396.)

OPINIONS OF THE ATTORNEY GENERAL

Obligation to pay fee on state. — Obligation to pay fee of solicitor general (now district attorney) is upon state and not upon county. 1957 Op. Att'y Gen. p. 75.

Payment of fee requires court order. — Fee referred to in Ga. L. 1958, p. 34, § 15A (see now O.C.G.A. § 19-11-59) can only be paid as a result of a court

order as provided in Ga. L. 1958, p. 34, § 13 (see now O.C.G.A. § 19-11-56) and the direction of a commanding officer to the officer's subordinate to make payments does not fall within the purview of Ga. L. 1958, p. 34, § 13 or § 15A (see now O.C.G.A. § 19-11-56 or O.C.G.A. § 19-11-59). 1965-66 Op. Att'y Gen. No. 66-248.

When and how district attorney collects fee. — Solicitor general (now district attorney) is entitled to payment of fee when case has been successfully concluded, and order for payment of fee has been processed as provided in Ga. L. 1958, p. 34, §§ 15 and 15A (see now O.C.G.A. §§ 19-11-58 and 19-11-59). 1957 Op. Att'y Gen. p. 75.

19-11-60. Duty of court of this state when acting as responding state.

When a court of this state, acting as a responding state, receives from the court of an initiating state the copies specified in Code Section 19-11-55, it shall:

- (1) Docket the cause;
- (2) Notify the district attorney;
- (3) Set a time and place for a hearing; and
- (4) Take such action as is necessary in accordance with the laws of this state to obtain jurisdiction. (Ga. L. 1958, p. 34, § 16.)

JUDICIAL DECISIONS

Service of petition, notice, and hearing required. — Court must provide service of a petition upon a defendant and the defendant must be given notice and a hearing as the laws of this state so provide. Dansby v. Dansby, 222 Ga. 118, 149 S.E.2d 252 (1966).

Cited in Balasco v. County of San Diego, 140 Ga. App. 482, 231 S.E.2d 485 (1976); Holler v. Holler, 257 Ga. 27, 354 S.E.2d 140 (1987).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, § 78.
C.J.S. — 67A C.J.S., Parent and Child, §§ 175, 203.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 18.

19-11-61. Procedure where responding court unable to obtain jurisdiction; cooperation of police in locating respondent; transfer of documents upon location of respondent or his property.

(a) If a court of this state, acting as a responding state, is unable to obtain jurisdiction of the respondent or his property, due to inaccuracies or inadequacies in the petition or otherwise, the court shall communicate this fact to the court in the initiating state, shall on its own

initiative use all means at its disposal to trace the respondent or his property, and shall hold the case pending the receipt of more accurate information or an amended petition from the court in the initiating state or information from the district attorney that the matter should be transferred as provided in subsection (b) of this Code section. The local police authorities and the state police shall cooperate with the court in locating any respondent alleged by petition to be present in this state.

(b) If the respondent or his property is not found in the county and the district attorney discovers that the respondent or his property may be found in another county of this state or in another state, the district attorney shall so inform the court. If the district attorney so informs the court, the clerk of court shall forward the documents received from the court in the initiating state to the superior court in the county of this state or to the appropriate court, information agency, or other proper officials of another state where the defendant or his property may be found. A clerk of court who so forwards documents shall give notice to the court from which the documents were received that the documents have been so forwarded. (Ga. L. 1958, p. 34, § 17; Ga. L. 1984, p. 387, § 1.)

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, § 78.

C.J.S. — 67A C.J.S., Parent and Child, §§ 175, 203.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 19.

19-11-62. Discovery procedures.

In any proceeding under this article the court may order interrogatories or depositions to be taken within or outside the state pursuant to the provisions of law applicable to a court of record. (Ga. L. 1958, p. 34, § 18.)

Cross references. — Interrogatories, and depositions generally, § 9-11-26 et seq.

RESEARCH REFERENCES

C.J.S. — 67A C.J.S., Parent and Child, §§ 211, 212.

U.L.A. — Uniform Reciprocal Enforce-

ment of Support Act (1958 Act) (U.L.A.) § 20.

19-11-63. Order of support or reimbursement.

If the court of the responding state finds a duty of support, it may order the respondent to furnish support and to pay arrearages due under any existing court order or to furnish reimbursement for reasonable expenses actually incurred in the absence of a court order and may subject the property of the respondent to such order. (Ga. L. 1958, p. 34, § 19; Ga. L. 1979, p. 941, § 2.)

Law reviews. — For review of 1996 domestic relations legislation, see 13 Ga. St. U.L. Rev. 127 (1996).

JUDICIAL DECISIONS

Reimbursement should be based upon expenses incurred in supporting child. — Amount of reimbursement awarded a parent should be based on evidence submitted to the superior court setting forth expenses incurred by her in supporting the child. *Hethcox v. Hethcox*, 146 Ga. App. 430, 246 S.E.2d 444 (1978).

Arrearages only recoverable after amendment by Ga. L. 1979, p. 941, §§ 1, 2. — Arrearages were not specifically recoverable under the Georgia Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., until O.C.G.A. §§ 19-11-51 and 19-11-63 were amended by Ga. L. 1979, p. 941, §§ 1, 2. *State ex rel. Brookins v. Brookins*, 257 Ga. 205, 357 S.E.2d 77 (1987).

Effect of order under URESA in subsequent arrearage action. — An order rendered by a responding court in a Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., proceeding is not res judicata in a subsequent action for arrearage under the original support order, subject to a setoff of any such arrearages already paid to prevent a double recovery. *State ex rel. Brookins v. Brookins*, 257 Ga. 205, 357 S.E.2d 77 (1987).

Cited in *Weaver v. Chester*, 195 Ga. App. 471, 393 S.E.2d 715 (1990); *Department of Human Resources v. Pruitt*, 223 Ga. App. 126, 476 S.E.2d 764 (1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, §§ 78, 81. 73 Am. Jur. 2d, Support of Persons, § 29.

C.J.S. — 67A C.J.S., Parent and Child, § 217 et seq.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 24.

ALR. — Constitutionality of statute providing for seizure of property of absent husband or parent, for benefit of wife or child, 65 ALR 886.

Right to credit on child support payments for social security or other government dependency payments made for benefit of child, 34 ALR5th 447.

19-11-64. Transmittal of copy of order to initiating state.

The court of this state, when acting as a responding state, shall cause to be transmitted to the court of the initiating state a copy of all orders of support or for reimbursement therefor. (Ga. L. 1958, p. 34, § 20.)

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, § 78.

C.J.S. — 67A C.J.S., Parent and Child, § 217 et seq.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 25.

19-11-65. Power of court to assure compliance with orders.

In addition to the other powers specified in this article, the court of this state, when acting as the responding state, has the power to subject the respondent to such terms and conditions as the court may deem proper to assure compliance with its orders and in particular has the power:

(1) To require the respondent to furnish recognizance in the form of a cash deposit or bond of such character and in such amount as the court may deem proper to assure payment of any amount required to be paid by the respondent;

(2) To require the respondent to make payments at specified intervals to the department or any county agency designated by the court or to the obligee and to report personally to the department at such times as may be deemed necessary; and

(3) To punish the respondent who violates any order of the court to the same extent as is provided by law for contempt of the court in any other action or proceeding cognizable by the court. (Ga. L. 1958, p. 34, § 21; Ga. L. 1989, p. 380, § 1; Ga. L. 1991, p. 94, § 19.)

Cross references. — Exercise of power of contempt generally, § 15-1-4.

Law reviews. — For note on 1989

amendment to this Code section, see 6 Ga. St. U.L. Rev. 232 (1989).

JUDICIAL DECISIONS

Cooperation of out-of-state courts cannot be compelled beyond terms of reciprocal law. — Courts of this state have no control over processes of courts of initiating state and cannot compel cooperation beyond bounds of substantially similar terms of its reciprocal law. *Thibadeau v. Thibadeau*, 133 Ga. App. 154, 210 S.E.2d 340 (1974).

Failure to enter findings does not bar enforcement of support. — Court's failure to enter findings of fact and conclusions of law with respect to paternity in the court's order directing payment of

child support as required by O.C.G.A. § 9-11-52(a) is an amendable defect and, therefore, the trial court does not err by denying the defendant's motion to set aside the judgment nor by finding the defendant in contempt for willfully failing to comply with the court's order. *Powell v. State*, 166 Ga. App. 780, 305 S.E.2d 646 (1983).

Arrearages may be enforced after child reaches majority. — Contempt action to collect arrearages which accrued while a child was under 18 may be filed even though the child on whose behalf the

action is brought is legally an adult at the time of the action. *Johnson v. State*, 167 Ga. App. 508, 306 S.E.2d 756 (1983).

OPINIONS OF THE ATTORNEY GENERAL

No additional fee in contempt proceeding for violating support order.

— Contempt proceeding for violating order of support issued in case under the Uniform Reciprocal Enforcement of Support Act (see now O.C.G.A. § 19-11-40 et seq.) is in nature of civil contempt proceeding to obtain compliance with order of

support for benefit of the plaintiff, and as such would be a continuation of the main cause; being a continuation of the main cause, the solicitor general (now district attorney) would not be entitled to receive an additional fee of \$50.00 for successfully representing the plaintiff. 1957 Op. Att'y Gen. p. 76.

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, § 78.

C.J.S. — 67A C.J.S., Parent and Child, § 204 et seq.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 26.

19-11-66. Determination of paternity.

If the obligor asserts as a defense that he is not the father of the child for whom support is sought and it appears to the court that the defense is not frivolous and if both of the parties are present at the hearing or if the proof required in the case indicates that the presence of either or both of the parties is not necessary, the court may adjudicate, by a jury trial if demanded by either party, the paternity issue. Otherwise the court may continue the hearing until the paternity issue has been adjudicated. (Ga. L. 1977, p. 699, § 1.)

Cross references. — Proceedings to determine paternity, § 19-7-40 et seq.

JUDICIAL DECISIONS

Term “frivolous” in O.C.G.A. § 19-11-66 refers to a defense in which the party's realistic chances of ultimate success are slight. *Glover v. Clark*, 161 Ga. App. 552, 288 S.E.2d 887 (1982).

Subject of parentage res judicata at time of URESA proceeding. — Trial court did not err in refusing to consider issue of parentage of minor child in context of Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., proceedings when the final divorce decree had been rendered and, pursuant to an agreement entered into by both parties,

had granted the appellant reasonable rights of visitation and had ordered the appellant to pay child support and \$250.00 for medical expenses relating to the birth of the child. The legitimacy of the child was a matter for decision during divorce proceedings and was res judicata at the time of the URESA proceeding. *East v. Pike*, 163 Ga. App. 375, 294 S.E.2d 597 (1982).

Cited in *Aikens v. Turner*, 241 Ga. 401, 245 S.E.2d 660 (1978); *Stinson v. Iowa Dep't of Social Servs.*, 172 Ga. App. 633, 323 S.E.2d 917 (1984).

RESEARCH REFERENCES

Am. Jur. 2d. — 41 Am. Jur. 2d, Illegitimate Children, § 15 et seq.

ALR. — Determination of paternity of child as within scope of proceeding under

Uniform Reciprocal Enforcement of Support Act, 81 ALR3d 1175.

Paternity proceedings: right to jury trial, 51 ALR4th 565.

19-11-67. Transmittal of payments to court of initiating state; certified statement of payments made by respondent.

A court of this state, when acting as a responding state, shall have the following duties, which may be carried out through the community supervision office, juvenile probation office, or probation office under the authority of Article 6 of Chapter 8 of Title 42 for the court:

- (1) Upon the receipt of a payment made by the respondent pursuant to any order of the court or otherwise, to transmit the same forthwith to the court of the initiating state; and

(2) Upon request, to furnish to the court of the initiating state a certified statement of all payments made by the respondent. (Ga. L. 1958, p. 34, § 22; Ga. L. 2015, p. 422, § 5-45/HB 310.)

The 2015 amendment, effective July 1, 2015, substituted “community supervision office, juvenile probation office, or probation office under the authority of Article 6 of Chapter 8 of Title 42 for the court” for “probation department of the court” at the end of the introductory paragraph. See editor’s note for applicability.

Editor’s notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that the amendment by this Act shall apply to sentences entered on or after July 1, 2015.

JUDICIAL DECISIONS

Cooperation of out-of-state courts cannot be compelled beyond terms of reciprocal law. — Courts of this state have no control over processes of courts of initiating state and cannot compel cooperation beyond bounds of substantially similar terms of its reciprocal law. *Thibadeau v. Thibadeau*, 133 Ga. App. 154, 210 S.E.2d 340 (1974).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, § 78.

C.J.S. — 67A C.J.S., Parent and Child, § 204 et seq.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 27.

19-11-68. Duty of court of initiating state to disburse payments received.

A court of this state, when acting as an initiating state, shall have the duty, which may be carried out through the clerk of the court, to receive

and disburse forthwith all payments made by the respondent or transmitted by the court of the responding state. (Ga. L. 1958, p. 34, § 23.)

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, § 77.	U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 28.
C.J.S. — 67A C.J.S., Parent and Child, §§ 175, 203.	

19-11-69. Spouses competent and compellable to testify.

Laws attaching a privilege against the disclosure of communications between husband and wife are inapplicable to proceedings under this article. Husband and wife are competent witnesses and may be compelled to testify to any relevant matter, including marriage and parentage. (Ga. L. 1958, p. 34, § 24.)

Cross references. — Certain communications privileged, § 24-5-501.

JUDICIAL DECISIONS

Cited in Walther v. Walther, 219 Ga. 644, 135 S.E.2d 401 (1964).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, § 76.	U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 22.
C.J.S. — 67A C.J.S., Parent and Child, § 213 et seq. 98 C.J.S., Witnesses, §§ 299, 300.	

19-11-70. Rules of evidence.

In any hearing under this article, the court shall be bound by the same rules of evidence that bind the juvenile courts of this state. (Ga. L. 1958, p. 34, § 25.)

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, § 76. 73 Am. Jur. 2d, Support of Persons, § 42.	U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 23.
C.J.S. — 67A C.J.S., Parent and Child, § 213 et seq.	

19-11-71. Previous support orders not superseded; how payments credited.

Any order of support issued by a court of this state when acting as a responding state shall not supersede any previous order of support issued in a divorce or separate maintenance action, but the amounts for a particular period paid pursuant to either order shall be credited against amounts accruing or accrued for the same period under both. (Ga. L. 1958, p. 34, § 26.)

JUDICIAL DECISIONS

Effect on orders previously issued in divorce or separate maintenance action. — Any order of support issued by a court of this state, entered in an action filed under the Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., shall not supersede any previous order of support issued in divorce or separate maintenance action, and the latter order will not constitute a modification of the former order; thus, amounts for a particular period paid pursuant to either order shall be credited against amounts accruing or accrued for the same period under both. *Ray v. Ray*, 247 Ga. 467, 277 S.E.2d 495 (1981).

Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., order did not supersede divorce decree ordering child support. *Bisno v. Biloon*, 161 Ga. App. 351, 291 S.E.2d 66 (1982), overruled on other grounds, *State ex rel. McKenna v. McKenna*, 253 Ga. 6, 315 S.E.2d 885 (1984).

Kentucky URESA order does not supersede prior Georgia support or-

der. — Kentucky Uniform Reciprocal Enforcement of Support Act order does not supersede a prior Georgia divorce decree ordering child support; and by the same token, the URESA order does not constitute a modification of the support order. *Earley v. Earley*, 165 Ga. App. 483, 300 S.E.2d 814 (1983).

Payment on URESA action credit on divorce decree. — Under the Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., the court having jurisdiction in the responding state makes an independent determination of a "fair and reasonable sum" irrespective of whether there is a prior decree; and if a different amount is ordered paid, the other judgment is not modified but the sums paid under either are credited to the other. *State ex rel. McKenna v. McKenna*, 253 Ga. 6, 315 S.E.2d 885 (1984); *Baird v. Herrmann*, 181 Ga. App. 579, 353 S.E.2d 75 (1987).

Cited in *Francis v. Pittman*, 162 Ga. App. 40, 290 S.E.2d 288 (1982); *Department of Human Resources v. Pruitt*, 223 Ga. App. 126, 476 S.E.2d 764 (1996).

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, §§ 73, 81.

C.J.S. — 67A C.J.S., Parent and Child, § 217.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 30.

ALR. — Construction and effect of pro-

vision of Uniform Reciprocal Enforcement of Support Act that no support order shall supersede or nullify any other order, 31 ALR4th 347.

Right to credit on child support payments for social security or other government dependency payments made for benefit of child, 34 ALR5th 447.

19-11-72. Jurisdiction in other proceedings not conferred.

Participation in any proceedings under this article shall not confer upon any court jurisdiction of any of the parties thereto in any other proceeding. (Ga. L. 1958, p. 34, § 27.)

JUDICIAL DECISIONS

Immunity of petitioner from respondent's state court claim. — Statute does not provide the petitioner with blanket immunity from jurisdictional exercise by respondent state's court. *Balasco v. County of San Diego*, 140 Ga. App. 482, 231 S.E.2d 485 (1976) (see O.C.G.A. § 19-11-72).

O.C.G.A. § 19-11-72 provides a nonresident petitioner immunity from the jurisdiction of the responding state's courts if the Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., procedures have been invoked for its legitimate ends — the enforcement of the duties of support. *Earley v. Earley*, 165 Ga. App. 483, 300 S.E.2d 814 (1983).

When there was no evidence that a nonresident former husband had initiated a Uniform Reciprocal Enforcement of Support, O.C.G.A. § 19-11-40 et seq., proceeding for an illegitimate end, he was immune under O.C.G.A. § 19-11-72 from personal jurisdiction in an action by his former wife to domesticate a Virginia divorce decree and have him held in contempt for nonpayment of support. *Riersgard v. Morton*, 267 Ga. 451, 479 S.E.2d 748 (1997).

Enforcement only of obligations under valid court order. — There is no authorization for the provisions of the Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., to be used to force respondent to meet obligation other than under terms of valid court

order. *Balasco v. County of San Diego*, 140 Ga. App. 482, 231 S.E.2d 485 (1976).

Counterclaims precluded. — Statute precludes counterclaim based on theory that the plaintiff, by initiating the proceeding, submits to jurisdiction generally. *Thibadeau v. Thibadeau*, 133 Ga. App. 154, 210 S.E.2d 340 (1974); *Register v. Kandlbinder*, 134 Ga. App. 754, 216 S.E.2d 647 (1975).

O.C.G.A. § 19-11-72 precludes counterclaims based merely on the theory that the plaintiff, by initiating the procedure on behalf of the named defendants, has submitted to the jurisdiction of the court of the responding state for other purposes. *Earley v. Earley*, 165 Ga. App. 483, 300 S.E.2d 814 (1983).

Proceedings as constituting tort upon respondent. — "Proceedings" are not "proceedings" under the statute when the proceedings constitute a tort upon a resident respondent. *Balasco v. County of San Diego*, 140 Ga. App. 482, 231 S.E.2d 485 (1976) (see O.C.G.A. § 19-11-72).

When institution of proceedings under the Uniform Reciprocal Enforcement of Support Act (see now O.C.G.A. § 19-11-40 et seq.) results in implication of a tort upon the respondent, jurisdiction is not merely ancillary to the petitioner's initiation of proceedings under those provisions, but rather would be based upon the commission of a tortious act in this state. *Balasco v. County of San Diego*, 140 Ga. App. 482, 231 S.E.2d 485 (1976).

RESEARCH REFERENCES

C.J.S. — 6 C.J.S., Appearances, § 39. 21 C.J.S., Courts, §§ 99, 108. 67A C.J.S., Parent and Child, § 204 et seq.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 31.

19-11-73. Construction of article.

This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (Ga. L. 1958, p. 34, § 31.)

RESEARCH REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d, Desertion and Nonsupport, § 72 et seq.

C.J.S. — 67A C.J.S., Parent and Child, §§ 175, 203. 82 C.J.S., Statutes, § 486 et seq.

U.L.A. — Uniform Reciprocal Enforcement of Support Act (1958 Act) (U.L.A.) § 41.

19-11-74. Temporary order.

At any time after the filing of a petition for support and before final hearing, the court may, on satisfactory affidavits or other proof, order a temporary allowance pending a hearing on the merits of the petition. (Ga. L. 1958, p. 34, § 32.)

RESEARCH REFERENCES

ALR. — Wife's possession of independent means as affecting her right to child support pendente lite, 60 ALR3d 832.

19-11-75. Right of appeal; effect of appeal on order of support.

Any respondent in an action brought under this article shall have the right of appeal as in civil actions. Any order for support made by the court shall not be affected by an appeal but shall continue in effect until the appeal is decided and thereafter, if the appeal is denied, until changed by further order of the court. (Ga. L. 1958, p. 34, § 33.)

RESEARCH REFERENCES

Am. Jur. 2d. — 73 Am. Jur. 2d, Support of Persons, § 46.

19-11-76. Additional remedies on foreign support order.

If the duty of support is based on a foreign support order, the obligee has the additional remedies provided in Code Sections 19-11-77 through 19-11-81. (Ga. L. 1979, p. 938, § 1.)

Law reviews. — For article surveying legislative and judicial developments in Georgia's divorce, alimony and child custody laws for 1978-79, see 31 Mercer L. Rev. 75 (1979).

19-11-77. Registration of foreign support order; filing in registry of foreign support orders.

(a) The obligee may register the foreign support order in a court of this state in the manner, with the effect, and for the purposes provided in this article.

(b) The clerk of the superior court shall maintain a registry of foreign support orders in which he shall file foreign support orders. (Ga. L. 1979, p. 938, § 1.)

Law reviews. — For article surveying legislative and judicial developments in Georgia's divorce, alimony and child custody laws for 1978-79, see 31 Mercer L. Rev. 75 (1979).

19-11-78. Application of Code Section 19-11-53.

Code Section 19-11-53 shall apply equally when this state is acting either as a rendering or registering state. (Ga. L. 1979, p. 938, § 1.)

19-11-79. Registration procedure — Transmittal of documents to district attorney; filing; notice; docketing.

(a) An obligee seeking to register a foreign support order in a superior court of this state shall transmit to the district attorney:

(1) Three certified copies of the order with all modifications thereof;

(2) One copy of the Uniform Reciprocal Enforcement of Support Act of the state in which the order was made;

(3) One copy of the law governing certification of orders in the state in which the order is being certified; and

(4) A statement, verified and signed by the obligee, showing the post office address of the obligee, the last known place of residence and post office address of the obligor, the amount of support remaining unpaid, a description and the location of any property of the obligor available upon execution, and a list of the states in which the order is registered.

(b) Upon receipt of the documents specified in subsection (a) of this Code section, the district attorney shall file them with the clerk of the superior court, for the purpose of setting a hearing thereon.

(c) Within ten days after the filing, the clerk shall send, by certified or registered mail or statutory overnight delivery with return receipt requested, to the obligor at the address given, a notice of the filing with a copy of the support order and a copy of the rule nisi setting the matter down for hearing. He shall also docket the case for hearing and notify the district attorney. (Ga. L. 1979, p. 938, § 1; Ga. L. 2000, p. 1589, § 4.)

Editor's notes. — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that subsection (c) is applicable with respect to notices delivered on or after July 1, 2000.

Law reviews. — For article surveying legislative and judicial developments in Georgia's divorce, alimony and child custody laws for 1978-79, see 31 Mercer L. Rev. 75 (1979).

19-11-80. Registration procedure — Hearing; defenses; grounds for stay; entry of order as registration; county's entitlement to fee; through whom payments made.

(a) At the hearing, the obligor may present only matters that would be available to him as defenses in an action to enforce a foreign money judgment. If he shows to the court that an appeal from the order is pending or will be taken or that a stay of execution has been granted, the court shall stay enforcement of the order until the appeal is concluded, the time for appeal is expired, or the order is vacated, upon satisfactory proof that the obligor has furnished security for payment of the support as required by the rendering state. If he shows to the court any ground upon which enforcement of a support order of this state may be stayed, the court shall stay enforcement of the order for an appropriate period if the obligor furnishes the same security for payment of the support ordered that is required for a support order of this state.

(b) If the obligor asserts no defenses or the court finds the obligor's defenses meritless, the court shall proceed to enter an order making the foreign support order an order of the courts of this state. The entry of such an order constitutes registration under this article.

(c) The registration of a foreign support order or of an order denying registration or of an order in an action brought to enforce a registered foreign support order shall constitute an order granting or denying support for the purposes of entitling the county in which a proceeding is brought under Code Sections 19-11-76 through 19-11-79, this Code section, and Code Section 19-11-81 to the \$50.00 fee as provided in Code Section 19-11-53.

(d) The court shall be empowered to order payment under the terms of the registered order through the clerk of the superior court, the department, or such other collection agency as the court shall designate. (Ga. L. 1979, p. 938, § 1; Ga. L. 1989, p. 380, § 2; Ga. L. 1991, p. 94, § 19; Ga. L. 1992, p. 6, § 19.)

Law reviews. — For article surveying legislative and judicial developments in Georgia’s divorce, alimony and child custody laws for 1978-79, see 31 Mercer L. Rev. 75 (1979).

For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 232 (1989).

19-11-81. Effect of registration of foreign support order.

Upon registration, the registered foreign support order shall be treated in the same manner as a support order issued by a court of this state. It has the same effect and is subject to the same procedures, defenses, and proceedings for modifying, vacating, or staying as a support order of this state and may be enforced and satisfied in like manner. (Ga. L. 1979, p. 938, § 1.)

Law reviews. — For article surveying legislative and judicial developments in Georgia’s divorce, alimony and child custody laws for 1978-79, see 31 Mercer L. Rev. 75 (1979).

ARTICLE 3

UNIFORM INTERSTATE FAMILY SUPPORT ACT

Law reviews. — For article commenting on the enactment of this article, see 14 Ga. St. U.L. Rev. 121 (1997). For article,

“Georgia’s Constitutional Scheme for State Appellate Jurisdiction,” see 6 Ga. St. B.J. 24 (2001).

JUDICIAL DECISIONS

Act does not apply retroactively. — Uniform Interstate Family Support Act, O.C.G.A. § 19-11-100 et seq., cannot be applied retroactively because of the lan-

guage in its effective date (O.C.G.A. § 19-11-40.1). Georgia Dep’t of Human Resources v. Deason, 238 Ga. App. 853, 520 S.E.2d 712 (1999).

RESEARCH REFERENCES

Am. Jur. Trials. — Interstate Enforcement of Child Support Orders, 37 Am. Jur. Trials 639.

C.J.S. — 27C C.J.S., Divorce, §§ 83 et seq., 611 et seq., 846 et seq.

PART 1

GENERAL PROVISIONS

19-11-100. Short title.

This article shall be known and may be cited as the “Uniform Interstate Family Support Act.” (Code 1981, § 19-11-100, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

Editor's notes. — Ga. L. 2013, p. 705, § 1/SB 193, effective July 1, 2013, reenacted this Code section without change.

JUDICIAL DECISIONS

Applicability. — Filing of an Alabama child support order in a Georgia court was not viewed as a traditional action on a foreign judgment, but was more appropriately governed by the Uniform Interstate Family Support Act (UIFSA), O.C.G.A. § 19-11-100 et seq.; in a Georgia arrearage proceeding under UIFSA, the statute of limitation under the laws of Georgia or of the issuing state, whichever was longer, and since the Alabama period for dormancy of judgments was longer than that of Georgia, Alabama law applied. *Bodenhamer v. Wooten*, 265 Ga. App. 733, 595 S.E.2d 592 (2004).

Procedures set forth in the Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., and the Uniform Interstate Family Support Act, O.C.G.A. § 19-11-100 et seq., for registering and enforcing foreign support judgments are in addition to and not exclusive of the procedures in O.C.G.A. § 9-12-130 et seq. to file and domesticate judgments for enforcement; therefore, a trial court had jurisdiction to consider a mother's petition seeking interest due on child support owing on a Tennessee divorce decree. *Dial v. Adkins*, 265 Ga. App. 650, 595 S.E.2d 332 (2004).

RESEARCH REFERENCES

ALR. — Construction and application of Uniform Interstate Family Support Act, 90 ALR5th 1.

19-11-101. Definitions.

As used in this article, the term:

(1) "Child" means an individual, whether over or under the age of majority, who is or is alleged to be owed a duty of support by the individual's parent or who is or is alleged to be the beneficiary of a support order directed to the parent.

(2) "Child support order" means a support order for a child, including a child who has attained the age of majority under the law of the issuing state or foreign country.

(3) "Convention" means the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, concluded at The Hague on November 23, 2007.

(4) "Duty of support" means an obligation imposed or which may be imposed by law to provide support for a child, spouse, or former spouse, including an unsatisfied obligation to provide support.

(5) "Foreign country" means a country, including a political subdivision thereof, other than the United States, that authorizes the issuance of support orders and:

(A) Which has been declared under the law of the United States to be a foreign reciprocating country;

(B) Which has established a reciprocal arrangement for child support with this state as provided in Code Section 19-11-127;

(C) Which has enacted a law or established procedures for the issuance and enforcement of support orders which are substantially similar to the procedures under this article; or

(D) In which the convention is in force with respect to the United States.

(6) "Foreign support order" means a support order of a foreign tribunal.

(7) "Foreign tribunal" means a court, administrative agency, or quasi-judicial entity of a foreign country which is authorized to establish, enforce, or modify support orders or to determine parentage of a child. The term includes a competent authority under the convention.

(8) "Home state" means the state or foreign country in which a child lived with a parent or a person acting as parent for at least six consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than six months old, the state or foreign country in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the six-month or other period.

(9) "Income" includes earnings or other periodic entitlements to money from any source and any other property subject to withholding for support under the law of Georgia.

(10) "Income-withholding order" means an order or other legal process directed to an obligor's employer or other debtor, pursuant to Code Sections 19-6-31 through 19-6-33, to withhold support from the income of the obligor.

(11) "Initiating tribunal" means the tribunal of a state or foreign country from which a petition or comparable pleading is forwarded or in which a petition or comparable pleading is filed for forwarding to another state or foreign country.

(12) "Issuing foreign country" means the foreign country in which a tribunal issues a support order or a judgment determining parentage of a child.

(13) "Issuing state" means the state in which a tribunal issues a support order or renders a judgment determining parentage of a child.

(14) "Issuing tribunal" means the tribunal of a state or foreign country that issues a support order or a judgment determining parentage of a child.

(15) "Law" includes decisional and statutory law and rules and regulations having the force of law.

(16) "Obligee" means:

(A) An individual to whom a duty of support is or is alleged to be owed or in whose favor a support order or a judgment determining parentage of a child has been issued;

(B) A foreign country, state, or political subdivision of a state to which the rights under a duty of support or support order have been assigned or which has independent claims based on financial assistance provided to an individual obligee in place of child support;

(C) An individual seeking a judgment determining parentage of the individual's child; or

(D) A person that is a creditor in a proceeding under Part 7 of this article.

(17) "Obligor" means an individual or the estate of a decedent that:

(A) Owes or is alleged to owe a duty of support;

(B) Is alleged but has not been adjudicated to be a parent of a child;

(C) Is liable under a support order; or

(D) Is a debtor in a proceeding under Part 7 of this article.

(18) "Outside this state" means a location in another state or a country other than the United States, whether or not the country is a foreign country.

(19) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(20) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(21) "Register" means to record or file in a tribunal of this state a support order or judgment determining parentage of a child issued in another state or a foreign country.

(22) “Registering tribunal” means a tribunal in which a support order or judgment determining parentage of a child is registered.

(23) “Responding state” means a state in which a petition or comparable pleading for support or to determine parentage of a child is filed or to which a petition or comparable pleading is forwarded for filing from another state or foreign country.

(24) “Responding tribunal” means the authorized tribunal in a responding state or foreign country.

(25) “Spousal support order” means a support order for a spouse or former spouse of the obligor.

(26) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession under the jurisdiction of the United States. The term includes an Indian nation or tribe.

(27) “Support enforcement agency” means a public official, governmental entity, or private agency authorized to:

(A) Seek enforcement of support orders or laws relating to the duty of support;

(B) Seek establishment or modification of child support;

(C) Request determination of parentage of a child;

(D) Attempt to locate obligors or their assets; or

(E) Request determination of the controlling child support order.

(28) “Support order” means a judgment, decree, order, decision, or directive, whether temporary, final, or subject to modification, issued in a state or foreign country for the benefit of a child, a spouse, or a former spouse, which provides for monetary support, health care, arrearages, retroactive support, or reimbursement for financial assistance provided to an individual obligee in place of child support. The term may include related costs and fees, interest, income withholding, automatic adjustment, reasonable attorney’s fees, and other relief.

(29) “Tribunal” means a court, administrative agency, or quasi-judicial entity authorized to establish, enforce, or modify support orders or to determine parentage of a child. (Code 1981, § 19-11-101, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, rewrote this Code section.

JUDICIAL DECISIONS

Foreign judgment was a “support order” under the Uniform Interstate Family Support Act. — Trial court erred in vacating the court’s prior order confirming a Massachusetts judgment that required a former husband to pay arrearages and in dismissing a former wife’s petition to register and enforce the judgment as a support order under the Uniform Interstate Family Support Act (UIFSA), O.C.G.A. § 19-11-100 et seq.,

because the Massachusetts judgment fell within the definition of a support order set forth in UIFSA, O.C.G.A. § 19-11-101(21), since it was an order and judgment for the benefit of a former spouse providing for arrearages and interest. *Sussman v. Sussman*, 301 Ga. App. 397, 687 S.E.2d 644 (2009).

Cited in *Baars v. Freeman*, 288 Ga. 835, 708 S.E.2d 273 (2011).

19-11-102. Designated tribunals; support enforcement agency.

(a) The superior courts, the Office of State Administrative Hearings, and the Department of Human Services are the tribunals of Georgia for purposes of this article.

(b) The Department of Human Services shall be the support enforcement agency of this state. (Code 1981, § 19-11-102, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, designated the existing provi-

sions as subsection (a) and added subsection (b).

JUDICIAL DECISIONS

Cited in *Baars v. Freeman*, 288 Ga. 835, 708 S.E.2d 273 (2011).

19-11-103. Nature of remedies.

(a) Remedies provided by this article are cumulative and do not affect the availability of remedies under other law or the recognition of a foreign support order on the basis of comity.

(b) This article does not:

(1) Provide the exclusive method of establishing or enforcing a support order under the law of Georgia; or

(2) Grant a tribunal of Georgia jurisdiction to render judgment or issue an order relating to child custody or visitation in a proceeding under this article. (Code 1981, § 19-11-103, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, designated the existing provi-

sions as subsection (a) and added subsection (b).

JUDICIAL DECISIONS

Applicability. — Procedures set forth in the Uniform Reciprocal Enforcement of Support Act, O.C.G.A. § 19-11-40 et seq., and the Uniform Interstate Family Support Act, O.C.G.A. § 19-11-100 et seq., for registering and enforcing foreign support judgments are in addition to and not exclusive of the procedures in O.C.G.A. § 9-12-130 et seq. to file and domesticate

judgments for enforcement; therefore, a trial court had jurisdiction to consider a mother's petition seeking interest due on child support owing on a Tennessee divorce decree. *Dial v. Adkins*, 265 Ga. App. 650, 595 S.E.2d 332 (2004).

Cited in *Baars v. Freeman*, 288 Ga. 835, 708 S.E.2d 273 (2011).

19-11-104. Applicability.

(a) A tribunal of Georgia shall apply Parts 1 through 6 and, as applicable, Part 7 of this article to a support proceeding involving:

- (1) A foreign support order;
- (2) A foreign tribunal; or
- (3) An obligee, obligor, or child residing in a foreign country.

(b) A tribunal of Georgia that is requested to recognize and enforce a support order on the basis of comity may apply the procedural and substantive provisions of Parts 1 through 6 of this article.

(c) Part 7 of this article applies only to a support proceeding under the convention. In such a proceeding, if a provision of Part 7 of this article is inconsistent with Parts 1 through 6 of this article, Part 7 of this article controls. (Code 1981, § 19-11-104, enacted by Ga. L. 2013, p. 705, § 1/SB 193.)

Effective date. — This Code section became effective July 1, 2013.

PART 2

JURISDICTION; COOPERATION BETWEEN STATES

19-11-110. Jurisdiction.

(a) In a proceeding to establish or enforce a support order or to determine parentage of a child, a tribunal of this state may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:

- (1) The individual is personally served with process within Georgia;
- (2) The individual submits to the jurisdiction of Georgia by consent, by entering a general appearance, or by filing a responsive

document having the effect of waiving any contest to personal jurisdiction;

(3) The individual resided with the child in Georgia;

(4) The individual resided in Georgia and provided prenatal expenses or support for the child;

(5) The child resides in Georgia as a result of the acts or directives of the individual;

(6) The individual engaged in sexual intercourse in Georgia and the child may have been conceived by that act of intercourse;

(7) The individual asserted parentage of a child in the putative father registry maintained in this state by the Department of Human Services; or

(8) There is any other basis consistent with the Constitutions of Georgia and the United States for the exercise of personal jurisdiction.

(b) The bases of personal jurisdiction set forth in subsection (a) of this Code section or in any other law of this state may not be used to acquire personal jurisdiction for a tribunal of this state to modify a child support order of another state unless the requirements of Code Section 19-11-170 are met, or, in the case of a foreign support order, unless the requirements of Code Section 19-11-174 are met. (Code 1981, § 19-11-110, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, designated the existing provisions as subsection (a) and added subsection (b); and, in subsection (a), in the

introductory language, substituted “or enforce a support” for “, enforce, or modify a support” and inserted “of a child”; and inserted “of a child” in paragraph (a)(7).

JUDICIAL DECISIONS

Cited in *Baars v. Freeman*, 288 Ga. 835, 708 S.E.2d 273 (2011).

RESEARCH REFERENCES

C.J.S. — 27C C.J.S., Divorce, §§ 806 et seq., 826 et seq.

ALR. — Requirements and effects of putative father registries, 28 ALR6th 349.

19-11-111. Personal jurisdiction continues while Georgia tribunal retains continuing, exclusive jurisdiction.

Personal jurisdiction acquired by a tribunal of Georgia in a proceeding under this article or other law of Georgia relating to a support order continues so long as a tribunal of Georgia has continuing, exclusive

jurisdiction to modify its order or continuing jurisdiction to enforce its order as provided by Code Sections 19-11-114, 19-11-115, and 19-11-119.1. (Code 1981, § 19-11-111, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted the present provisions of this Code section for the former provisions, which read: “A tribunal of Georgia exercising personal jurisdiction over a nonresident under Code Section 19-11-110 may apply Code Section 19-11-135 to receive evidence from an-

other state and Code Section 19-11-137 to obtain discovery through a tribunal of another state. In all other respects, Parts 3 through 7 of this article do not apply and the tribunal shall apply the procedural and substantive law of Georgia, including the rules on choice of law other than those established by this article.”

JUDICIAL DECISIONS

Cited in Baars v. Freeman, 288 Ga. 835, 708 S.E.2d 273 (2011).

19-11-112. Authority of tribunal.

Under this article, a tribunal in Georgia may serve as an initiating tribunal to forward proceedings to a tribunal of another state and as a responding tribunal for proceedings initiated in another state or foreign country. (Code 1981, § 19-11-112, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, inserted “a tribunal of” near the

middle and added “or foreign country” at the end.

JUDICIAL DECISIONS

Cited in Baars v. Freeman, 288 Ga. 835, 708 S.E.2d 273 (2011).

19-11-113. Limitation on jurisdiction of Georgia tribunal if action filed in another state or foreign country.

- (a) A tribunal in Georgia may exercise jurisdiction to establish a support order if the petition or comparable pleading is filed after a pleading is filed in another state or a foreign country only if:
- (1) The petition or comparable pleading in Georgia is filed before the expiration of the time allowed in the other state or the foreign country for filing a responsive pleading challenging the exercise of jurisdiction by the other state or the foreign country;

(2) The contesting party timely challenges the exercise of jurisdiction in the other state or the foreign country; and

(3) If relevant, Georgia is the home state of the child.

(b) A tribunal in Georgia may not exercise jurisdiction to establish a support order if the petition or comparable pleading is filed before a petition or comparable pleading is filed in another state or a foreign country if:

(1) The petition or comparable pleading in the other state or foreign country is filed before the expiration of the time allowed in Georgia for filing a responsive pleading challenging the exercise of jurisdiction by Georgia;

(2) The contesting party timely challenges the exercise of jurisdiction in Georgia; and

(3) If relevant, the other state or foreign country is the home state of the child. (Code 1981, § 19-11-113, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, inserted “or a foreign country” in the introductory language of subsections (a) and (b); inserted “or the foreign coun-

try” twice in paragraph (a)(1) and once in paragraph (a)(2); and inserted “or foreign country” in paragraphs (b)(1) and (b)(3).

19-11-114. Continuing, exclusive jurisdiction to modify support order.

(a) A tribunal in Georgia that has issued a child support order consistent with the law of Georgia has and shall exercise continuing, exclusive jurisdiction to modify its child support order if the order is the controlling order and:

(1) At the time of the filing of a request for modification Georgia is the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued; or

(2) Even if Georgia is not the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued, the parties consent in a record or in open court that the tribunal of Georgia may continue to exercise jurisdiction to modify its order.

(b) A tribunal in Georgia that has issued a child support order consistent with the law of Georgia may not exercise continuing, exclusive jurisdiction to modify the order if:

(1) All of the parties who are individuals file consent in a record with the tribunal of Georgia that a tribunal of another state that has jurisdiction over at least one of the parties who is an individual or that is located in the state of residence of the child may modify the order and assume continuing, exclusive jurisdiction; or

(2) Its order is not the controlling order.

(c) If a tribunal of another state has issued a child support order pursuant to this article or a law substantially similar to this article which modifies a child support order of a tribunal of Georgia, tribunals of Georgia shall recognize the continuing, exclusive jurisdiction of the tribunal of the other state.

(d) A tribunal of Georgia that lacks continuing, exclusive jurisdiction to modify a child support order may serve as an initiating tribunal to request a tribunal of another state to modify a support order issued in that state.

(e) A temporary support order issued ex parte or pending resolution of a jurisdictional conflict does not create continuing, exclusive jurisdiction in the issuing tribunal. (Code 1981, § 19-11-114, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, rewrote this Code section.

JUDICIAL DECISIONS

Jurisdiction over child support arrearages. — Georgia Uniform Interstate Family Support Act, O.C.G.A. § 19-11-101 et seq., did not deprive a trial court of jurisdiction over the issue of child support arrearages based upon a prior-filed United Kingdom enforcement proceeding. Continuing, exclusive jurisdiction over the child support provisions of

the decree existed in the trial court because the trial court issued the decree, the mother and the child resided in Georgia, and no evidence existed that the parents had filed written consents to allow the tribunal of another state to assume continuing, exclusive jurisdiction. *Baars v. Freeman*, 288 Ga. 835, 708 S.E.2d 273 (2011).

19-11-115. Initiating tribunal; responding tribunal.

(a) A tribunal in Georgia that has issued a child support order consistent with the law of Georgia may serve as an initiating tribunal to request a tribunal of another state to enforce:

(1) The order if the order is the controlling order and has not been modified by a tribunal of another state that assumed jurisdiction pursuant to this article; or

(2) A money judgment for arrears of support and interest on the order accrued before a determination that an order of a tribunal of another state is the controlling order.

(b) A tribunal in Georgia having continuing jurisdiction over a support order may act as a responding tribunal to enforce the order. (Code 1981, § 19-11-115, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, rewrote this Code section.

19-11-116. Governing tribunal when conflicting orders; determination of controlling order.

(a) If a proceeding is brought under this article and only one tribunal has issued a child support order, the order of that tribunal controls and must be recognized.

(b) If a proceeding is brought under this article and two or more child support orders have been issued by tribunals of Georgia, another state, or a foreign country with regard to the same obligor and same child, a tribunal of Georgia having personal jurisdiction over both the obligor and individual obligee shall apply the following rules and by order shall determine which order controls and must be recognized:

(1) If only one of the tribunals would have continuing, exclusive jurisdiction under this article, the order of that tribunal controls;

(2) If more than one of the tribunals would have continuing, exclusive jurisdiction under this article:

(A) An order issued by a tribunal in the current home state of the child controls; or

(B) If an order has not been issued in the current home state of the child, the order most recently issued controls; or

(3) If none of the tribunals would have continuing, exclusive jurisdiction under this article, the tribunal of Georgia shall issue a child support order, which controls.

(c) If two or more child support orders have been issued for the same obligor and same child, upon request of a party who is an individual or that is a support enforcement agency, a tribunal in Georgia having personal jurisdiction over both the obligor and the obligee who is an individual shall determine which order controls subsection (b) of this Code section. The request may be filed with a registration for enforcement or registration for modification pursuant to Part 6 of this article or may be filed as a separate proceeding.

(d) A request to determine which is the controlling order must be accompanied by a copy of every child support order in effect and the applicable record of payments. The requesting party shall give notice of the request to each party whose rights may be affected by the determination.

(e) The tribunal that issued the controlling order under subsection (a), (b), or (c) of this Code section has continuing jurisdiction to the extent provided in Code Sections 19-11-114 and 19-11-115.

(f) A tribunal of Georgia that determines by order which is the controlling order under paragraph (1) or (2) of subsection (b) or subsection (c) of this Code section or that issues a new controlling order under paragraph (3) of subsection (b) of this Code section shall state in that order:

(1) The basis upon which the tribunal made its determination;

(2) The amount of prospective support, if any; and

(3) The total amount of consolidated arrears and accrued interest, if any, under all of the orders after all payments made are credited as provided by Code Section 19-11-118.

(g) Within 30 days after issuance of an order determining which is the controlling order, the party obtaining the order shall file a certified copy of it in each tribunal that issued or registered an earlier order of child support. A party or support enforcement agency obtaining the order that fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the controlling order.

(h) An order that has been determined to be the controlling order, or a judgment for consolidated arrears of support and interest, if any, made pursuant to this Code section must be recognized in proceedings under this article. (Code 1981, § 19-11-116, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, rewrote this Code section.

19-11-117. Enforcement of two or more child support orders, at least one of which was issued by another state or foreign country.

In responding to registrations or petitions for enforcement of two or more child support orders in effect at the same time with regard to the same obligor and different individual obligees, at least one of which was issued by a tribunal of another state or a foreign country, a tribunal of Georgia shall enforce those orders in the same manner as if the orders had been issued by a tribunal of Georgia. (Code 1981, § 19-11-117, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, deleted “multiple” preceding “registrations” near the beginning, inserted “or a foreign country”, and deleted “multiple” preceding “orders” near the end.

19-11-118. Crediting of amounts collected.

A tribunal of Georgia shall credit amounts collected for a particular period pursuant to any child support order against the amounts owed for the same period under any other child support order for support of the same child issued by a tribunal of Georgia or another state, or a foreign country. (Code 1981, § 19-11-118, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted the present provisions of this Code section for the former provisions, which read: "Amounts collected and credited for a particular period

pursuant to a support order issued by a tribunal of another state must be credited against the amounts accruing or accrued for the same period under a support order issued by the tribunal of Georgia."

19-11-119. Evidentiary issues outside state; application.

A tribunal of Georgia exercising personal jurisdiction over a nonresident in a proceeding under this article, under other law of Georgia relating to a support order, or recognizing a foreign support order may receive evidence from outside this state pursuant to Code Section 19-11-135, communicate with a tribunal outside this state pursuant to Code Section 19-11-136, and obtain discovery through a tribunal outside this state pursuant to Code Section 19-11-137. In all other respects, Parts 3 through 6 of this article do not apply and the tribunal shall apply the procedural and substantive law of Georgia. (Code 1981, § 19-11-119, enacted by Ga. L. 2013, p. 705, § 1/SB 193.)

Effective date. — This Code section became effective July 1, 2013.

19-11-119.1. Spousal support order; modification; initiating tribunal to request enforcement; responding tribunal to enforce or modify order.

(a) A tribunal of Georgia issuing a spousal support order consistent with the law of Georgia has continuing, exclusive jurisdiction to modify the spousal support order throughout the existence of the support obligation.

(b) A tribunal of Georgia may not modify a spousal support order issued by a tribunal of another state or a foreign country having continuing, exclusive jurisdiction over that order under the law of that state or foreign country.

(c) A tribunal of Georgia that has continuing, exclusive jurisdiction over a spousal support order may serve as:

(1) An initiating tribunal to request a tribunal of another state to enforce the spousal support order issued in this state; or

(2) A responding tribunal to enforce or modify its own spousal support order. (Code 1981, § 19-11-119.1, enacted by Ga. L. 2013, p. 705, § 1/SB 193.)

Effective date. — This Code section became effective July 1, 2013.

PART 3

CIVIL PROVISIONS

19-11-120. Application of part; initiation of a proceeding.

(a) Except as otherwise provided in this article, this part applies to all proceedings under this article.

(b) An individual petitioner or a support enforcement agency may initiate a proceeding authorized under this article by filing a petition in an initiating tribunal for forwarding to a responding tribunal or by filing a petition or a comparable pleading directly in a tribunal of another state or a foreign country which has or can obtain personal jurisdiction over the respondent. (Code 1981, § 19-11-120, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, deleted former subsection (b), which read: “(b) This article provides for the following proceedings:

“(1) Establishment of an order for spousal support or child support pursuant to Part 4 of this article;

“(2) Enforcement of a support order and income-withholding order of another state without registration pursuant to Part 5 of this article;

“(3) Registration of an order for spousal support or child support of another state for enforcement pursuant to Part 6 of this article;

“(4) Modification of an order for child

support or spousal support issued by a tribunal of Georgia pursuant to Code Sections 19-11-112 through 19-11-115;

“(5) Registration of an order for child support of another state for modification pursuant to Part 6 of this article;

“(6) Determination of parentage pursuant to Part 7 of this article; and

“(7) Assertion of jurisdiction over non-residents pursuant to Code Sections 19-11-110 and 19-11-111.”; redesignated former subsection (c) as present subsection (b); and, in present subsection (b), substituted “initiate” for “commence” near the beginning and inserted “or a foreign country” near the end.

RESEARCH REFERENCES

C.J.S. — 27C C.J.S., Divorce, §§ 803 et seq., 837 et seq.

19-11-121. Representative for minor parent.

A minor parent, or a guardian or other legal representative of a minor parent, may maintain a proceeding on behalf of or for the benefit of the

minor's child. (Code 1981, § 19-11-121, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

Editor's notes. — Ga. L. 2013, p. 705, § 1/SB 193, effective July 1, 2013, reenacted this Code section without change.

19-11-122. Governing law and procedure for responding Georgia tribunal.

Except as otherwise provided in this article, a responding tribunal of Georgia:

(1) Shall apply the procedural and substantive law generally applicable to similar proceedings originating in Georgia and may exercise all powers and provide all remedies available in those proceedings; and

(2) Shall determine the duty of support and the amount payable in accordance with the law and support guidelines of Georgia. (Code 1981, § 19-11-122, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted “provided in” for “provided by” in the introductory language; and deleted “, including the rules on choice of law,” following “substantive law” in paragraph (1).

19-11-123. Information to be provided to responding tribunal.

(a) Upon the filing of a petition authorized by this article, an initiating tribunal of Georgia shall forward the petition and its accompanying documents:

(1) To the responding tribunal or appropriate support enforcement agency in the responding state; or

(2) If the identity of the responding tribunal is unknown, to the state information agency of the responding state with a request that they be forwarded to the appropriate tribunal and that receipt be acknowledged.

(b) If requested by the responding tribunal, a tribunal of Georgia shall issue a certificate or other document and make findings required by the law of the responding state. If the responding tribunal is in a foreign country, upon request the tribunal of Georgia shall specify the amount of support sought, convert that amount into the equivalent amount in the foreign currency under applicable official or market exchange rate as publicly reported, and provide any other documents necessary to satisfy the requirements of the responding foreign tribunal. (Code 1981, § 19-11-123, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted “tribunal of Georgia shall forward the petition” for “tribunal of this state shall forward three copies of the petition” in the introductory language of subsection (a); and rewrote subsection (b), which read: “If a responding state has not enacted this article or a law or procedure substantially similar to this article, a tri-

bunal of Georgia may issue a certificate or other document and make findings required by the law of the responding state. If the responding state is a foreign jurisdiction, the tribunal may specify the amount of support sought and provide other documents necessary to satisfy the requirements of the responding state.”

JUDICIAL DECISIONS

Cited in Baars v. Freeman, 288 Ga. 835, 708 S.E.2d 273 (2011).

19-11-124. Receipt of petition of pleading by responding Georgia tribunal; action authorized; limitations; foreign currency conversion.

(a) When a responding tribunal of Georgia receives a petition or comparable pleading from an initiating tribunal or directly pursuant to subsection (b) of Code Section 19-11-120, it shall cause the petition or pleading to be filed and notify the petitioner where and when it was filed.

(b) A responding tribunal of Georgia, to the extent not prohibited by other law, may do one or more of the following:

- (1) Establish or enforce a support order, modify a child support order, determine the controlling child support order, or determine parentage of a child;
- (2) Order an obligor to comply with a support order, specifying the amount and the manner of compliance;
- (3) Order income withholding;
- (4) Determine the amount of any arrearages and specify a method of payment;
- (5) Enforce orders by civil or criminal contempt, or both;
- (6) Set aside property for satisfaction of the support order;
- (7) Place liens and order execution on the obligor’s property;
- (8) Order an obligor to keep the tribunal informed of the obligor’s current residential address, e-mail address, telephone number, employer, address of employment, and telephone number at the place of employment;
- (9) Issue an order for the arrest of an obligor who has failed after proper notice to appear at a hearing ordered by the tribunal and enter

the arrest order in any local and state computer systems for criminal warrants;

(10) Order the obligor to seek appropriate employment by specified methods;

(11) Award reasonable attorney's fees and other fees and costs; and

(12) Grant any other available remedy.

(c) A responding tribunal of Georgia shall include in a support order issued under this article, or in the documents accompanying the order, the calculations on which the support order is based.

(d) A responding tribunal of Georgia may not condition the payment of a support order issued under this article upon compliance by a party with provisions for visitation.

(e) If a responding tribunal of Georgia issues an order under this article, the tribunal shall send a copy of the order to the petitioner and the respondent and to the initiating tribunal, if any.

(f) If requested to enforce a support order, arrears, or judgment or modify a support order stated in a foreign currency, a responding tribunal of Georgia shall convert the amount stated in the foreign currency to the equivalent amount in dollars under the applicable official or market exchange rate as publicly reported. (Code 1981, § 19-11-124, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted "subsection (b)" for "subsection (c)" in subsection (a); substituted "not prohibited by other law" for "otherwise authorized" in the introductory language of subsection (b); substituted the present provisions of paragraph (b)(1) for

the former provisions, which read: "Issue or enforce a support order, modify a child support order, or render a judgment to determine parentage"; inserted "e-mail address," in paragraph (b)(8); added "for criminal warrants" at the end of paragraph (b)(9); and added subsection (f).

19-11-125. Receipt by inappropriate tribunal.

If a petition or comparable pleading is received by an inappropriate tribunal of this state, the tribunal shall forward the pleading and accompanying documents to an appropriate tribunal of this state or another state and notify the petitioner where and when the pleading was sent. (Code 1981, § 19-11-125, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted "the tribunal shall" for "it shall" near the middle, and substi-

tuted "of this state" for "in this state" near the end.

19-11-126. Support enforcement agency's services; determining controlling order; foreign currency conversion; enforcement of support order and income withholding order of another state; absence of fiduciary relationship.

(a) A support enforcement agency of this state, upon request, shall provide services to a petitioner in a proceeding under this article.

(b) A support enforcement agency of this state that is providing services to the petitioner shall:

(1) Take all steps necessary to enable an appropriate tribunal of Georgia, another state, or a foreign country to obtain jurisdiction over the respondent;

(2) Request an appropriate tribunal to set a date, time, and place for a hearing;

(3) Make a reasonable effort to obtain all relevant information, including information as to income and property of the parties;

(4) Within five days, exclusive of Saturdays, Sundays, and legal holidays, after receipt of a written notice in a record from an initiating, responding, or registering tribunal, send a copy of the notice to the petitioner or other appropriate agency;

(5) Within five days, exclusive of Saturdays, Sundays, and legal holidays, after receipt of a written communication in a record from the respondent or the respondent's attorney, send a copy of the communication to the petitioner; and

(6) Notify the petitioner if jurisdiction over the respondent cannot be obtained.

(c) A support enforcement agency of this state that requests registration of a child support order in this state for enforcement or for modification shall make reasonable efforts:

(1) To ensure that the order to be registered is the controlling order; or

(2) If two or more child support orders exist and the identity of the controlling order has not been determined, to ensure that a request for such a determination is made in a tribunal having jurisdiction to do so.

(d) A support enforcement agency of this state that requests registration and enforcement of a support order, arrears, or judgment stated in a foreign currency shall convert the amounts stated in the foreign currency into the equivalent amounts in dollars under the applicable official or market exchange rate as publicly reported.

(e) A support enforcement agency of this state shall issue or request a tribunal of Georgia to issue a child support order and an income withholding order that redirect payment of current support, arrears, and interest if requested to do so by a support enforcement agency of another state pursuant to Code Section 19-11-138.

(f) This article does not create a relationship of attorney-client or other fiduciary relationship between a support enforcement agency or the attorney for the agency and the individual being assisted by the agency. (Code 1981, § 19-11-126, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, in subsection (b), in the introductory language, inserted “of this state” and deleted “as appropriate” following “the petitioner”; substituted “of Georgia, another state, or a foreign country” for “in Georgia

or another state” in paragraph (b)(1); inserted “in a record” in paragraphs (b)(4) and (b)(5); added subsections (c) through (e); and redesignated former subsection (c) as subsection (f).

19-11-127. Authority of Attorney General.

(a) If the Attorney General determines that the support enforcement agency is neglecting or refusing to provide services to an individual, the Attorney General may provide those services directly to the individual.

(b) The Attorney General may determine that a foreign country has established a reciprocal arrangement for child support with this state and take appropriate action for notification of the determination. (Code 1981, § 19-11-127, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, deleted former subsections (a) and (b), which read: “(a) The district attorney of each judicial circuit shall be authorized to represent the Department of Human Services in any proceeding under this article; otherwise, at the option of the district attorney, actions under this article on behalf of the department shall be brought by attorneys appointed by the Attorney General. Written delegation of such duties previously executed by a district attorney pursuant to Article 2 of this chapter, the “Uniform Reciprocal Enforcement of Support Act,” particularly Code Section 19-11-53, shall constitute a delegation of such representation to the Attorney General for purposes of this article. In all actions brought or maintained by the Department of Human Services, the department shall be regarded as the sole

client of such attorney, and no attorney-client relationship shall be created between such attorney and any individual seeking or receiving services under this article through the Department of Human Services. The department may require a completed application for services pursuant to Title IV-D of the federal Social Security Act as a condition of providing any services under this article.

“(b) Where a support order is established pursuant to Code Section 19-11-140 incident to representation of the department by the district attorney, there shall be paid to the county in which the petition is handled the sum of \$50.00 for each such support order established, whether this state is the initiating or responding jurisdiction.”; redesignated former subsection (c) as present subsection (a); and added present subsection (b).

19-11-128. Employment of private counsel.

An individual may employ private counsel to represent the individual in proceedings authorized by this article. (Code 1981, § 19-11-128, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

Editor's notes. — Ga. L. 2013, p. 705, § 1/SB 193, effective July 1, 2013, reenacted this Code section without change.

19-11-129. State information agency.

(a) The Department of Human Services is the state information agency under this article.

(b) The state information agency shall:

(1) Compile and maintain a current list, including addresses, of the tribunals in this state which have jurisdiction under this article and any support enforcement agencies in this state and transmit a copy to the state information agency of every other state;

(2) Maintain a register of names and addresses of tribunals and support enforcement agencies received from other states;

(3) Forward to the appropriate tribunal in the county in Georgia in which the obligee who is an individual or the obligor resides, or in which the obligor's property is believed to be located, all documents concerning a proceeding under this article received from another state or a foreign country; and

(4) Obtain information concerning the location of the obligor and the obligor's property within this state not exempt from execution, by such means as postal verification and federal or state locator services, examination of telephone directories, requests for the obligor's address from employers, and examination of governmental records, including, to the extent not prohibited by other law, those relating to real property, vital statistics, law enforcement, taxation, motor vehicles, drivers' licenses, and social security. (Code 1981, § 19-11-129, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, inserted "names and addresses of" in paragraph (b)(2); in paragraph (b)(3), substituted "the county in Georgia in which the obligee who is an individual" for "the place in Georgia in which the individual obligee" near the beginning,

and substituted "another state or a foreign country" for "an initiating tribunal or the state information agency of the initiating state" near the end; and substituted "drivers'" for "driver's" near the end of paragraph (b)(4).

19-11-130. Filing of petition to establish, register, or modify support order; required information; relief sought.

(a) In a proceeding under this article, a petitioner seeking to establish a support order to determine parentage of a child, or to register and modify a support order of a tribunal of another state or a foreign country must file a petition. Unless otherwise ordered under Code Section 19-11-131, the petition or accompanying documents must provide, so far as known, the name, residential address, and social security numbers of the obligor and the obligee or the parent and alleged parent and the name, sex, residential address, social security number, and date of birth of each child for whose benefit support is sought or whose parentage is to be determined. Unless filed at the time of registration, the petition must be accompanied by a copy of any support order known to have been issued by another tribunal. The petition may include any other information that may assist in locating or identifying the respondent.

(b) The petition must specify the relief sought. The petition and accompanying documents must conform substantially with the requirements imposed by the forms mandated by federal law for use in cases filed by a support enforcement agency. (Code 1981, § 19-11-130, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, in subsection (a), rewrote the first sentence, which read: “A petitioner seeking to establish or modify a support order or to determine parentage in a proceeding under this article must verify the petition”; in the second sentence, inserted “or the parent and alleged parent”; and in the second and third sentences, substituted

“whose benefit support is sought or whose parentage is to be determined. Unless filed at the time of registration the petition must be accompanied by a copy of any support order known to have been issued by another tribunal.” for “whom support is sought. The petition must be accompanied by a certified copy of any support order in effect.”

19-11-131. Nondisclosure of identifying information where health, safety, or liberty at risk; disclosure of information in the interest of justice.

If a party alleges in an affidavit or a pleading under oath that the health, safety, or liberty of a party or child would be jeopardized by disclosure of specific identifying information, that information must be sealed and may not be disclosed to the other party or the public. After a hearing in which a tribunal takes into consideration the health, safety, or liberty of the party or child, the tribunal may order disclosure of information that the tribunal determines to be in the interest of justice. (Code 1981, § 19-11-131, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted the present provisions of this Code section for the former provisions, which read: “Upon a finding, which may be made ex parte, that the health, safety, or liberty of a party or child would be unreasonably put at risk by the

disclosure of identifying information, or if an existing order so provides, a tribunal shall order that the address of the child or party or other identifying information not be disclosed in a pleading or other document filed in a proceeding under this article.”

19-11-132. Fees and costs.

(a) The petitioner may not be required to pay a filing fee or other costs.

(b) If an obligee prevails, a responding tribunal of Georgia may assess against an obligor filing fees, reasonable attorney’s fees, other costs, and necessary travel and other reasonable expenses incurred by the obligee and the obligee’s witnesses. The tribunal may not assess fees, costs, or expenses against the obligee or the support enforcement agency of either the initiating or the responding state or foreign country, except as provided by other law. Attorney’s fees may be taxed as costs and may be ordered paid directly to the attorney, who may enforce the order in the attorney’s own name. Payment of support owed to the obligee has priority over fees, costs, and expenses.

(c) The tribunal shall order the payment of costs and reasonable attorney’s fees if it determines that a hearing was requested primarily for delay. In a proceeding under Part 6 of this article, a hearing is presumed to have been requested primarily for delay if a registered support order is confirmed or enforced without change. (Code 1981, § 19-11-132, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, in subsection (b), inserted “of Georgia” in the first sentence, and in-

serted “or foreign country” in the second sentence.

19-11-133. Personal jurisdiction.

(a) Participation by a petitioner in a proceeding under this article before a responding tribunal, whether in person, by private attorney, or through services provided by the support enforcement agency, does not confer personal jurisdiction over the petitioner in another proceeding.

(b) A petitioner is not amenable to service of civil process while physically present in this state to participate in a proceeding under this article.

(c) The immunity granted by this Code section does not extend to civil litigation based on acts unrelated to a proceeding under this article committed by a party while physically present in Georgia to participate

in the proceeding. (Code 1981, § 19-11-133, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, inserted “under this article” in subsection (a) and inserted “physically” in subsection (c).

19-11-134. Defense of nonparentage.

A party whose parentage of a child has been previously determined by or pursuant to law may not plead nonparentage as a defense to a proceeding under this article. (Code 1981, § 19-11-134, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

Editor’s notes. — Ga. L. 2013, p. 705, § 1/SB 193, effective July 1, 2013, reenacted this Code section without change.

19-11-135. Physical presence of individual nonresident party not required; admissible evidence.

(a) The physical presence of a nonresident party who is an individual in a tribunal of Georgia is not required for the establishment, enforcement, or modification of a support order or the rendition of a judgment determining parentage of a child.

(b) An affidavit, a document substantially complying with federally mandated forms, or a document incorporated by reference in any of them, which would not be excluded under the hearsay rule if given in person, is admissible in evidence if given under penalty of perjury by a party or witness residing outside this state.

(c) A copy of the record of child support payments certified as a true copy of the original by the custodian of the record may be forwarded to a responding tribunal. The copy is evidence of facts asserted in it and is admissible to show whether payments were made.

(d) Copies of bills for testing for parentage of a child, and for prenatal and postnatal health care of the mother and child, furnished to the adverse party at least ten days before trial, are admissible in evidence to prove the amount of the charges billed and that the charges were reasonable, necessary, and customary.

(e) Documentary evidence transmitted from outside this state to a tribunal of Georgia by telephone, telecopier, or other electronic means that do not provide an original record may not be excluded from evidence on an objection based on the means of transmission.

(f) In a proceeding under this article, a tribunal of Georgia shall permit a party or witness residing outside this state to be deposed or to testify under penalty of perjury by telephone, audiovisual means, or

other electronic means at a designated tribunal or other location. A tribunal of Georgia shall cooperate with other tribunals in designating an appropriate location for the deposition or testimony.

(g) If a party called to testify at a civil hearing refuses to answer on the ground that the testimony may be self-incriminating, the trier of fact may draw an adverse inference from the refusal.

(h) A privilege against disclosure of communications between spouses does not apply in a proceeding under this article.

(i) The defense of immunity based on the relationship of husband and wife or parent and child does not apply in a proceeding under this article.

(j) A voluntary acknowledgment of paternity, certified as a true copy, is admissible to establish parentage of the child. (Code 1981, § 19-11-135, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, in subsection (a), substituted “a nonresident party who is an individual in a tribunal” for “the petitioner in a responding tribunal” near the beginning and added “of a child” at the end; in subsection (b), substituted “An affidavit, a document” for “A verified petition, affidavit, document” at the beginning, near the middle, substituted “or a document” for “and a document” and substituted “which would not be excluded” for “not excluded” and substituted “under penalty of perjury by a party or witness residing outside this state” for “under oath by a party or witness residing in another state” at the end;

inserted “of a child,” in subsection (d); in subsection (e), substituted “outside this state” for “another state”, inserted “electronic”, and substituted “original record” for “original writing”; in subsection (f), in the first sentence, substituted “shall permit a party or witness residing outside this state” for “may permit a party or witness residing in another state” near the beginning, inserted “under penalty of perjury” near the middle, deleted “in that state” following “location” at the end, and substituted “of Georgia shall cooperate with other tribunals” for “this state shall cooperate with tribunals of other states”; and added subsection (j).

JUDICIAL DECISIONS

Testimony by telephone. — Pursuant to O.C.G.A. § 19-11-135(f) and given that two closely interrelated contempt proceedings between a former husband and a former wife were consolidated for hearing, the trial court did not abuse the court’s

discretion in permitting one of the former spouses to testify by telephone or by not dismissing the spouse’s contempt motion for want of prosecution. *Baars v. Freeman*, 288 Ga. 835, 708 S.E.2d 273 (2011).

19-11-136. Communication between tribunals.

A tribunal in Georgia may communicate with a tribunal outside this state in a record, or by telephone, e-mail, or other means, to obtain information concerning the laws, the legal effect of a judgment, decree, or order of that tribunal, and the status of a proceeding. A tribunal in

Georgia may furnish similar information by similar means to a tribunal outside this state. (Code 1981, § 19-11-136, enacted by Ga. L. 1997, p. 1613 § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, in the first sentence, substituted “a tribunal outside this state in a record, or by telephone, email, or” for “a tribunal of another state in writing, or by telephone, or” near the beginning, deleted “of

that state” following “laws” near the middle, and deleted “in the other state” following “proceeding” at the end; and substituted “outside this state” for “of another state” at the end of the second sentence.

19-11-137. Tribunal’s authority to accomplish discovery.

A tribunal of this state may:

(1) Request a tribunal outside this state to assist in obtaining discovery; and

(2) Upon request, compel a person over which it has jurisdiction to respond to a discovery order issued by a tribunal outside this state. (Code 1981, § 19-11-137, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted “outside this state” for “of another state” in paragraphs (1)

and (2), and substituted “over which” for “over whom” in paragraph (2).

19-11-138. Disbursement of funds; redirecting payments.

(a) A support enforcement agency or tribunal in Georgia shall disburse promptly any amounts received pursuant to a support order, as directed by the order. The agency or tribunal shall furnish to a requesting party or tribunal of another state or a foreign country a certified statement by the custodian of the record of the amounts and dates of all payments received.

(b) If neither the obligor, nor the obligee who is an individual, nor the child resides in this state, upon request from the support enforcement agency of Georgia or another state, the support enforcement agency of this state or a tribunal of this state shall:

(1) Direct that the support payment be made to the support enforcement agency in the state in which the obligee is receiving services; and

(2) Issue and send to the obligor’s employer a conforming income withholding order or an administrative notice of change of payee, reflecting the redirected payments.

(c) The support enforcement agency of this state receiving redirected payments from another state pursuant to a law similar to subsection (b)

of this Code section shall furnish to a requesting party or tribunal of the other state a certified statement by the custodian of the record of the amount and dates of all payments received. (Code 1981, § 19-11-138, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, designated the existing provisions as subsection (a) and inserted “or a foreign country” in the last sentence; and added subsections (b) and (c).

PART 4

ESTABLISHMENT OF SUPPORT ORDER

19-11-140. Authority of tribunal upon failure to issue support order; temporary child support order.

(a) If a support order entitled to recognition under this article has not been issued, a responding tribunal of this state with personal jurisdiction over the parties may issue a support order if:

(1) The individual seeking the order resides outside this state; or

(2) The support enforcement agency seeking the order is located outside this state.

(b) The tribunal may issue a temporary child support order if the tribunal determines that such an order is appropriate and the individual ordered to pay is:

(1) A presumed father of the child;

(2) Petitioning to have his paternity adjudicated;

(3) Identified as the father of the child through genetic testing;

(4) An alleged father who has declined to submit to genetic testing;

(5) Shown by clear and convincing evidence to be the father of the child;

(6) An acknowledged father as provided by applicable state law or the law of a foreign country;

(7) The mother of the child; or

(8) An individual who has been ordered to pay child support in a previous proceeding and the order has not been reversed or vacated.

(c) Upon finding, after notice and opportunity to be heard, that an obligor owes a duty of support, the tribunal shall issue a support order directed to the obligor and may issue other orders pursuant to Code Section 19-11-124. (Code 1981, § 19-11-140, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, inserted “with personal jurisdiction over the parties” in the introductory paragraph of subsection (a); replaced “in another state” with “outside this state” in paragraphs (1) and (2) of subsection (a); and substituted the present provisions of subsection (b) for the former provisions, which read: “(b) The tribunal may issue a temporary child support order if:

“(1) The respondent has signed a verified statement acknowledging parentage;

“(2) The respondent has been determined by or pursuant to law to be the parent; or

“(3) There is other clear and convincing evidence that the respondent is the child’s parent”.

RESEARCH REFERENCES

C.J.S. — 27C C.J.S., Divorce, § 706 et seq.

19-11-141. Responding tribunal.

A tribunal of Georgia authorized to determine parentage of a child may serve as a responding tribunal in a proceeding to determine parentage of a child brought under this article or a law or procedure substantially similar to this article. (Code 1981, § 19-11-141, enacted by Ga. L. 2013, p. 705, § 1/SB 193.)

Effective date. — This Code section became effective July 1, 2013.

PART 5

DIRECT ENFORCEMENT OF ORDER OF ANOTHER STATE WITHOUT REGISTRATION

19-11-150. Issuance of income-withholding orders.

An income-withholding order issued in another state may be sent by or on behalf of the obligee, or by the support enforcement agency, to the person defined as the obligor’s employer pursuant to Code Sections 19-6-31 through 19-6-33 without first filing a petition or comparable pleading or registering the order with a tribunal of this state. (Code 1981, § 19-11-150, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, in the middle of this Code section, inserted “by or on behalf of the obligee, or by the support enforcement agency,” and inserted “person defined as the”.

19-11-151. Obligation of employer upon receipt of income-withholding order.

(a) Upon receipt of an income-withholding order, the obligor’s employer shall immediately provide a copy of the order to the obligor.

(b) The employer shall treat an income-withholding order issued in another state which appears regular on its face as if it had been issued by a tribunal of Georgia.

(c) Except as otherwise provided by subsection (d) of this Code section and Code Section 19-11-152, the employer shall withhold and distribute the funds as directed in the withholding order by complying with the terms of the order which specify:

(1) The duration and the amount of periodic payments of current child support, stated as a sum certain;

(2) The person designated to receive payments and the address to which the payments are to be forwarded;

(3) Medical support, whether in the form of periodic cash payment, stated as a sum certain, or ordering the obligor to provide health insurance coverage for the child under a policy available through the obligor's employment;

(4) The amount of periodic payments of fees and costs for a support enforcement agency, the issuing tribunal, and the obligee's attorney, stated as sums certain; and

(5) The amount of periodic payments of arrearages and interest on arrearages, stated as sums certain.

(d) An employer shall comply with the law of the state of the obligor's principal place of employment for withholding from income with respect to:

(1) The employer's fee for processing an income-withholding order;

(2) The maximum amount permitted to be withheld from the obligor's income; and

(3) The time periods within which the employer must implement the withholding order and forward the child support payment. (Code 1981, § 19-11-151, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, deleted "or agency" preceding "designated" in paragraph (c)(2).

19-11-152. Receipt of two or more income-withholding orders.

If an obligor's employer receives two or more income-withholding orders with respect to the earnings of the same obligor, the employer satisfies the terms of the orders if the employer complies with the law of the state of the obligor's principal place of employment to establish the priorities for withholding and allocating income withheld for two or

more child support obligees. (Code 1981, § 19-11-152, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted “two or more” for “multiple” near the beginning and end, and deleted “multiple” preceding “orders” near the middle.

19-11-153. Civil liability.

An employer that complies with an income-withholding order issued in another state in accordance with this article is not subject to civil liability to an individual or agency with regard to the employer’s withholding of child support from the obligor’s income. (Code 1981, § 19-11-153, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted “that complies” for “who complies” near the beginning.

19-11-154. Penalties for employer’s noncompliance.

An employer that willfully fails to comply with an income-withholding order issued in another state and received for enforcement is subject to the same penalties that may be imposed for noncompliance with an order issued by a tribunal in Georgia. (Code 1981, § 19-11-154, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted “that willfully” for “who willfully” near the beginning and substituted “in another” for “by another” near the middle.

19-11-155. Contesting of order from another tribunal.

(a) An obligor may contest the validity or enforcement of an income-withholding order issued in another state and received directly by an employer in Georgia by registering the order in a tribunal of Georgia and filing a contest to that order as provided in Part 6 of this article, or otherwise contesting the order in the same manner as if the order had been issued by a tribunal of Georgia.

(b) The obligor shall give notice of the contest to:

(1) Any support enforcement agency providing services to the obligee;

(2) Each employer that has directly received an income-withholding order relating to the obligor; and

(3) The person designated to receive payments in the income-withholding order or, if no person is designated, to the obligee. (Code 1981, § 19-11-155, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, in subsection (a), inserted “by registering the order in a tribunal of Georgia and filing a contest to that order as provided in Part 6 of this article, or otherwise contesting the order” and deleted the

former second sentence, which read: “Code Section 19-11-163 applies to the contest.”; inserted “relating to the obligor” in paragraph (b)(2); and deleted “or agency” following “person” twice in paragraph (b)(3).

19-11-156. Enforcement of orders issued by another state or foreign country.

(a) A party or support enforcement agency seeking to enforce a support order or an income-withholding order, or both, issued in another state or a foreign support order may send the documents required for registering the order to a support enforcement agency of Georgia.

(b) Upon receipt of the documents, the support enforcement agency, without initially seeking to register the order, shall consider and, if appropriate, use any administrative procedure authorized by the law of Georgia to enforce a support order or an income-withholding order, or both. If the obligor does not contest administrative enforcement, the order need not be registered. If the obligor contests the validity or administrative enforcement of the order, the support enforcement agency shall register the order pursuant to this article. (Code 1981, § 19-11-156, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, in subsection (a), inserted “or support enforcement agency” near the beginning and substituted “issued in an-

other state or a foreign support order” for “issued by a tribunal of another state” near the middle.

PART 6

ENFORCEMENT AND MODIFICATION OF SUPPORT ORDER AFTER REGISTRATION

19-11-160. Registration of orders issued by another state or foreign country.

A support order or income-withholding order issued in another state or a foreign support order may be registered in Georgia for enforcement. (Code 1981, § 19-11-160, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted “or income-withholding order issued in another state or a foreign support order” for “or an income-withholding order issued by a tribunal of another state” in this Code section.

JUDICIAL DECISIONS

Cited in *Sussman v. Sussman*, 301 Ga. App. 397, 687 S.E.2d 644 (2009).

19-11-161. Requirements for registration of orders issued by another state or foreign country; other filings.

(a) Except as otherwise provided in Code Section 19-11-184.1, a support order or income-withholding order of another state or a foreign support order may be registered in Georgia by sending the following records to the appropriate tribunal in Georgia:

(1) A letter of transmittal to the tribunal requesting registration and enforcement;

(2) Two copies, including one certified copy, of the order to be registered, including any modification of the order;

(3) A sworn statement by the person requesting registration or a certified statement by the custodian of the records showing the amount of any arrearage;

(4) The name of the obligor and, if known:

(A) The obligor’s address and social security number;

(B) The name and address of the obligor’s employer and any other source of income of the obligor; and

(C) A description and the location of property of the obligor in Georgia not exempt from execution; and

(5) Except as otherwise provided in Code Section 19-11-131, the name and address of the obligee and, if applicable, the person to whom support payments are to be remitted.

(b) On receipt of a request for registration, the registering tribunal shall cause the order to be filed as an order of a tribunal of another state or a foreign support order, together with one copy of the documents and information, regardless of their form.

(c) A petition, motion, or comparable filing seeking a remedy that must be affirmatively sought under other laws of this state, and discovery incident thereto, may be filed at the same time as the request for registration or later. The pleading, motion, or other filing must specify the grounds for the remedy sought. For purposes of this

subsection, remedies sought may include, but are not limited to, a rule for contempt or a petition for entry of an income deduction order.

(d) If two or more orders are in effect, the person requesting registration shall:

(1) Furnish to the tribunal a copy of every support order asserted to be in effect in addition to the documents specified in this Code section;

(2) Specify the order alleged to be the controlling order, if any; and

(3) Specify the amount of consolidated arrears, if any.

(e) A request for a determination of which is the controlling order may be filed separately or with a request for registration and enforcement or for registration and modification. The person requesting registration shall give notice of the request to each party whose rights may be affected by the determination. (Code 1981, § 19-11-161, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, in subsection (a), in the introductory language, substituted “Except as otherwise provided in Code Section 19-11-184.1,” for “A” at the beginning, inserted “or a foreign support order” in the middle, and substituted “records” for “documents and information” near the end; in paragraph (a)(2), substituted “the order” for “all orders” and “the order” for “an order”; substituted “person requesting”

for “party seeking” in paragraph (a)(3); in paragraph (a)(5), substituted “Except as otherwise provided in Code Section 19-11-131, the” for “The” at the beginning, and deleted “agency or” preceding “person” in the middle; substituted “an order of a tribunal of another state or a foreign support order” for “a foreign judgment” in subsection (b); and added subsections (d) and (e).

19-11-162. Filing in Georgia tribunal required for registration; enforcement; modification.

(a) A support order or income-withholding order issued in another state or a foreign support order is registered when the order is filed in the registering tribunal of Georgia.

(b) A registered support order issued in another state or a foreign country is enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal in Georgia.

(c) Except as otherwise provided in this part, a tribunal in Georgia shall recognize and enforce, but may not modify, a registered support order if the issuing tribunal had jurisdiction. (Code 1981, § 19-11-162, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, inserted “or a foreign support order” in subsection (a); in subsection (b),

inserted “support” and inserted “or a foreign country”; and inserted “support” in subsection (c).

19-11-163. Governing law; statute of limitations; application of procedural and remedial law of Georgia; prospective application of law of other state or foreign country.

(a) Except as otherwise provided in subsection (d) of this Code section, the law of the issuing state or foreign country governs:

(1) The nature, extent, amount, and duration of current payments under a registered support order;

(2) The computation and payment of arrearages and accrual of interest on the arrearages under the support order; and

(3) The existence and satisfaction of other obligations under the support order.

(b) In a proceeding for arrears under a registered support order, the statute of limitation of Georgia or of the issuing state or foreign country, whichever is longer, applies.

(c) A responding tribunal of Georgia shall apply the procedures and remedies of this state to enforce current support and collect arrears and interest due on a support order of another state or a foreign country registered in Georgia.

(d) After a tribunal of Georgia or another state determines which is the controlling order and issues an order consolidating arrears, if any, a tribunal of Georgia shall prospectively apply the law of the state or foreign country issuing the controlling order, including its law on interest on arrears, on current and future support, and on consolidated arrears. (Code 1981, § 19-11-163, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted the present provisions of subsection (a) for the former provisions, which read: “The law of the issuing state governs the nature, extent, amount, and duration of current payments and other obligations of support and the payment of arrearages under the

order.”; in subsection (b), substituted “arrears under a registered support order” for “arrearages” near the beginning, deleted “under the laws” preceding “of Georgia” near the middle, and inserted “or foreign country” near the end; and added subsections (c) and (d).

JUDICIAL DECISIONS

Law from another state properly applied. — Trial court properly applied Florida law in addressing respondent father’s defense of dormancy in an action by petitioner human resources department to collect arrearages under a Florida child support order when Florida was the issuing state within the meaning of O.C.G.A.

§ 19-11-163(a) and had a shorter statute of limitation than Georgia for purposes of O.C.G.A. § 19-11-163(b). *Owens v. Dep’t of Human Res.*, 255 Ga. App. 678, 566 S.E.2d 403 (2002).

Filing of an Alabama child support order in a Georgia court was not viewed as a traditional action on a foreign judgment,

but was more appropriately governed by the Uniform Interstate Family Support Act (UIFSA), O.C.G.A. § 19-11-100 et seq.; in a Georgia arrearage proceeding under UIFSA, the statute of limitation under the laws of Georgia or of the issuing state, whichever was longer, and since the Alabama period for dormancy of judgments was longer than that of Georgia, Alabama law applied. *Bodenhamer v. Wooten*, 265 Ga. App. 733, 595 S.E.2d 592 (2004).

Law of foreign state should have been applied. — Trial court erred in vacating the court's prior order confirming a Massachusetts judgment that required a former husband to pay arrearages and in dismissing a former wife's petition to register and enforce the judgment as a support order under the Uniform Inter-

state Family Support Act (UIFSA), O.C.G.A. § 19-11-100 et seq., on the ground that the Massachusetts judgment was dormant under Georgia law; under the choice of law provisions of UIFSA, Massachusetts law controlled, and the Massachusetts judgment remained enforceable under that state's statute of limitation because the Massachusetts statute of limitation for the enforcement of judgments was 20 years, and less than 20 years had elapsed since the issuance of the Massachusetts judgment. The limitation period for the enforcement of judgments was longer in Massachusetts than in Georgia, and the trial court should have applied Massachusetts law to the dormancy issue in the case. *Sussman v. Sussman*, 301 Ga. App. 397, 687 S.E.2d 644 (2009).

19-11-164. Notification to nonregistering party and obligor's employer.

(a) When a support order or income-withholding order issued in another state or a foreign support order is registered, the registering tribunal of Georgia shall notify the nonregistering party. The notice must be accompanied by a copy of the registered order and the documents and relevant information accompanying the order.

(b) A notice must inform the nonregistering party:

(1) That a registered order is enforceable as of the date of registration in the same manner as an order issued by a tribunal of Georgia;

(2) That a hearing to contest the validity or enforcement of the registered order must be requested within 20 days after notice unless the registered order is under Code Section 19-11-184.2;

(3) That failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrearages and precludes further contest of that order with respect to any matter that could have been asserted; and

(4) Of the amount of any alleged arrearages.

(c) If the registering party asserts that two or more orders are in effect, a notice must also:

(1) Identify the two or more orders and the order alleged by the registering party to be the controlling order and the consolidated arrears, if any;

(2) Notify the nonregistering party of the right to a determination of which is the controlling order;

(3) State that the procedures provided in subsection (b) of this Code section apply to the determination of which is the controlling order; and

(4) State that failure to contest the validity or enforcement of the order alleged to be the controlling order in a timely manner may result in confirmation that the order is the controlling order.

(d) Upon registration of an income-withholding order for enforcement, the support enforcement agency or the registering tribunal shall notify the obligor's employer pursuant to Code Sections 19-6-31 through 19-6-33. (Code 1981, § 19-11-164, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, in subsection (a), inserted "or a foreign support order" and "of Georgia" in the first sentence; substituted "A notice" for "The notice" at the beginning of the introductory language of subsection (b); inserted "unless the registered order is

under Code Section 19-11-184.2" at the end of paragraph (b)(2); added present subsection (c); redesignated former subsection (c) as subsection (d); and inserted "the support enforcement agency or" in subsection (d).

19-11-165. Contesting the validity of registered support order by nonregistering party.

(a) A nonregistering party seeking to contest the validity or enforcement of a registered order in Georgia shall request a hearing within the time required by Code Section 19-11-164. The nonregistering party may seek to vacate the registration, to assert any defense to an allegation of noncompliance with the registered order, or to contest the remedies being sought or the amount of any alleged arrearages pursuant to Code Section 19-11-166.

(b) If the nonregistering party fails to contest the validity or enforcement of the registered support order in a timely manner, the order is confirmed by operation of law.

(c) If a nonregistering party requests a hearing to contest the validity or enforcement of the registered support order, the registering tribunal shall schedule the matter for hearing and give notice to the parties of the date, time, and place of the hearing. (Code 1981, § 19-11-165, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted "the time required by Code Section 19-11-164" for "20 days after

notice of the registration" at the end of the first sentence of subsection (a); and inserted "support" in subsections (b) and (c).

19-11-166. Burden of proof in contesting validity of registered support order; stays.

(a) A party contesting the validity or enforcement of a registered support order or seeking to vacate the registration has the burden of proving one or more of the following defenses:

- (1) The issuing tribunal lacked personal jurisdiction over the contesting party;
- (2) The order was obtained by fraud;
- (3) The order has been vacated, suspended, or modified by a later order;
- (4) The issuing tribunal has stayed the order pending appeal;
- (5) There is a defense under the law of Georgia to the remedy sought;
- (6) Full or partial payment has been made;
- (7) The statute of limitation under Code Section 19-11-163 precludes enforcement of some or all of the alleged arrearages; or
- (8) The alleged controlling order is not the controlling order.

(b) If a party presents evidence establishing a full or partial defense under subsection (a) of this Code section, a tribunal may stay enforcement of a registered support order, continue the proceeding to permit production of additional relevant evidence, and issue temporary or other appropriate orders. Any portion of the registered support order which is not in dispute may be enforced by all remedies available under the laws of Georgia.

(c) If the contesting party does not establish a defense under subsection (a) of this Code section to the validity or enforcement of a registered support order, the registering tribunal shall issue an order confirming the order. (Code 1981, § 19-11-166, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, inserted “support” in the introductory language of subsection (a); deleted “or” at the end of paragraph (a)(6); in paragraph (a)(7), inserted “alleged” and added “; or” at the end; added paragraph

(a)(8); in subsection (b), substituted “a registered support order” for “the registered order” in the first sentence, and inserted “support” in the last sentence; and substituted “a registered support order” for “the order” in subsection (c).

19-11-167. Effect of confirmation.

Confirmation of a registered support order, whether by operation of law or after notice and hearing, precludes further contest of the order

with respect to any matter that could have been asserted at the time of registration. (Code 1981, § 19-11-167, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, inserted “support” near the beginning of this Code section.

19-11-168. Petitions for modification.

A party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another state shall register that order in Georgia in the same manner provided in Code Sections 19-11-160 through 19-11-167 if the order has not been registered. A petition for modification may be filed at the same time as a request for registration, or later. The pleading must specify the grounds for modification. (Code 1981, § 19-11-168, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted “19-11-167” for “19-11-163” in the first sentence.

19-11-169. Enforcement pending modification.

A tribunal of Georgia may enforce a child support order of another state registered for purposes of modification in the same manner as if the order had been issued by a tribunal of Georgia, but the registered support order may be modified only if the requirements of Code Section 19-11-170 or 19-11-172 have been met. (Code 1981, § 19-11-169, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, inserted “support” near the middle and inserted “or 19-11-172” near the end of this Code section.

19-11-170. Requirements for modification; effect on jurisdiction.

(a) If Code Section 19-11-172 does not apply, upon petition a tribunal of Georgia may modify a child support order issued in another state which is registered in Georgia if, after notice and hearing, the tribunal finds that:

(1) The following requirements are met:

(A) Neither the child, nor the obligee who is an individual, nor the obligor resides in the issuing state;

(B) A petitioner who is a nonresident of Georgia seeks modification; and

(C) The respondent is subject to the personal jurisdiction of the tribunal of Georgia; or

(2) This state is the residence of the child or a party who is an individual, is subject to the personal jurisdiction of the tribunal of Georgia, and all of the parties who are individuals have filed consents in a record in the issuing tribunal for a tribunal of this state to modify the support order and assume continuing, exclusive jurisdiction.

(b) Modification of a registered child support order is subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by a tribunal of this state, and the order may be enforced and satisfied in the same manner.

(c) A tribunal in Georgia may not modify any aspect of a child support order that may not be modified under the law of the issuing state, including the duration of the obligation of support. If two or more tribunals have issued child support orders for the same obligor and same child, the order that controls and must be so recognized under the provisions of Code Section 19-11-116 establishes the aspects of the support order which are nonmodifiable.

(d) In a proceeding to modify a child support order, the law of the state that is determined to have issued the initial controlling order governs the duration of the obligation of support. The obligor’s fulfillment of the duty of support established by that order precludes imposition of a further obligation of support by a tribunal of Georgia.

(e) On issuance of an order by a tribunal of Georgia modifying a child support order issued in another state, the tribunal of Georgia becomes the tribunal having continuing, exclusive jurisdiction.

(f) Notwithstanding subsections (a) through (e) of this Code section and subsection (b) of Code Section 19-11-110, a tribunal of Georgia retains jurisdiction to modify an order issued by a tribunal of Georgia if:

(1) One party resides in another state; and

(2) The other party resides outside the United States. (Code 1981, § 19-11-170, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted the present introductory language of subsection (a) for the former provisions, which read: “After a child support order issued in another state has been registered in Georgia, the responding tribunal of Georgia may modify that order only if Code Section 19-11-172 does not apply and, after notice and hearing, it finds that”; substituted

“Neither the child, nor the obligee who is an individual, nor the obligor resides” for “The child, the individual obligee, and the obligor do not reside” in subparagraph (a)(1)(A); in paragraph (a)(2), substituted “This state is the residence of the child or” for “The child, or” at the beginning, substituted “filed consents in a record” for “filed written consents” near the middle, and deleted “over the order. However, if

the issuing state is a foreign jurisdiction that has not enacted a law or established procedures substantially similar to the procedures under this article, the consent otherwise required of an individual residing in this state is not required for the tribunal to assume jurisdiction to modify the child support order” following “jurisdiction” at the end; in subsection (c),

added “, including the duration of the obligation of support” at the end of the first sentence, and inserted “same” in the second sentence; added present subsection (d); redesignated former subsection (d) as present subsection (e); in subsection (e), inserted “by a tribunal of Georgia” and substituted “the tribunal” for “a tribunal”; and added subsection (f).

19-11-171. Recognition of modification by another tribunal.

If a child support order issued by a tribunal in Georgia is modified by a tribunal of another state which assumed jurisdiction pursuant to this article, a tribunal of Georgia:

- (1) May enforce its order that was modified only as to arrears and interest accruing before the modification;
- (2) May provide appropriate relief for violations of its order which occurred before the effective date of the modification; and
- (3) Shall recognize the modifying order of the other state, upon registration, for the purpose of enforcement. (Code 1981, § 19-11-171, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted the present provisions of this Code section for the former provisions, which read: “A tribunal in Georgia shall recognize a modification of its earlier child support order by a tribunal of another state which assumed jurisdiction pursuant to this article or a law substantially similar to this article and, upon request, except as otherwise provided in this article, shall:

“(1) Enforce the order that was modified

only as to amounts accruing before the modification;

“(2) Enforce only nonmodifiable aspects of that order;

“(3) Provide other appropriate relief only for violations of that order which occurred before the effective date of the modification; and

“(4) Recognize the modifying order of the other state, upon registration, for the purpose of enforcement.”

19-11-172. Jurisdiction; application of article.

(a) If all of the parties who are individuals reside in Georgia and the child does not reside in the issuing state, a tribunal in Georgia has jurisdiction to enforce and to modify the issuing state’s child support order in a proceeding to register that order.

(b) A tribunal in Georgia exercising jurisdiction as provided in this Code section shall apply the provisions of Parts 1 and 2 of this article and the procedural and substantive law of Georgia to the proceeding for enforcement or modification. Parts 3, 4, 5, 7, and 8 of this article do not

apply. (Code 1981, § 19-11-172, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

Editor's notes. — Ga. L. 2013, p. 705, § 1/SB 193, effective July 1, 2013, reenacted this Code section without change.

JUDICIAL DECISIONS

Lack of jurisdiction over military personnel. — Father did not reside in Georgia for purposes of recording and modifying an Alabama child support order under O.C.G.A. § 19-11-172(a) of the Uniform Interstate Family Support Act, O.C.G.A. § 19-11-100 et seq., because while the father had been stationed in

Georgia in the Army, the father was registered to vote in Alabama, had a driver's license there, and lived in Alabama with his wife, two sons, and his father; thus, the father was domiciled in Alabama for the purposes of O.C.G.A. § 19-2-1. *Kean v. Marshall*, 294 Ga. App. 459, 669 S.E.2d 463 (2008).

19-11-173. Filing requirement for modified order.

Within 30 days after issuance of a modified child support order, the party obtaining the modification shall file a certified copy of the order with the issuing tribunal that had continuing, exclusive jurisdiction over the earlier order and in each tribunal in which the party knows the earlier order has been registered. A party who obtains the order and fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the modified order of the new tribunal having continuing, exclusive jurisdiction. (Code 1981, § 19-11-173, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

Editor's notes. — Ga. L. 2013, p. 705, § 1/SB 193, effective July 1, 2013, reenacted this Code section without change.

19-11-174. Jurisdiction to modify child support order.

(a) Except as otherwise provided in Code Section 19-11-184.6, if a foreign country lacks or refuses to exercise jurisdiction to modify its child support order pursuant to its laws, a tribunal of Georgia may assume jurisdiction to modify the child support order and bind all individuals subject to the personal jurisdiction of the tribunal whether the consent to modification of a child support order otherwise required of the individual pursuant to Code Section 19-11-170 has been given or whether the individual seeking modification is a resident of this state or of the foreign country.

(b) An order issued by a tribunal of this state modifying a foreign child support order pursuant to this Code section is the controlling

order. (Code 1981, § 19-11-174, enacted by Ga. L. 2013, p. 705, § 1/SB 193.)

Effective date. — This Code section became effective July 1, 2013.

19-11-175. Registration of foreign child support order.

A party or support enforcement agency seeking to modify, or to modify and enforce, a foreign child support order not under the convention may register that order in this state under Code Sections 19-11-160 through 19-11-167 if the order has not been registered. A petition for modification may be filed at the same time as a request for registration, or at another time. The petition must specify the grounds for modification. (Code 1981, § 19-11-175, enacted by Ga. L. 2013, p. 705, § 1/SB 193.)

Effective date. — This Code section became effective July 1, 2013.

PART 7

DETERMINATION OF PARENTAGE

19-11-180. Definitions.

As used in this part, the term:

(1) “Application” means a request under the convention by an obligee or obligor, or on behalf of a child, made through a central authority for assistance from another central authority.

(2) “Central authority” means the entity designated by the United States or a foreign country described in subparagraph (D) of paragraph (5) of Code Section 19-11-101 to perform the functions specified in the convention.

(3) “Convention support order” means a support order of a tribunal of a foreign country described in subparagraph (D) of paragraph (5) of Code Section 19-11-101.

(4) “Direct request” means a petition filed by an individual in a tribunal of Georgia in a proceeding involving an obligee, obligor, or child residing outside the United States.

(5) “Foreign central authority” means the entity designated by a foreign country described in subparagraph (D) of paragraph (5) of Code Section 19-11-101 to perform the functions specified in the convention.

(6) “Foreign support agreement”:

(A) Means an agreement for support in a record that:

- (i) Is enforceable as a support order in the country of origin;
- (ii) Has been:

(I) Formally drawn up or registered as an authentic instrument by a foreign tribunal; or

(II) Authenticated by, or concluded, registered, or filed with, a foreign tribunal; and

- (iii) May be reviewed and modified by a foreign tribunal; and

(B) Includes a maintenance arrangement or authentic instrument under the convention.

(7) “United States central authority” means the secretary of the United States Department of Health and Human Services. (Code 1981, § 19-11-180, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted the present provisions of this Code section for the former provisions, which read: “(a) A tribunal of this state may serve as an initiating or responding tribunal in a proceeding brought under this article or a law substantially similar to this article, or the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Recipro-

cal Enforcement of Support Act to determine that the petitioner is a parent of a particular child or to determine that a respondent is a parent of that child.

“(b) In a proceeding to determine parentage, a responding tribunal in Georgia shall apply the procedural and substantive law of this state and the rules of this state on choice of law.”

19-11-181. Applicability of part.

This part applies only to a support proceeding under the convention. In such a proceeding, if a provision of this part is inconsistent with Parts 1 through 6 of this article, this part controls. (Code 1981, § 19-11-181, enacted by Ga. L. 2013, p. 705, § 1/SB 193.)

Effective date. — This Code section became effective July 1, 2013.

19-11-182. Department of Human Services recognized as designated agency.

The Department of Human Services is recognized as the agency designated by the United States central authority to perform specific functions under the convention. (Code 1981, § 19-11-182, enacted by Ga. L. 2013, p. 705, § 1/SB 193.)

Effective date. — This Code section became effective July 1, 2013.

19-11-183. Duties of Department of Human Services; available support proceedings.

(a) In a support proceeding under this part, the Department of Human Services shall:

(1) Transmit and receive applications; and

(2) Initiate or facilitate the institution of a proceeding regarding an application in a tribunal of Georgia.

(b) The following support proceedings are available to an obligee under the convention:

(1) Recognition or recognition and enforcement of a foreign support order;

(2) Enforcement of a support order issued or recognized in Georgia;

(3) Establishment of a support order if there is no existing order, including, if necessary, determination of parentage of a child;

(4) Establishment of a support order if recognition of a foreign support order is refused under paragraph (2), (4), or (9) of subsection (b) of Code Section 19-11-184.3;

(5) Modification of a support order of a tribunal of Georgia; and

(6) Modification of a support order of a tribunal of another state or a foreign country.

(c) The following support proceedings are available under the convention to an obligor against which there is an existing support order:

(1) Recognition of an order suspending or limiting enforcement of an existing support order of a tribunal of Georgia;

(2) Modification of a support order of a tribunal of Georgia; and

(3) Modification of a support order of a tribunal of another state or a foreign country.

(d) A tribunal of Georgia may not require security, bond, or deposit, however described, to guarantee the payment of costs and expenses in proceedings under the convention. (Code 1981, § 19-11-183, enacted by Ga. L. 2013, p. 705, § 1/SB 193.)

Effective date. — This Code section became effective July 1, 2013.

19-11-184. Filing direct requests; entitlement to assistance; preference for simplified and expeditious processes.

(a) A petitioner may file a direct request seeking establishment or modification of a support order or determination of parentage of a child. In the proceeding, the law of Georgia applies.

(b) A petitioner may file a direct request seeking recognition and enforcement of a support order or support agreement. In the proceeding, Code Sections 19-11-184.1 through 19-11-184.8 apply.

(c) In a direct request for recognition and enforcement of a convention support order or foreign support agreement:

(1) A security, bond, or deposit is not required to guarantee the payment of costs and expenses; and

(2) An obligee or obligor that in the issuing country has benefited from free legal assistance is entitled to benefit, at least to the same extent, from any free legal assistance provided for by the law of Georgia under the same circumstances.

(d) A petitioner filing a direct request is not entitled to assistance from the Department of Human Services.

(e) This part does not prevent the application of laws of Georgia that provide simplified, more expeditious rules regarding a direct request for recognition and enforcement of a foreign support order or foreign support agreement. (Code 1981, § 19-11-184, enacted by Ga. L. 2013, p. 705, § 1/SB 193.)

Effective date. — This Code section became effective July 1, 2013.

19-11-184.1. Request for registration.

(a) Except as otherwise provided in this part, a party who is an individual or a support enforcement agency seeking recognition of a convention support order shall register the order in this state as provided in Part 6 of this article.

(b) Notwithstanding Code Sections 19-11-130 and subsection (a) of Code Section 19-11-161, a request for registration of a convention support order must be accompanied by:

(1) A complete text of the support order or an abstract or extract of the support order drawn up by the issuing foreign tribunal, which may be in the form recommended by the Hague Conference on Private International Law;

(2) A record stating that the support order is enforceable in the issuing country;

(3) If the respondent did not appear and was not represented in the proceedings in the issuing country, a record attesting, as appropriate, either that the respondent had proper notice of the proceedings and an opportunity to be heard or that the respondent had proper notice of the support order and an opportunity to be heard in a challenge or appeal on fact or law before a tribunal;

(4) A record showing the amount of arrears, if any, and the date the amount was calculated;

(5) A record showing a requirement for automatic adjustment of the amount of support, if any, and the information necessary to make the appropriate calculations; and

(6) If necessary, a record showing the extent to which the applicant received free legal assistance in the issuing country.

(c) A request for registration of a convention support order may seek recognition and partial enforcement of the order.

(d) A tribunal of Georgia may vacate the registration of a convention support order without the filing of a contest under Code Section 19-11-184.2 only if, acting on its own motion, the tribunal finds that recognition and enforcement of the order would be manifestly incompatible with public policy.

(e) The tribunal shall promptly notify the parties of the registration or the order vacating the registration of a convention support order. (Code 1981, § 19-11-184.1, enacted by Ga. L. 2013, p. 705, § 1/SB 193.)

Effective date. — This Code section became effective July 1, 2013.

19-11-184.2. Contest of registered convention support order.

(a) Except as otherwise provided in this part, Code Sections 19-11-164 through 19-11-167 apply to a contest of a registered convention support order.

(b) A party contesting a registered convention support order shall file a contest not later than 30 days after notice of the registration, but if the contesting party does not reside in the United States, the contest must be filed not later than 60 days after notice of the registration.

(c) If the nonregistering party fails to contest the registered convention support order by the time specified in subsection (b) of this Code section, the order is enforceable.

(d) A contest of a registered convention support order may be based only on grounds set forth in Code Section 19-11-184.3. The contesting party bears the burden of proof.

(e) In a contest of a registered convention support order, a tribunal of Georgia:

(1) Is bound by the findings of fact on which the foreign tribunal based its jurisdiction; and

(2) May not review the merits of the order.

(f) A tribunal of Georgia deciding a contest of a registered convention support order shall promptly notify the parties of its decision.

(g) A challenge or appeal, if any, does not stay the enforcement of a convention support order unless there are exceptional circumstances. (Code 1981, § 19-11-184.2, enacted by Ga. L. 2013, p. 705, § 1/SB 193.)

Effective date. — This Code section became effective July 1, 2013.

19-11-184.3. Grounds for refusal of recognition and enforcement of registered convention support order.

(a) Except as otherwise provided in subsection (b) of this Code section, a tribunal of Georgia shall recognize and enforce a registered convention support order.

(b) The following grounds are the only grounds on which a tribunal of Georgia may refuse recognition and enforcement of a registered convention support order:

(1) Recognition and enforcement of the order is manifestly incompatible with public policy, including the failure of the issuing tribunal to observe minimum standards of due process, which include notice and an opportunity to be heard;

(2) The issuing tribunal lacked personal jurisdiction consistent with Code Section 19-11-110;

(3) The order is not enforceable in the issuing country;

(4) The order was obtained by fraud in connection with a matter of procedure;

(5) A record transmitted in accordance with Code Section 19-11-184.1 lacks authenticity or integrity;

(6) A proceeding between the same parties and having the same purpose is pending before a tribunal of Georgia and that proceeding was the first to be filed;

(7) The order is incompatible with a more recent support order involving the same parties and having the same purpose if the more recent support order is entitled to recognition and enforcement under this article in Georgia;

(8) Payment, to the extent alleged arrears have been paid in whole or in part;

(9) In a case in which the respondent neither appeared nor was represented in the proceeding in the issuing foreign country:

(A) If the law of that country provides for prior notice of proceedings, the respondent did not have proper notice of the proceedings and an opportunity to be heard; or

(B) If the law of that country does not provide for prior notice of the proceedings, the respondent did not have proper notice of the order and an opportunity to be heard in a challenge or appeal on fact or law before a tribunal; or

(10) The order was made in violation of Code Section 19-11-184.6.

(c) If a tribunal of Georgia does not recognize a convention support order under paragraph (2), (4), or (9) of subsection (b) of this Code section:

(1) The tribunal may not dismiss the proceeding without allowing a reasonable time for a party to request the establishment of a new convention support order; and

(2) The Department of Human Services shall take all appropriate measures to request a child support order for the obligee if the application for recognition and enforcement was received under Code Section 19-11-183. (Code 1981, § 19-11-184.3, enacted by Ga. L. 2013, p. 705, § 1/SB 193.)

Effective date. — This Code section became effective July 1, 2013.

19-11-184.4. Option to enforce portions of convention support order.

If a tribunal of Georgia does not recognize and enforce a convention support order in its entirety, it shall enforce any severable part of the order. An application or direct request may seek recognition and partial enforcement of a convention support order. (Code 1981, § 19-11-184.4, enacted by Ga. L. 2013, p. 705, § 1/SB 193.)

Effective date. — This Code section became effective July 1, 2013.

19-11-184.5. Recognition and enforcement of foreign support agreement.

(a) Except as otherwise provided in subsections (c) and (d) of this Code section, a tribunal of Georgia shall recognize and enforce a foreign support agreement registered in this state.

(b) An application or direct request for recognition and enforcement of a foreign support agreement must be accompanied by:

(1) A complete text of the foreign support agreement; and

(2) A record stating that the foreign support agreement is enforceable as an order of support in the issuing country.

(c) A tribunal of Georgia may vacate the registration of a foreign support agreement only if, acting on its own motion, the tribunal finds that recognition and enforcement would be manifestly incompatible with public policy.

(d) In a contest of a foreign support agreement, a tribunal of Georgia may refuse recognition and enforcement of the agreement if it finds:

(1) Recognition and enforcement of the agreement is manifestly incompatible with public policy;

(2) The agreement was obtained by fraud or falsification;

(3) The agreement is incompatible with a support order involving the same parties and having the same purpose in this state, another state, or a foreign country if the support order is entitled to recognition and enforcement under this article in Georgia; or

(4) The record submitted under subsection (b) of this Code section lacks authenticity or integrity.

(e) A proceeding for recognition and enforcement of a foreign support agreement must be suspended during the pendency of a challenge to or appeal of the agreement before a tribunal of another state or a foreign country. (Code 1981, § 19-11-184.5, enacted by Ga. L. 2013, p. 705, § 1/SB 193.)

Effective date. — This Code section became effective July 1, 2013.

19-11-184.6. Modification of convention child support order.

(a) A tribunal of Georgia may not modify a convention child support order if the obligee remains a resident of the foreign country where the support order was issued unless:

(1) The obligee submits to the jurisdiction of a tribunal of Georgia, either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity; or

(2) The foreign tribunal lacks or refuses to exercise jurisdiction to modify its support order or issue a new support order.

(b) If a tribunal of Georgia does not modify a convention child support order because the order is not recognized in this state, subsection (c) of Code Section 19-11-184.3 applies. (Code 1981, § 19-11-184.6, enacted by Ga. L. 2013, p. 705, § 1/SB 193.)

Effective date. — This Code section became effective July 1, 2013.

19-11-184.7. Personal information.

Personal information gathered or transmitted under this part may be used only for the purposes for which it was gathered or transmitted. (Code 1981, § 19-11-184.7, enacted by Ga. L. 2013, p. 705, § 1/SB 193.)

Effective date. — This Code section became effective July 1, 2013.

19-11-184.8. Language.

A record filed with a tribunal of Georgia under this part must be in the original language and, if not in English, must be accompanied by an English translation verified by the translator. (Code 1981, § 19-11-184.8, enacted by Ga. L. 2013, p. 705, § 1/SB 193.)

Effective date. — This Code section became effective July 1, 2013.

PART 8

INTERSTATE RENDITION

19-11-185. “Governor” defined; authority.

(a) For purposes of this part, the term “governor” includes an individual performing the functions of governor or the executive authority of a state covered by this article.

(b) The Governor of this state may:

(1) Demand that the governor of another state surrender an individual found in the other state who is charged criminally in this state with having failed to provide for the support of an obligee; or

(2) On the demand of the governor of another state, surrender an individual found in this state who is charged criminally in the other state with having failed to provide for the support of an obligee.

(c) A provision for extradition of individuals not inconsistent with this article applies to the demand even if the individual whose surrender is demanded was not in the demanding state when the crime was allegedly committed and has not fled therefrom. (Code 1981, § 19-11-185, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted “of the governor” for “by the governor” at the beginning of paragraph (b)(2).

Cross references. — Election of governor, Ga. Const. 1983, Art. V, Sec. I. Duties and powers of governor, Ga. Const. 1983, Art. V, Sec. II.

19-11-186. Prosecutor’s duties upon request by governor; rendition.

(a) Before making a demand that the governor of another state surrender an individual charged criminally in this state with having failed to provide for the support of an obligee, the Governor of this state may require a prosecutor of this state to demonstrate that at least 90 days previously the obligee had initiated proceedings for support pursuant to this article or that the proceeding would be of no avail.

(b) If, under this article or a law substantially similar to this article, the governor of another state makes a demand that the Governor of this state surrender an individual charged criminally in that state with having failed to provide for the support of a child or other individual to whom a duty of support is owed, the Governor of this state may require a prosecutor to investigate the demand and report whether a proceeding for support has been initiated or would be effective. If it appears that a proceeding would be effective but has not been initiated, the Governor of this state may delay honoring the demand for a reasonable time to permit the initiation of a proceeding.

(c) If a proceeding for support has been initiated and the individual whose rendition is demanded prevails, the Governor of this state may decline to honor the demand. If the petitioner prevails and the individual whose rendition is demanded is subject to a support order, the Governor of this state may decline to honor the demand if the individual is complying with the support order. (Code 1981, § 19-11-186, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, deleted “the Uniform Reciprocal Enforcement of Support Act, or the Re-

vised Uniform Reciprocal Enforcement of Support Act,” preceding “the governor” in the first sentence of subsection (b).

PART 9

MISCELLANEOUS PROVISIONS

19-11-190. Construction of article; uniformity.

In applying and construing this article, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it. (Code 1981, § 19-11-190, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

The 2013 amendment, effective July 1, 2013, substituted the present provisions of this Code section for the former provisions, which read: “This article shall

be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of the article among states enacting it.”

19-11-190.1. Effective date.

This article applies to proceedings begun on or after July 1, 2013, to establish a support order or determine parentage of a child or to register, recognize, enforce, or modify a prior support order, determination, or agreement, whenever issued or entered. (Code 1981, § 19-11-190.1, enacted by Ga. L. 2013, p. 705, § 1/SB 193.)

Effective date. — This Code section became effective July 1, 2013.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2013, “on or

after July 1, 2013,” was substituted for “on or after the effective date of this Code section” near the beginning of this Code section.

19-11-191. Severability.

If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable. (Code 1981, § 19-11-191, enacted by Ga. L. 1997, p. 1613, § 33; Ga. L. 2013, p. 705, § 1/SB 193.)

Editor’s notes. — Ga. L. 2013, p. 705, § 1/SB 193, effective July 1, 2013, reenacted this Code section without change.

CHAPTER 12

CHANGE OF NAME

Sec.		Sec.	
19-12-1.	Petition for name change; notice of filing; consent of minor's parents or guardian; service on parents or guardian; time of hearing; judgment; clerk's fees.	19-12-3.	Certificate of change of name; use as evidence; form of certificate.
19-12-2.	Hearing on objections to petition.	19-12-4.	Change of name with fraudulent intent not authorized.

19-12-1. Petition for name change; notice of filing; consent of minor's parents or guardian; service on parents or guardian; time of hearing; judgment; clerk's fees.

(a) Any person desirous of changing his name or the name or names of his minor child or children may present a petition to the superior court of the county of his residence, setting forth fully and particularly the reasons why the change is asked, which petition shall be verified by the petitioner.

(b) Within seven days of the filing of the petition, the petitioner shall cause a notice of the filing, signed by him, to be published in the official legal organ of the county once a week for four weeks. The notice shall contain therein the name of the petitioner, the name of the person whose name is to be changed if different from that of the petitioner, the new name desired, the court in which the petition is pending, the date on which the petition was filed, and the right of any interested or affected party to appear and file objections.

(c) If the petition seeks to change the name of a minor child, the written consent of his parent or parents if they are living and have not abandoned the child, or the written consent of the child's guardian if both parents are dead or have abandoned the child, shall be filed with the petition, except that the written consent of a parent shall not be required if the parent has not contributed to the support of the child for a continuous period of five years or more immediately preceding the filing of the petition.

(d) In all cases, before a minor child's name may be changed, the parent or parents of the child shall be served with a copy of the petition. If the parent or parents reside within this state, service of the petition shall be made in person, except that if the location or address of the parent is unknown, service of the petition on the parent shall be made by publication as provided in this Code section. If the parent or parents reside outside this state, service of the petition on the parent or parents residing outside this state shall be made by certified mail or statutory

overnight delivery if the address is known or by publication as provided in this Code section if the address is not known.

(e) Where a child resides with persons other than his parent or parents, a copy of the petition shall be served upon the person acting as guardian of the child in the same manner as service would be made on a parent.

(f) Upon the expiration of:

(1) Thirty days from the filing of the petition if the person whose name to be changed is an adult;

(2) Thirty days from the date of service upon the parent, parents, or guardian of a minor whose name is to be changed if the parent, parents, or guardian reside within this state; or

(3) Sixty days from the date of service upon the parent, parents, or guardian of a minor whose name is to be changed if either the parent, parents, or guardian reside outside the state and the petition is served by mail,

and after proof to the court of publication of the notice as required in this Code section is made, if no objection is filed, the court shall proceed at chambers at such date as the court shall fix to hear and determine all matters raised by the petition and to render final judgment or decree thereon. For such service, the clerk shall receive the fees prescribed in Code Section 15-6-77, relating to fees of clerks of the superior courts for civil cases. (Ga. L. 1875, p. 103, § 1; Code 1882, § 1787a; Civil Code 1895, § 2495; Civil Code 1910, § 3014; Code 1933, § 79-501; Ga. L. 1943, p. 260, § 1; Ga. L. 1961, p. 129, § 1; Ga. L. 1973, p. 504, § 1; Ga. L. 1977, p. 1098, § 10; Ga. L. 1978, p. 1365, § 1; Ga. L. 2000, p. 1589, § 3.)

Cross references. — Inclusion in judgment for divorce of provision for restoration of maiden or prior name, § 19-5-16. Amendment of certificates or reports, § 31-10-23.

Code Commission notes. — Pursuant

to Code Section 28-9-5, in 1991, a semicolon was substituted for “, or” at the end of paragraph (f)(1) and “; or” was substituted for “, or” at the end of paragraph (f)(2).

JUDICIAL DECISIONS

Court discretion. — Granting or refusal of an application for name change is based solely on sound legal discretion. *Binford v. Reid*, 83 Ga. App. 280, 63 S.E.2d 345 (1951); *Johnson v. Coggins*, 124 Ga. App. 603, 184 S.E.2d 696 (1971); *In re Mullinix*, 152 Ga. App. 215, 262 S.E.2d 540 (1979).

There was no abuse of discretion in

denying a petition for name change when the petitioner was incarcerated following the petitioner's conviction for first degree forgery. *In re Parrott*, 194 Ga. App. 856, 392 S.E.2d 48 (1990).

Notice prescribed by General Assembly. — It is the prerogative of the General Assembly to prescribe what notice, if any, is required prior to the court's

action upon petition for change of name. *Fulghum v. Paul*, 229 Ga. 463, 192 S.E.2d 376 (1972).

Written parental consent. — Written consent of parent or parents is necessary unless a child has been abandoned. *Wearn v. Wray*, 139 Ga. App. 363, 228 S.E.2d 385 (1976).

Parental surname not property right. — Father's protectible interest in having his child bear parental surname is not a property right within the meaning of due process. *Fulghum v. Paul*, 229 Ga. 463, 192 S.E.2d 376 (1972).

Rights of incarcerated father. — Trial court erred in granting the petition to change the child's name since incarcerated father was not personally served, though such notice was possible, and the father's written objections to the petition were not judicially considered. *Brown v. Waters*, 208 Ga. App. 866, 432 S.E.2d 817 (1993).

Procedure when identity of natural father is in dispute. — Problem with the procedure required by the statute arose when there was a dispute as to the identity of the natural father of child. How-

ever, this procedure would be proper legal vehicle for resolution of such dispute by serving the petition on both purported fathers, making both of them parties to the proceedings. The trial judge would then have to resolve the dispute. *Doe v. Roe*, 235 Ga. 318, 219 S.E.2d 700 (1975).

Motion for name change properly granted. — Father's motion to change his son's name was properly granted after the trial court granted the father's motion to legitimize his son as the mother's claim that the son would be confused by the name change paled since she also requested a name change. *Carden v. Warren*, 269 Ga. App. 275, 603 S.E.2d 769 (2004).

Hearing required for surname change. — When a child, by her mother, sought to change the child's surname to that of the child's deceased father, it was error to deny the petition without a hearing. O.C.G.A. § 19-12-1(f)(3) provided for a hearing. *In re Scott*, 288 Ga. App. 374, 654 S.E.2d 221 (2007).

Cited in *Cook v. English*, 85 Ga. App. 739, 70 S.E.2d 86 (1952); *Bruster v. Hopper*, 146 Ga. App. 217, 246 S.E.2d 140 (1978).

OPINIONS OF THE ATTORNEY GENERAL

Serviceman overseas cannot change name in foreign court without relinquishing citizenship. — Serviceman, citizen of Georgia stationed overseas, cannot submit to jurisdiction of Japanese Family Court in order to have his name changed without relinquishing his Georgia and United States citizenship but must petition superior court in county in which name to be changed is recorded. 1962 Op. Att'y Gen. p. 345.

Woman may change surname assumed by marriage. — Married woman's surname is that of her husband, but

she may change it for legal purposes, including issuance of a driver's license, by judicial decree or by consistent usage of another name without resort to judicial proceedings. 1975 Op. Att'y Gen. No. 75-49.

Married woman assumes husband's surname. — Under Georgia law, a woman, upon marriage, takes husband's surname by operation of law, and unless and until she has this married name altered or changed by court order, it is her "legal" name. 1974 Op. Att'y Gen. No. 74-33.

RESEARCH REFERENCES

Am. Jur. 2d. — 57 Am. Jur. 2d, Name, §§ 14 et seq., 37, 44 et seq., 56.

Am. Jur. Pleading and Practice Forms. — 18A Am. Jur. Pleading and Practice Forms, Name, § 2.

C.J.S. — 65 C.J.S., Names, § 21 et seq. 67A C.J.S., Parent and Child, § 38 et seq.

ALR. — Circumstances justifying grant or denial of petition to change adult's name, 79 ALR3d 562.

Rights and remedies of parents inter se with respect to the names of their children, 40 ALR5th 697.

19-12-2. Hearing on objections to petition.

If written objections are filed by any interested or affected party within the time limits specified in subsection (f) of Code Section 19-12-1, the court shall thereupon proceed to hear the matter at chambers. (Ga. L. 1875, p. 103, § 2; Code 1882, § 1787b; Civil Code 1895, § 2496; Civil Code 1910, § 3015; Code 1933, § 79-502; Ga. L. 1961, p. 129, § 2; Ga. L. 1973, p. 504, § 2.)

JUDICIAL DECISIONS

Written objections improperly ignored. — In addition to the lack of personal service, the judgment in the case was infirm because of the trial court's failure to consider the prisoner-father's written objections to the petition, contrary to the requirement of O.C.G.A. § 19-12-2.

Brown v. Waters, 208 Ga. App. 866, 432 S.E.2d 817 (1993).

Cited in Cook v. English, 85 Ga. App. 739, 70 S.E.2d 86 (1952); Doe v. Roe, 235 Ga. 318, 219 S.E.2d 700 (1975); In re Serpentfoot, 285 Ga. App. 325, 646 S.E.2d 267 (2007).

RESEARCH REFERENCES

C.J.S. — 65 C.J.S., Names, § 21 et seq.

19-12-3. Certificate of change of name; use as evidence; form of certificate.

(a) At any time after the entry of the final order of change of name, upon the request of the petitioner requesting the change of name, the clerk of the court granting the same shall issue to the petitioner a certificate of change of name, under the seal of the court, upon payment to the clerk of the fee provided in paragraph (4) of subsection (g) of Code Section 15-6-77. The certificate shall be received as evidence of the facts contained in the certificate.

(b) The certificate of change of name shall be in substantially the following form:

This is to certify that _____ (name of petitioner) has obtained final order of change of name in the Superior Court of _____ County, Georgia, on the _____ day of _____, _____, as shown by the records of the court.

The name (or names) of _____ (full name prior to entry of the final order of change of name) has (or have) been changed to _____ (full name after entry of the final order of change of name).

Given under the hand and seal of said court, this the _____ day of _____, _____.

(Seal of court)

Clerk

(Code 1933, § 79-504, enacted by Ga. L. 1968, p. 327, § 1; Ga. L. 1991, p. 1324, § 5; Ga. L. 1999, p. 81, § 19.)

Cross references. — Amendment of copy of court order changing name of birth certificate upon receipt of certified person, § 31-10-23.

RESEARCH REFERENCES

Am. Jur. 2d. — 57 Am. Jur. 2d, Name, § 19.
C.J.S. — 65 C.J.S., Names, § 21 et seq.

19-12-4. Change of name with fraudulent intent not authorized.

Nothing contained in this chapter shall authorize any person to change his name with a view to deprive another fraudulently of any right under the law. (Code 1933, § 79-503, enacted by Ga. L. 1961, p. 129, § 3.)

JUDICIAL DECISIONS

No abuse of discretion. — There was no abuse of discretion in denying a petition for name change as the petitioner was incarcerated following the petitioner’s conviction for first degree forgery. In re Parrott, 194 Ga. App. 856, 392 S.E.2d 48 (1990).
petition for a name change was not an abuse of discretion as such would have deprived a newspaper publisher of that person’s good name if granted. In re Serpentfoot, 285 Ga. App. 325, 646 S.E.2d 267 (2007), cert. denied, 2007 Ga. LEXIS 661 (Ga. 2007).
Trial court’s order denying an activist’s

RESEARCH REFERENCES

Am. Jur. 2d. — 57 Am. Jur. 2d, Name, §§ 16, 22, 23, 66, 75.
C.J.S. — 65 C.J.S., Names, § 21 et seq.

CHAPTER 13

FAMILY VIOLENCE

Article 1

Granting of Relief by Superior Courts

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- 19-13-10. Definitions.
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- 19-13-20. Definitions.
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- 19-13-30. State Commission on Family Violence.
- 19-13-31. Commission created; comprehensive state plan for ending family violence; establishment of community task forces.
- 19-13-32. Membership; terms; filling of vacancies; officers.
- 19-13-33. Meetings; quorum; reimbursement for expenses.
- 19-13-34. Powers and duties of commission.
- 19-13-35. Termination provisions [Repealed].

Article 4

Protective Order Registry

- 19-13-50. Short title.
- 19-13-51. Definitions.
- 19-13-52. Purpose of registry; maintenance; access to information; linking to National Crime Information Center Network.
- 19-13-53. Standardized forms; timing of transmission of information and data entry; responsibility of sheriff's office.
- 19-13-54. Foreign protective orders.
- 19-13-55. Confidential nature of information in registry.
- 19-13-56. Liability of court or law enforcement personnel.

Cross references. — Certain communications privileged, § 24-5-501. Communications between victim of family violence or sexual assault and agents providing services to such victim, § 24-5-509.

Editor's notes. — By resolution (Ga. L. 1986, p. 1203), the General Assembly urged the judges of the superior courts to order restitution in cases involving child abuse or sexual abuse and provided for the preparation of a report regarding the use of such orders.

By resolution (Ga. L. 1986, p. 1204), the General Assembly urged certain public organizations and state agencies to develop programs for the education and

training of social services and criminal justice professionals in the areas of child abuse, sexual abuse, and sexual exploitation.

Administrative rules and regulations. — Family violence intervention program, Official Compilation of the Rules and Regulations of the State of Georgia, Board of Corrections, Chapter 125-4-9.

Law reviews. — For annual survey article discussing developments in domestic relations law, see 51 Mercer L. Rev. 263 (1999).

For comment, "The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not Be Mediated," see 34 Emory L.J. 855 (1985).

JUDICIAL DECISIONS

In-chambers consultation with child to be recorded. — In a family violence action, the trial court erred in refusing to allow the court's in-chambers consultation with the child to be recorded. *Williams v. Stepler*, 221 Ga. App. 338, 471 S.E.2d 284 (1996).

Jurisdiction of appeals. — Orders entered under the Family Violence Act, O.C.G.A. § 19-13-1 et seq., must come by discretionary application and jurisdiction of appeals lies in the Georgia Court of Appeals. *Schmidt v. Schmidt*, 270 Ga. 461, 510 S.E.2d 810 (1999).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Child Abuse — The Battered Child Syndrome, 2 POF2d 365.

Child Neglect, 3 POF2d 265.

ALR. — Admissibility of expert or opinion testimony on battered wife or battered woman syndrome, 18 ALR4th 1153.

Tort liability of public authority for fail-

ure to remove parentally abused or neglected children from parents' custody, 60 ALR4th 942.

Admissibility of expert testimony concerning domestic-violence syndromes to assist jury in evaluating victim's testimony or behavior, 57 ALR5th 315.

ARTICLE 1

GRANTING OF RELIEF BY SUPERIOR COURTS

Law reviews. — For article, "Obtaining Protective Orders for Relief from Family Violence," see 6 Ga. St. B.J. 20 (2000). For article, "Domestic Relations Law," see 53 Mercer L. Rev. 265 (2001). For article, "Family Violence and Military Procedures in Georgia: An Introduction for Non-Military Lawyers," see 7 Ga. St. B.J. 16 (2001).

For note on the 1994 amendments of Code Sections 19-13-3 to 19-13-4 of this article, see 11 Ga. St. U.L. Rev. 180 (1994).

For comment, "The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization," see 63 Emory L.J. 1163 (2014).

19-13-1. “Family violence” defined.

As used in this article, the term “family violence” means the occurrence of one or more of the following acts between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons living or formerly living in the same household:

(1) Any felony; or

(2) Commission of offenses of battery, simple battery, simple assault, assault, stalking, criminal damage to property, unlawful restraint, or criminal trespass.

The term “family violence” shall not be deemed to include reasonable discipline administered by a parent to a child in the form of corporal punishment, restraint, or detention. (Ga. L. 1981, p. 880, § 1; Ga. L. 1988, p. 1251, § 2; Ga. L. 1992, p. 1266, § 3; Ga. L. 1993, p. 1534, § 3.)

Law reviews. — For article citing developments in Georgia juvenile court practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 167 (1981). For article, “Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System,” see 8 Ga. St. U.L. Rev. 539 (1992). For survey article on domestic relations cases for the period from June 1, 2002 through May 31, 2003, see 55 Mercer

L. Rev. 223 (2003). For annual survey of domestic relations law, see 58 Mercer L. Rev. 133 (2006).

For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 95 (1993). For review of 1996 family violence legislation, see 13 Ga. St. U.L. Rev. 101 (1996).

For comment, “The Abuse of Animals as a Method of Domestic Violence: The Need for Criminalization,” see 63 Emory L.J. 1163 (2014).

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“Family violence” defined broadly. — Officers who investigated a claim of possible child abuse failed in their obligation to file a Family Violence Report, as required by O.C.G.A. § 17-4-20.1(c), and the trial court properly denied a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 by the officers and others in a wrongful death claim on behalf of a deceased child as genuine issues of material fact existed as to whether their failure to investigate and file the necessary report proximately resulted in the child’s injuries and death; the definition of “family violence” was broad under O.C.G.A. § 19-13-1, and although “reasonable discipline” was excepted thereunder, the officers had an obligation to investigate allegations that a child was being

whipped. *Meagher v. Quick*, 264 Ga. App. 639, 594 S.E.2d 182 (2003).

“Family violence” arrest warrant. — Whether an arrest warrant labeled “Domestic Violence” was the correct label used to arrest the plaintiff for an offense related to a domestic violence case but not a crime of domestic violence under O.C.G.A. § 19-13-1 was irrelevant to the plaintiff’s civil rights claim that the defendant violated the Fourteenth Amendment by falsely swearing a domestic violence warrant against the plaintiff. *Smith v. Mercer*, No. 1:07-CV-1149-RWS, 2008 U.S. Dist. LEXIS 38758 (N.D. Ga. May 13, 2008).

Family violence not likely to resume justifying modification of protective order. — Restrained party who

seeks termination of a family violence permanent protective order must prove by a preponderance of the evidence that a material change in circumstances has occurred, such that the resumption of family violence is not likely and justice would be served by termination of the order and in reviewing cases such as this, a court should look to the totality of the circumstances. Furthermore, circumstances a court should consider when considering modifying a family violence permanent protective order include: the present nature of the parties' relationship; the restrained party's history of compliance with the protective order and history of violence; the restrained party's efforts to undergo therapy; the age and health of the restrained party; any undue hardships suffered as a result of the order; and, the existence and nature of any objections the victim has to termination. *Mandt v. Lovell*, 293 Ga. 807, 750 S.E.2d 134 (2013).

Modification of permanent protective order. — Appellate court properly upheld the modification of a permanent protection order issued in a family violence matter between parents because O.C.G.A. § 19-13-4(c) contemplated that the duration of such orders could be modified based on changing conditions and circumstances, and the father sufficiently alleged such changed circumstances, including that neither party had custody of the child. *Mandt v. Lovell*, 293 Ga. 807, 750 S.E.2d 134 (2013).

Service of process insufficient. — Service upon a spouse against whom a temporary protective order had been granted under the Georgia Family Violence Act, O.C.G.A. § 19-13-1 et seq., was insufficient. The original service provided

the spouse with no notice of the allegations, and service upon the spouse as the spouse left a hearing in the case was improper under the rule insulating a party in attendance upon the trial of a case from service of process. *Loiten v. Loiten*, 288 Ga. App. 638, 655 S.E.2d 265 (2007).

Insufficient evidence. — Trial court erred in finding that a guardian proved by a preponderance of the evidence, as required under O.C.G.A. § 19-13-3(a), that a mother committed an act of family violence pursuant to O.C.G.A. § 19-13-1, as there was insufficient evidence that the mother committed an act of violence, specifically simple battery in violation of O.C.G.A. § 16-5-23, as opposed to administering reasonable discipline in the form of corporal punishment, as O.C.G.A. § 16-5-23 specifically exempted corporal punishment from the definition of battery, and the appellate court determined after considering O.C.G.A. §§ 16-3-20 and 20-2-731 that the alleged action of the mother in slapping her daughter did not rise to the level of unreasonable discipline. *Buchheit v. Stinson*, 260 Ga. App. 450, 579 S.E.2d 853 (2003).

Sufficient evidence. — Protective order against a former wife was warranted under the Family Violence Act, O.C.G.A. § 19-13-1, because there was sufficient evidence that she committed the predicate act of stalking her former husband by hiring a detective to follow him, by harassing him at his place of work, and by sending him threatening text messages. *Quinby v. Rausch*, 300 Ga. App. 424, 685 S.E.2d 395 (2009).

Cited in *Roberson v. State*, 186 Ga. App. 808, 368 S.E.2d 568 (1988); *McCracken v. State*, 224 Ga. App. 356, 480 S.E.2d 361 (1997).

RESEARCH REFERENCES

C.J.S. — 28 C.J.S., Domestic Abuse and Violence, § 1 et seq.

ALR. — “Cohabitation” for purposes of

domestic violence statutes, 71 ALR5th 285.

19-13-2. Jurisdiction of superior court.

(a) Except for proceedings involving a nonresident respondent, the superior court of the county where the respondent resides shall have jurisdiction over all proceedings under this article.

(b) For proceedings under this article involving a nonresident respondent, the superior court where the petitioner resides or the superior court where an act involving family violence allegedly occurred shall have jurisdiction, where the act involving family violence meets the elements for personal jurisdiction provided for under paragraph (2) or (3) of Code Section 9-10-91. (Ga. L. 1981, p. 880, § 2; Ga. L. 1982, p. 3, § 19; Ga. L. 1997, p. 1543, § 1.)

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 151 (1997).

JUDICIAL DECISIONS

Jurisdiction of superior court. — Issuance of the protective order underlying the appellant prisoner's conviction for aggravated stalking under the Family Violence Act, O.C.G.A. § 19-13-1 et seq., when the prisoner and the victim had never been married, were not living in the same house, and did not have children together, did not affect the court's jurisdiction since the order expressly provided that the order's violation would subject the prisoner to prosecution for aggravated stalking; a superior court judge had the authority to issue a protective order under the stalking statute, O.C.G.A. § 16-5-94, or the Georgia Family Violence Act, specifically O.C.G.A. § 19-13-2. *Giles v. State*, 257 Ga. App. 65, 570 S.E.2d 375 (2002).

When a father made threatening telephone calls from another state to a mother and to their child, a trial court could not exercise jurisdiction over the father under the Family Violence Act, O.C.G.A. § 19-13-1 et seq., which applied the long arm statute, O.C.G.A. § 9-10-91, because, under O.C.G.A. § 9-10-91(3), even though the father committed a tortious injury in Georgia, no other factors in that section applied, and, under O.C.G.A.

§ 9-10-91(2), providing long arm jurisdiction over one committing a tortious act in Georgia, while the harmful effects of the father's acts were felt in Georgia, the father never came to Georgia to commit those acts. *Anderson v. Deas*, 273 Ga. App. 770, 615 S.E.2d 859 (2005).

Family Violence Act, O.C.G.A. § 19-13-1 et seq., gave Georgia courts jurisdiction over a nonresident only if the act with which the nonresident was charged met the requirements of O.C.G.A. § 9-10-91(2), (3); further, the conduct giving rise to the offense occurred when the maker of the call spoke into the telephone; a father's daily calls to Georgia from another state to speak to the father's daughter or when the father made the calls that allegedly threatened and harassed the mother did not confer jurisdiction in Georgia. *Anderson v. Deas*, 279 Ga. App. 892, 632 S.E.2d 682 (2006).

Venue. — In a family violence case in which the respondent has left the family home but has not avowed an intention to remain in that new location, venue is proper both in the county of the family's residence and in the county to which the respondent has relocated. *Davis-Redding v. Redding*, 246 Ga. App. 792, 542 S.E.2d 197 (2000).

19-13-3. Filing of petition seeking relief from family violence; granting of temporary relief ex parte; hearing; dismissal of petition upon failure to hold hearing; procedural advice for victims.

(a) A person who is not a minor may seek relief under this article by filing a petition with the superior court alleging one or more acts of family violence. A person who is not a minor may also seek relief on behalf of a minor by filing such a petition.

(b) Upon the filing of a verified petition in which the petitioner alleges with specific facts that probable cause exists to establish that family violence has occurred in the past and may occur in the future, the court may order such temporary relief ex parte as it deems necessary to protect the petitioner or a minor of the household from violence. If the court issues an ex parte order, a copy of the order shall be immediately furnished to the petitioner.

(c) Within ten days of the filing of the petition under this article or as soon as practical thereafter, but in no case later than 30 days after the filing of the petition, a hearing shall be held at which the petitioner must prove the allegations of the petition by a preponderance of the evidence as in other civil cases. In the event a hearing cannot be scheduled within the county where the case is pending within the 30 day period the same shall be scheduled and heard within any other county of that circuit. If a hearing is not held within 30 days, the petition shall stand dismissed unless the parties otherwise agree.

(d) Family violence shelter or social service agency staff members designated by the court may explain to all victims not represented by counsel the procedures for filling out and filing all forms and pleadings necessary for the presentation of their petition to the court. The clerk of the court may provide forms for petitions and pleadings to victims of family violence and to any other person designated by the superior court pursuant to this Code section as authorized to advise victims on filling out and filing such petitions and pleadings. The clerk shall not be required to provide assistance to persons in completing such forms or in presenting their case to the court. Any assistance provided pursuant to this Code section shall be performed without cost to the petitioners. The performance of such assistance shall not constitute the practice of law as defined in Code Section 15-19-51. (Ga. L. 1981, p. 880, § 3; Ga. L. 1982, p. 3, § 19; Ga. L. 1984, p. 542, § 1; Ga. L. 1985, p. 983, § 1; Ga. L. 1988, p. 320, § 3; Ga. L. 1988, p. 1248, § 1; Ga. L. 1994, p. 1270, § 7; Ga. L. 1996, p. 883, § 5.)

Cross references. — Reporting of instances of child abuse, § 19-7-5. Maintenance of child abuse and deprivation records, § 49-5-40 et seq.

Law reviews. — For article citing developments in Georgia juvenile court practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 167 (1981). For article, “Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System,” see 8 Ga. St. U.L. Rev. 539

(1992). For survey article on domestic relations law, see 60 Mercer L. Rev. 121 (2008).

For comment, “Engendering Fairness in Domestic Violence Arrests: Improving Police Accountability Through the Equal Protection Clause,” see 60 Emory L.J. 1011 (2011).

JUDICIAL DECISIONS

Burden of proof. — Trial court erred in finding that a guardian proved by a preponderance of the evidence, as required under O.C.G.A. § 19-13-3(a), that a mother committed an act of family violence pursuant to O.C.G.A. § 19-13-1 as there was insufficient evidence that the mother committed an act of violence, specifically simple battery in violation of O.C.G.A. § 16-5-23, as opposed to administering reasonable discipline in the form of corporal punishment, as O.C.G.A. § 16-5-23 specifically exempted corporal punishment from the definition of battery, and the appellate court determined after considering O.C.G.A. §§ 16-3-20 and 20-2-731 that the alleged action of the mother in slapping her daughter did not rise to the level of unreasonable discipline. *Buchheit v. Stinson*, 260 Ga. App. 450, 579 S.E.2d 853 (2003).

Trial court abused the court’s discretion by issuing a protective order against a lessee because a lessor did not meet the burden under O.C.G.A. §§ 16-5-94(e) and 19-13-3(c) of showing that the lessee committed the offense of stalking, O.C.G.A. § 16-5-90(a)(1); other than the lessor’s own testimony, the lessor offered no proof that the lessee and a former business associate were acting in concert against the lessor or that their alleged joint activities were of the type that would support a protective order based on the offense of stalking. *Martin v. Woodyard*, 313 Ga. App. 797, 723 S.E.2d 293 (2012).

“Reasonably recent” act of violence not required. — Appellate court found that under O.C.G.A. § 19-13-3 there was no requirement that any past act of family violence alleged in the petition be “reasonably recent.” By requiring the wife to show a “reasonably recent” act of family vio-

lence by the husband, the court below abused the court’s discretion. *Lewis v. Lewis*, 316 Ga. App. 67, 728 S.E.2d 741 (2012).

Counsel’s letter of conflict. — When an attorney was retained in a case being heard on an accelerated docket under the Family Violence Act, O.C.G.A. § 19-13-1 et seq., and promptly filed a conflict letter with the trial court advising the court that the attorney would be in another court at the time scheduled for a hearing in the case in which the attorney was retained, and followed up with the trial court on the day of the hearing regarding the attorney’s general availability, it was an abuse of discretion for the trial court to refuse to honor the conflict letter because it was not filed seven days in advance of the hearing, as this part of the rule was explicitly an “expectation,” which took into account that it was not always possible to file such a letter seven days in advance of a hearing, especially in cases being heard on an accelerated docket, and there was no evidence that the opposing party would have been prejudiced by a brief delay. *Foster v. Gidewon*, 280 Ga. 21, 622 S.E.2d 357 (2005).

Protective order under O.C.G.A. § 16-5-94. — While a preponderance of the evidence supported issuance of a protective order against a victim’s sister-in-law, specifically, that the latter stalked the former, threatening violence for the purpose of harassing and intimidating the latter, the superior court could not prohibit the sister-in-law from owning or possessing a firearm for the duration of the order, or prohibit the sister-in-law from contacting immediate family members when the victim was not present. *Rawcliffe v. Rawcliffe*, 283 Ga. App. 264, 641 S.E.2d 255 (2007).

Imposition of a stalking protective order against the former boyfriend was inappropriate under O.C.G.A. §§ 16-5-90(a)(1), 16-5-94(e), and 19-13-3(c) because the evidence admitted at the hearing was clearly insufficient to establish the necessary “pattern” of harassing and intimidating behavior against the former girlfriend. Even assuming that an incident in the parking lot constituted the requisite contact of an intimidating or harassing nature, the only other evidence presented was that the parties would sometimes be in the same place at the school, which was a place that both had the right to be. *Ramsey v. Middleton*, 310 Ga. App. 300, 713 S.E.2d 428 (2011).

Expiration of temporary order. — Temporary protective order (TPO) issued under O.C.G.A. § 16-5-94 stood dismissed as a matter of law after 30 days without a hearing pursuant to O.C.G.A. § 19-13-3(c); after that date, the superior court lacked the power to enforce the TPO, as provided in O.C.G.A. § 19-13-4(d), or order the parties to comply with a settlement agreement. Although the parties allegedly agreed to continue the hearing, there was no showing in the record of such consent. *Peebles v. Claxton*, 326 Ga. App. 53, 755 S.E.2d 861 (2014).

Permanent restraining order not granted. — Because a fire chief’s actions taken against certain fire department employees did not constitute stalking by a preponderance of the evidence under O.C.G.A. § 16-5-90(a)(1), but were committed for the legitimate purpose of physical training and arose during legitimate training activities, the issuance of a permanent restraining order against the fire chief for those activities amounted to an abuse of discretion. *Pilcher v. Stribling*, 282 Ga. 166, 647 S.E.2d 8 (2007).

Jury instruction on family violence protective order violation erroneous. — Defendant’s conviction for violating a family violence protective order as a lesser included offense of aggravated stalking was reversed on appeal because the defendant was not indicted for the family violence protective order violation; thus, the trial court erred in instructing the jury on the lesser offense. *Edgecomb v. State*, 319 Ga. App. 804, 738 S.E.2d 645 (2013).

Cited in *Davis-Redding v. Redding*, 246 Ga. App. 792, 542 S.E.2d 197 (2000); *Anderson v. Mergenhagen*, 283 Ga. App. 546, 642 S.E.2d 105 (2007); *Perlman v. Perlman*, 318 Ga. App. 731, 734 S.E.2d 560 (2012).

OPINIONS OF THE ATTORNEY GENERAL

Divorce action combined with petition for relief under Family Violence Act. — Petitions for relief under the Family Violence Act, O.C.G.A. § 19-13-1 et seq., and petitions for divorce may be combined in one action; however, the procedures governing the divorce action must comply with the Civil Practice Act, O.C.G.A. Ch. 11, T. 9. Furthermore, the filing fees for such a combination action would be governed by the general civil action filing fees provisions; only if a petition for relief under the Family Violence Act is filed separately would the statutory lesser filing fee be applicable. 1995 Op. Att’y Gen. No. U95-7.

Filing fees. — O.C.G.A. § 15-6-77 (b)(1) and (b)(2), which provides that the total cost for all services rendered by the clerk of superior court in civil cases shall

be either \$40 or \$55, should be construed together with, and does not repeal, O.C.G.A. § 19-13-3, which provides for a \$16 filing fee for petitions filed under the Family Violence Act, O.C.G.A. § 19-13-1 et seq. 1988 Op. Att’y Gen. No. U88-11.

One-dollar fees for the clerks’ and sheriffs’ retirement funds should be charged in addition to the filing fees for a petition filed under the Family Violence Act, O.C.G.A. § 19-13-1 et seq. 1988 Op. Att’y Gen. No. U88-11.

If service of process is necessary, the sheriff’s \$20 fee should be imposed in addition to the \$16 filing fee under the Family Violence Act, O.C.G.A. § 19-13-1 et seq. 1988 Op. Att’y Gen. No. U88-11.

Clerk of the superior court would be authorized to collect costs in support of county law libraries as authorized by the

chief judge in any action filed under the Family Violence Act, O.C.G.A. § 19-13-1 et seq. 1988 Op. Att'y Gen. No. U88-11.

RESEARCH REFERENCES

C.J.S. — Domestic Abuse and Violence, § 4 et seq.

19-13-4. Protective orders and consent agreements; contents; issuing copy of order to sheriff; expiration; enforcement.

(a) The court may, upon the filing of a verified petition, grant any protective order or approve any consent agreement to bring about a cessation of acts of family violence. The court shall not have the authority to issue or approve mutual protective orders concerning paragraph (1), (2), (5), (9), or (11) of this subsection, or any combination thereof, unless the respondent has filed a verified petition as a counter petition pursuant to Code Section 19-13-3 no later than three days, not including Saturdays, Sundays, and legal holidays, prior to the hearing and the provisions of Code Section 19-13-3 have been satisfied. The orders or agreements may:

- (1) Direct the respondent to refrain from such acts;
- (2) Grant to a party possession of the residence or household of the parties and exclude the other party from the residence or household;
- (3) Require a party to provide suitable alternate housing for a spouse, former spouse, or parent and the parties' child or children;
- (4) Award temporary custody of minor children and establish temporary visitation rights;
- (5) Order the eviction of a party from the residence or household and order assistance to the victim in returning to it, or order assistance in retrieving personal property of the victim if the respondent's eviction has not been ordered;
- (6) Order either party to make payments for the support of a minor child as required by law;
- (7) Order either party to make payments for the support of a spouse as required by law;
- (8) Provide for possession of personal property of the parties;
- (9) Order the respondent to refrain from harassing or interfering with the victim;
- (10) Award costs and attorney's fees to either party; and

(11) Order the respondent to receive appropriate psychiatric or psychological services as a further measure to prevent the recurrence of family violence.

(b) A copy of the order shall be issued by the clerk of the superior court to the sheriff of the county wherein the order was entered and shall be retained by the sheriff as long as that order shall remain in effect.

(c) Any order granted under this Code section shall remain in effect for up to one year; provided, however, that upon the motion of a petitioner and notice to the respondent and after a hearing, the court in its discretion may convert a temporary order granted under this Code section to an order effective for not more than three years or to a permanent order.

(d) A protective order issued pursuant to this Code section shall apply and shall be effective throughout this state. It shall be the duty of every superior court and of every sheriff, every deputy sheriff, and every state, county, or municipal law enforcement officer within this state to enforce and carry out the terms of any valid protective order issued by any court under the provisions of this Code section. (Ga. L. 1981, p. 880, § 4; Ga. L. 1982, p. 2300, §§ 1, 2; Ga. L. 1988, p. 1250, § 1; Ga. L. 1993, p. 788, § 1; Ga. L. 1994, p. 1270, § 8; Ga. L. 2000, p. 1081, § 2; Ga. L. 2003, p. 652, § 2.)

Cross references. — Confidentiality of address of registered electors; term of request; procedure, § 21-2-225.1.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2000, “paragraph” was substituted for “paragraphs” in the introductory language of subsection (a).

Law reviews. — For article, “Domestic Relations Law,” see 53 Mercer L. Rev. 265

(2001). For survey article on domestic relations law, see 60 Mercer L. Rev. 121

(2008). For annual survey of law on domestic relations, see 62 Mercer L. Rev. 105

(2010). For article on domestic relations, see 66 Mercer L. Rev. 65 (2014).

For note on 1993 amendment of this Code section, see 10 Ga. St. U.L. Rev. 126 (1993).

JUDICIAL DECISIONS

Temporary protective order obtained under the Family Violence Act, O.C.G.A. § 19-13-1 et seq., was not subject to the 30-day expiration period applicable to temporary restraining orders. *Carroll v. State*, 224 Ga. App. 543, 481 S.E.2d 562 (1997).

Double jeopardy for punishment for aggravated stalking and violation of protective order. — When a defendant was indicted for aggravated stalking under O.C.G.A. § 16-5-91(a) in violation of a protective order issued under

O.C.G.A. § 19-13-4, a criminal contempt proceeding based on the same incident could trigger the double jeopardy clause of the Fifth Amendment. The protective order violation contained no elements not contained in the criminal offense; furthermore, the protective order specifically enjoined the defendant from surveilling the subject of the order for the purpose of harassing and intimidating the subject as also proscribed by § 16-5-91(a). *Tanks v. State*, 292 Ga. App. 177, 663 S.E.2d 812 (2008).

Mutually protective provisions unauthorized. — When a mother in her petition under the Family Violence Act, O.C.G.A. § 19-13-1 et seq., alleged that the father of her child had abused her and admitted to damaging the father's property after one incident of abuse, and the father did not file a counterpetition, the trial court did not have the authority to include mutually protective provisions in the order under O.C.G.A. § 19-13-4(a)(1), (9), and (11). Moreover, if the acts to which the mother admitted in her petition were to be used as the basis for issuance of a protective order against her, or if she had engaged in other or different acts warranting such relief, § 19-3-4(a) and the requirements of due process entitled her to notice and an opportunity to prepare a defense before appearing at the hearing. *Williams v. Jones*, 291 Ga. App. 395, 662 S.E.2d 195 (2008).

Extension of temporary order. — In light of the purpose of the Family Violence Act, O.C.G.A. § 19-13-1 et seq., and the fact that a hearing was started but had to be continued, the trial court did not err in holding that a temporary protective order could remain in effect beyond the six-month period established by subsection (c) of O.C.G.A. § 19-13-4 without first holding a hearing and entering an order making the protective order permanent. *Duggan v. Duggan-Schlitz*, 246 Ga. App. 127, 539 S.E.2d 840 (2000).

Expiration of temporary order. — Temporary protective order (TPO) issued under O.C.G.A. § 16-5-94 stood dismissed as a matter of law after 30 days without a hearing pursuant to O.C.G.A. § 19-13-3(c); after that date, the superior court lacked the power to enforce the TPO, as provided in O.C.G.A. § 19-13-4(d), or order the parties to comply with a settlement agreement. Although the parties allegedly agreed to continue the hearing, there was no showing in the record of such consent. *Peebles v. Claxton*, 326 Ga. App. 53, 755 S.E.2d 861 (2014).

Specific findings not required. — Trial court did not have to make specific findings to support the court's temporary award of child custody since a finding that the award was in the best interests of the children was implicit in the court's order.

Baca v. Baca, 256 Ga. App. 514, 568 S.E.2d 746 (2002).

History of unfounded allegations of abuse justified dismissal of petition. — Order dismissing the father's petition for family violence protective orders on behalf of the children against the mother was upheld because much of the evidence of what the children said about the mother came from the testimony of the father, who had a history of making unfounded allegations of child abuse against former wives, including the mother. *Perlman v. Perlman*, 318 Ga. App. 731, 734 S.E.2d 560 (2012).

Attorney's fees. — Trial court erred by applying the divorce and alimony "disparity of income" standard under O.C.G.A. § 19-6-2(a)(1) to a motion for attorney's fees filed under the Family Violence Act, O.C.G.A. § 19-13-1 et seq. *Suarez v. Halbert*, 246 Ga. App. 822, 543 S.E.2d 733 (2000).

Permanent protective order. — After a wife initiated an effort to obtain a permanent order of protection against the husband, whom the wife was divorcing, while the temporary protection order was in effect, and the husband received notice and was given a hearing on the issue, the trial court properly issued a permanent order pursuant to O.C.G.A. § 19-13-4(a); the fact that the temporary order had expired was immaterial to the trial court's authority to enter the permanent order. *Nguyen v. Dinh*, 278 Ga. 887, 608 S.E.2d 211 (2005).

Modification of permanent protective order. — Appellate court properly upheld the modification of a permanent protection order issued in a family violence matter between parents because O.C.G.A. § 19-13-4(c) contemplated that the duration of such orders could be modified based on changing conditions and circumstances, and the father sufficiently alleged such changed circumstances, including that neither party had custody of the child. *Mandt v. Lovell*, 293 Ga. 807, 750 S.E.2d 134 (2013).

Text of O.C.G.A. § 19-13-4(c) contemplates that the duration of family violence protective orders may be modified based on changing conditions and circumstances. Thus, a restrained party who

seeks termination of a family violence permanent protective order must prove by a preponderance of the evidence that a material change in circumstances has occurred, such that the resumption of family violence is not likely and justice would be served by termination of the order and in reviewing cases such as this, a court should look to the totality of the circumstances. *Mandt v. Lovell*, 293 Ga. 807, 750 S.E.2d 134 (2013).

Transmission of order to Protective Order Registry mandatory. — Although a one-year protective order against a husband had expired at the time of his appeal, rendering certain evidentiary issues moot, other issues which tended to evade review were considered. The trial court did not err in transmitting the protective order to the Georgia Protective Order Registry as required by O.C.G.A. § 19-13-4. *Birchby v. Carboy*, 311 Ga. App. 538, 716 S.E.2d 592 (2011).

Effect of protective order on right to benefits under ERISA. — Widow's argument, that a determination denying her benefits on the grounds that her separation from her husband was permanent was "contrary to law" because the ex parte protective order under which the decedent

was removed from the home the day before he died of a self-inflicted gunshot wound would have expired automatically by operation of law unless it were made permanent after a hearing and order, pursuant to O.C.G.A. § 19-13-4(c), was rejected; the decision denying benefits was not based on an understanding that the protective order was itself permanent, but merely on a finding that the order evinced the couple's intention to separate permanently. *Smith v. Delta Airlines, Inc.*, No. 06-13915, 2007 U.S. App. LEXIS 1678 (11th Cir. Jan. 25, 2007) (Unpublished).

Jury instruction on family violence protective order violation erroneous. — Defendant's conviction for violating a family violence protective order as a lesser included offense of aggravated stalking was reversed on appeal because the defendant was not indicted for the family violence protective order violation; thus, the trial court erred in instructing the jury on the lesser offense. *Edgecomb v. State*, 319 Ga. App. 804, 738 S.E.2d 645 (2013).

Cited in *Davis-Redding v. Redding*, 246 Ga. App. 792, 542 S.E.2d 197 (2000); *Elgin v. Swann*, 315 Ga. App. 809, 728 S.E.2d 328 (2012); *Neal v. Hibbard*, 770 S.E.2d 600, No. S14A1673, 2015 Ga. LEXIS 183 (2015).

RESEARCH REFERENCES

C.J.S. — 28 C.J.S., Domestic Abuse and Violence, § 16 et seq.

ALR. — Validity and application of

statute allowing endangered child to be temporarily removed from parental custody, 38 ALR4th 756.

19-13-5. Supplemental nature of remedies provided by article.

The remedies provided by this article are not exclusive but are additional to any other remedies provided by law. (Ga. L. 1981, p. 880, § 5.)

19-13-6. Penalties.

A violation of an order issued pursuant to this article may be punished by an action for contempt or criminally punished as provided in Article 7 of Chapter 5 of Title 16. (Code 1981, § 19-13-6, enacted by Ga. L. 1985, p. 905, § 1; Ga. L. 1988, p. 1249, § 1; Ga. L. 2003, p. 652, § 3.)

JUDICIAL DECISIONS

Double jeopardy. — State may not prosecute a defendant for aggravated stalking based upon the same set of facts previously used to prosecute the same defendant for a violation of a domestic violence order. *Kinney v. State*, 223 Ga. App. 418, 477 S.E.2d 843 (1996).

RESEARCH REFERENCES

C.J.S. — 28 C.J.S., Domestic Abuse and Violence, § 37 et seq.

ARTICLE 1A

FAMILY VIOLENCE INTERVENTION

Cross references. — Family violence intervention program participation as condition of probation, § 42-8-35.6.

Editor's notes. — Ga. L. 2002, p. 1435, § 1, not codified by the General Assembly,

provides that: "This Act shall be known and may be cited as the 'Georgia's Family Violence Intervention Program Certification Act.'"

19-13-10. Definitions.

As used in this article, the term:

(1) "Commission" means the State Commission on Family Violence.

(2) "Commissioner" means the commissioner of community supervision.

(3) "Department" means the Department of Community Supervision.

(4) "Family or household members" means past or present spouses, persons who are parents of the same child, or other persons living or formerly living in the same household.

(5) "Family violence" means the commission of the offenses of battery, simple battery, simple assault, assault, stalking, criminal damage to property, or criminal trespass between family or household members.

(6) "Family violence intervention program" or "program" means any program that is certified by the Department of Community Supervision pursuant to Code Section 19-13-14 and designed to rehabilitate family violence offenders. Such term shall include, but shall not be limited to, batterer intervention programs, anger management programs, anger counseling, family problem resolution, and violence therapy. (Code 1981, § 19-13-10, enacted by Ga. L. 2002, p. 1435, § 3; Ga. L. 2015, p. 422, § 5-46/HB 310.)

The 2015 amendment, effective July 1, 2015, substituted “commissioner of community supervision” for “commissioner of corrections” in paragraph (2); substituted “Department of Community Supervision” for “Department of Corrections” in paragraph (3); and, in paragraph (6), substituted “Department of Community Supervision” for “Department of Corrections” in the first sentence, and substituted “Such term shall include, but shall

not be limited to” for “The term includes, but is not limited to” in the last sentence. See editor’s note for applicability.

Editor’s notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that the amendment by this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For note on the 2002 enactment of this Code section, see 19 Ga. St. U.L. Rev. 142 (2002).

19-13-11. Fee for certification application; valid period of certification.

In carrying out the purpose of this article, the department shall charge a fee for the consideration of applications for certification of family violence intervention programs and instructors. The amount of this fee shall be established by the commission and shall, as best as the commission shall determine, approximate the expense incurred by the department in consideration of an application. These certifications shall be valid for a period of two years unless suspended or revoked prior to the expiration of that time period. (Code 1981, § 19-13-11, enacted by Ga. L. 2002, p. 1435, § 3.)

19-13-12.

Reserved.

Editor’s notes. — Ga. L. 2002, p. 1435, § 3, effective July 1, 2002, in effect reserved this Code section designation for

future enactment of provisions of this article.

19-13-13. Administration and supervision of certification.

(a) A program certified pursuant to this article shall be administered by the department. The department is authorized to promulgate, adopt, and enforce rules and regulations necessary to carry out this article, including, but not limited to, prescribing the form of applications, visiting program facilities, and investigating complaints.

(b) The department shall be responsible for the approval and certification of programs and staff. This responsibility includes the training for and monitoring of all programs under this article. (Code 1981, § 19-13-13, enacted by Ga. L. 2002, p. 1435, § 3.)

19-13-14. Standards and requirements for course content; course operators; certification of programs; maintenance of list of certified programs.

(a) The commission and the department shall establish standards and requirements concerning the content of courses, including, but not limited to, duration of courses, qualifications of instructors, program and certification fees, attendance requirements, and examinations. In order to be certified, a program shall meet the standards established by the commission and the department.

(b) Programs may be operated by any individual, partnership, corporation, association, civic group, club, county, municipality, board of education, school, or college or any public, private, or governmental entity.

(c) No official or employee, or his or her spouse, of the department or the State Board of Pardons or Paroles shall own, operate, instruct at, or be employed by a program except as provided by Code Section 19-13-15.

(d) The department is responsible for establishing requirements for the certification of programs. An applicant must meet the certification requirements promulgated by the department through standards established by the commission and the department. No program shall be approved unless the owner of the program agrees in writing to submit reports as required in the rules and regulations of the department and to allow the examination and audit of the books, records, and financial statements of the program or its authorized agent. No program will be certified unless the owner of the program agrees in writing to pay to the state, for the costs of administration, a fee as established by the commission, provided that nothing in this Code section shall be construed so as to allow the department to retain any funds required by the Constitution of this state to be paid into the state treasury; and provided, further, that the department shall comply with all provisions of Part 1 of Article 4 of Chapter 12 of Title 45, the "Budget Act," except Code Section 45-12-92, prior to expending any such miscellaneous funds. All programs operated by the department and the State Board of Pardons and Paroles shall be exempt from fee provisions relating to obtaining certification.

(e) The department has the authority to deny, suspend, or revoke a certificate under this article or to impose sanctions upon and discipline a program which is not complying with the rules and regulations set forth by the department. The department shall establish criteria to determine noncompliance with its rules and regulations, sanctions for noncompliance, and methods of appeal if certification is denied, suspended, or revoked.

(f) The department shall maintain a list of programs certified pursuant to this article and make the list available to the public and all courts. (Code 1981, § 19-13-14, enacted by Ga. L. 2002, p. 1435, § 3.)

19-13-15. Cooperation with State Board of Pardons and Paroles.

The department and the State Board of Pardons and Paroles may operate family violence intervention programs which meet the requirements of the department. The courts and the State Board of Pardons and Paroles may accept such programs in lieu of certified family violence intervention programs as defined in paragraph (6) of Code Section 19-13-10. (Code 1981, § 19-13-15, enacted by Ga. L. 2002, p. 1435, § 3.)

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2002, “paragraph (6)” was substituted for “paragraph (1)” near the end of this Code section.

19-13-16. Mandatory participation; cost for participation.

(a) A court, in addition to imposing any penalty provided by law, when sentencing a defendant or revoking a defendant’s probation for an offense involving family violence, or when imposing a protective order against family violence, shall order the defendant to participate in a family violence intervention program, whether a certified program pursuant to this article or a program operated pursuant to Code Section 19-13-15, unless the court determines and states on the record why participation in such a program is not appropriate.

(b) The State Board of Pardons and Paroles, for a violation of parole for an offense involving family violence, shall require the conditional releasee to participate in a family violence intervention program, whether a certified program pursuant to this article or a program operated pursuant to Code Section 19-13-15, unless the State Board of Pardons and Paroles determines why participation in such a program is not appropriate.

(c) Unless the defendant is indigent, the cost of the family violence intervention program as provided by this Code section shall be borne by the defendant. If the defendant is indigent, then the cost of the program shall be determined by a sliding scale based upon the defendant’s ability to pay. (Code 1981, § 19-13-16, enacted by Ga. L. 2002, p. 1435, § 3.)

19-13-17. Administrative fine.

As an alternative to criminal or other civil enforcement, the commissioner or his or her designee, in order to enforce this article or any orders, rules, or regulations promulgated pursuant to this article, may

issue an administrative fine not to exceed \$1,000.00 for each violation, whenever that commissioner or his or her designee, after a hearing, determines that any person, firm, or corporation has violated any provision of this article or any order, rule, or regulation promulgated pursuant to this article. The hearing and any administrative review thereof shall be conducted in accordance with the procedures for contested cases under Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." Any person, firm, or corporation that has exhausted all administrative remedies available and that is aggrieved or adversely affected by a final order or action of the commissioner or his or her designee shall have the right of judicial review in accordance with Chapter 13 of Title 50. All fines collected or recovered by the commissioner under this Code section shall be remitted to the Office of the State Treasurer to the credit of the general fund of this state. The commissioner or his or her designee may file in the superior court (1) wherein the person under order resides; (2) if such person is a corporation, in the county wherein the corporation maintains its principal place of business; or (3) in the county wherein the violation occurred, a certified copy of a final order of the commissioner or his or her designee, whether unappealed from or affirmed upon appeal, whereupon the court shall render judgment in accordance with the judgment and notify the parties. The judgment shall have the same effect and proceedings in relation thereto shall thereafter be the same as though the judgment had been rendered in an action duly heard and determined by the court. The penalty prescribed in this Code section shall be concurrent, alternative, and cumulative with any and all other civil, criminal, or alternative rights, remedies, forfeitures, or penalties provided, allowed, or available to the commissioner or his or her designee with respect to any violation of this article or any order, rule, or regulation promulgated pursuant to this article. (Code 1981, § 19-13-17, enacted by Ga. L. 2002, p. 1435, § 3; Ga. L. 2010, p. 863, § 2/SB 296.)

ARTICLE 2

FAMILY VIOLENCE SHELTERS

RESEARCH REFERENCES

C.J.S. — 28 C.J.S., Domestic Abuse and Violence, § 1 et seq.

Cross references. — Plan to ensure

confidentiality of family violence shelters' addresses and locations by telephone companies, § 46-5-7.

19-13-20. Definitions.

As used in this article, the term:

- (1) "Council" means the Criminal Justice Coordinating Council.

(2) “Family or household members” means spouses, parents and children, or other persons related by consanguinity or affinity and occupying a common domicile.

(3) “Family violence” means the occurrence of one of the following acts between family or household members who reside together:

(A) Attempting to cause or causing bodily injury or serious bodily injury with or without a deadly weapon; or

(B) By physical menace, placing another in fear of imminent serious bodily injury.

(4) “Family violence program” means any program whose primary stated purpose is to provide services to victims of family violence. A family violence program may be but is not required to be associated with a family violence shelter.

(5) “Family violence shelter” means a facility approved by the council for the purpose of receiving, on a temporary basis, persons who are subject to family violence. Family violence shelters are distinguished from shelters operated for detention or placement of children only, as provided in subsection (c) of Code Section 15-11-135 and subsection (a) of Code Section 15-11-504. (Ga. L. 1981, p. 663, § 1; Ga. L. 1983, p. 521, § 1; Ga. L. 1988, p. 13, § 19; Ga. L. 1988, p. 1287, § 1; Ga. L. 1996, p. 819, § 1; Ga. L. 2000, p. 20, § 14; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2013, p. 294, § 4-30/HB 242; Ga. L. 2015, p. 890, § 9/HB 263.)

The 2013 amendment, effective January 1, 2014, substituted “subsection (c) of Code Section 15-11-135 and subsection (a) of Code Section 15-11-504” for “subsection (a) of Code Section 15-11-48” in the last sentence of paragraph (5). See editor’s note for applicability.

The 2015 amendment, effective July 1, 2015, substituted the present provisions of paragraph (1) for the former provisions, which read: “‘Department’ means the Department of Human Services.”; and substituted “council” for “department” in the first sentence of paragraph (5).

Editor’s notes. — Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General

Assembly, provides that: “This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions.”

RESEARCH REFERENCES

C.J.S. — 27A C.J.S., Divorce, § 30 et seq.

19-13-21. Powers and duties of council.

(a) It shall be the duty of the council:

(1) To establish minimum standards for an approved family violence shelter to enable such shelter to receive state funds;

(2) To receive applications for the development and establishment of family violence shelters;

(3) To approve or reject each application within 60 days of receipt of the application;

(4) To distribute funds to an approved shelter as funds become available;

(5) To fund other family violence programs as funds become available, provided that such programs meet standards established by the council; and

(6) To evaluate annually each family violence shelter for compliance with the minimum standards.

(b) Without using designated shelter funds, the council may:

(1) Formulate and conduct a research and evaluation program on family violence and cooperate with and assist and participate in programs of other properly qualified agencies, including any agency of the federal government, schools of medicine, hospitals, and clinics, in planning and conducting research on the prevention of family violence and the care, treatment, and rehabilitation of persons engaged in or subject to family violence;

(2) Serve as a clearing-house for information relating to family violence;

(3) Carry on educational programs on family violence for the benefit of the general public, persons engaged in or subject to family violence, professional persons, or others who care for or may be engaged in the care and treatment of persons engaged in or subject to family violence; and

(4) Enlist the assistance of public and voluntary health, education, welfare, and rehabilitation agencies in a concerted effort to prevent family violence and to treat persons engaged in or subject to family violence. (Ga. L. 1981, p. 663, § 2; Ga. L. 1983, p. 521, § 2; Ga. L. 1988, p. 1287, § 2; Ga. L. 1996, p. 819, § 2; Ga. L. 2015, p. 890, § 10/HB 263.)

The 2015 amendment, effective July 1, 2015, substituted “council” for “department” at the end of subsection (a), at the

end of paragraph (a)(5), and at the end of subsection (b).

Code Commission notes. — Pursuant

to Code Section 28-9-5, in 1988, “clearing-house” was substituted for “clearinghouse” in paragraph (b)(2). Pursuant to Code Section 28-9-5, in 1996, “shelter” was substituted for “shelters” twice in paragraph (a)(1).

Law reviews. — For article citing developments in Georgia juvenile court practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 167 (1981).

19-13-22. Eligibility for licensing and funding; applying for licensing and funding; receiving and referral functions; shelters and programs; admission procedures; board of shelter.

(a) In order to be approved and funded under this article, each shelter shall:

- (1) Provide a facility which will serve as a shelter to receive or house persons who are family violence victims;
- (2) Receive the periodic written endorsement of local law enforcement agencies;
- (3) Receive a minimum of 25 percent of its funding from other sources. Contributions in kind, whether materials, commodities, transportation, office space, other types of facilities, or personal services, may be evaluated and counted as part of the required local funding; and
- (4) Meet the minimum standards of the council for approving family violence shelters; provided, however, that facilities not receiving state funds shall not be required to be approved.

(b) The council shall provide procedures whereby local organizations may apply for approval and funding. Any local agency or organization may apply to participate.

(c) Each approved family violence shelter shall be designated to serve as a temporary receiving facility for the admission of persons subject to family violence. Each shelter shall refer such persons and their spouses to any public or private facility, service, or program providing treatment or rehabilitation services, including, but not limited to, the prevention of such violence and the care, treatment, and rehabilitation of persons engaged in or subject to family violence.

(d) Family violence shelters and family violence programs may be established throughout the state as private, local, state, or federal funds are available. Any county or municipality in this state is authorized to make grants of county or municipal funds, respectively, to any family violence center approved as such in accordance with the minimum standards of the council.

(e) The family violence shelters shall establish procedures pursuant to which persons subject to family violence may seek admission to these shelters on a voluntary basis.

(f) Each family violence shelter shall have a board composed of at least three citizens, one of whom shall be a member of a local, municipal, or county law enforcement agency. (Ga. L. 1981, p. 663, § 3; Ga. L. 1983, p. 521, §§ 3-5; Ga. L. 1988, p. 1287, § 3; Ga. L. 1989, p. 1108, § 1; Ga. L. 1996, p. 819, § 3; Ga. L. 2015, p. 890, § 11/HB 263.)

The 2015 amendment, effective July 1, 2015, substituted “council” for “department” near the beginning of paragraph (a)(4), at the beginning of subsection (b), and at the end of subsection (d).

Law reviews. — For article citing developments in Georgia juvenile court practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 167 (1981).

19-13-23. Confidentiality of location of family violence shelter; exceptions.

(a) Any person who knowingly publishes, disseminates, or otherwise discloses the location of a family violence shelter is guilty of a misdemeanor.

(b) This Code section shall not apply to:

(1) Confidential communications between a client and his or her attorney; or

(2) Instances when such publication, dissemination, or disclosure is authorized by the director of the shelter. (Code 1981, § 19-13-23, enacted by Ga. L. 1997, p. 1543, § 2.)

Law reviews. — For article commenting on the 1997 enactment of this Code section, see 14 Ga. St. U.L. Rev. 151 (1997).

ARTICLE 3

STATE COMMISSION ON FAMILY VIOLENCE

19-13-30. State Commission on Family Violence.

(a) The General Assembly finds and declares that violence in Georgia homes among family members accounts for many serious injuries, deaths, and extensive physical and emotional damage to children and adults. Family violence knows no economic or social barriers. The costs of family violence include misery and trauma for individuals and families and increased government spending for police services, criminal prosecutions, incarcerations, court personnel, foster care, public assistance, and juvenile corrections.

(b) The General Assembly has enacted comprehensive legislation addressing family violence, including provision for the issuance of temporary protective orders to protect individuals from violence. It has become evident that enforcement of these laws is inconsistent and an effective response to family violence will require a comprehensive community effort as well as coordination among the courts, prosecutors, law enforcement agencies, the correctional system, and public assistance and other service providers. The creation of a state commission and local task forces to combat family violence was highly recommended by the Georgia Commission on Gender Bias in the Judicial System. (Code 1981, § 19-13-30, enacted by Ga. L. 1992, p. 1810, § 1.)

JUDICIAL DECISIONS

Cited in *Bell v. State*, 323 Ga. App. 751, 748 S.E.2d 114 (2013).

19-13-31. Commission created; comprehensive state plan for ending family violence; establishment of community task forces.

There is created a State Commission on Family Violence which shall be responsible for developing a comprehensive state plan for ending family violence. This plan shall include the initiation, coordination, and oversight of the implementation of family violence laws and the establishment in each judicial circuit of a Community Task Force on Family Violence. These task forces shall be supported by and work in collaboration with the state commission. The commission shall be assigned for administrative purposes only, as set out in Code Section 50-4-3, to the Department of Community Supervision. (Code 1981, § 19-13-31, enacted by Ga. L. 1992, p. 1810, § 1; Ga. L. 1997, p. 1543, § 3; Ga. L. 2002, p. 1435, § 4; Ga. L. 2015, p. 422, § 5-47/HB 310.)

The 2015 amendment, effective July 1, 2015, substituted “Department of Community Supervision” for “Department of Corrections” at the end of this Code section. See editor’s note for applicability.

Editor’s notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that the amendment by this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 151 (1997).

For note on the 2002 amendment of this Code section, see 19 Ga. St. U.L. Rev. 132 (2002).

19-13-32. Membership; terms; filling of vacancies; officers.

(a) The State Commission on Family Violence shall consist of 37 members:

(1) Three ex officio members shall be the director of the Division of Family and Children Services of the Department of Human Services, the director of Women's Health Services in the Department of Public Health, and the Attorney General;

(2) Three members shall be members of the House of Representatives and shall be appointed by the Speaker of the House of Representatives;

(3) Three members shall be members of the Senate and shall be appointed by the President of the Senate;

(4) The remaining members shall be appointed by the Governor as follows:

(A) One judge from each judicial administrative district;

(B) Three advocates for battered women recommended by groups which have addressed the problem of family violence;

(C) One person with expertise and interest regarding family violence involving persons who are 60 years of age or older;

(D) One person with expertise and interest regarding family violence involving children; and

(E) One representative from each of the following:

(i) The Administrative Office of the Courts;

(ii) The Georgia Peace Officer Standards and Training Council;

(iii) The Georgia Association of Chiefs of Police;

(iv) The District Attorneys Association of Georgia;

(v) The State Board of Pardons and Paroles;

(vi) The Department of Community Supervision;

(vii) The Georgia Sheriffs' Association;

(viii) The Criminal Justice Coordinating Council;

(ix) The Solicitors Association of Georgia;

(x) The legal aid community;

(xi) The academic community;

(xii) Men Stopping Violence; and

(xiii) A former victim of domestic violence.

(b) The Governor, Speaker of the House, and President of the Senate shall appoint individuals who are specially qualified to serve on the

commission by reason of their experience and knowledge of family violence issues.

(c) Members serving on July 1, 1996, or persons appointed to complete the unexpired terms of members serving on July 1, 1996, shall complete the terms for which they were appointed. The term of appointment shall be three years for initial successors to members appointed in accordance with the following provisions of subsection (a) of this Code section: paragraph (2) and divisions (ii), (iv), (vi), (viii), (x), and (xii) of subparagraph (E) of paragraph (4). The term of appointment shall be three years for the initial members appointed in accordance with subparagraphs (a)(4)(C) and (a)(4)(D) of this Code section. Initial successors to judicial members appointed to represent even-numbered judicial administrative districts shall be appointed for terms of three years. Two of the initial successors for members appointed in accordance with subparagraph (a)(4)(B) of this Code section shall be appointed for terms of three years. The term of appointment shall be two years for initial successors to all other members except those serving *ex officio*. The letter of appointment shall set out the term for which each member is appointed. Thereafter, each member shall be appointed for a term of two years, and no member may serve more than two consecutive terms. Each member shall serve until the date his or her successor is appointed. All vacancies shall be filled for the unexpired term by an appointee of the original appointing official.

(d) The commission shall elect a chairperson, vice chairperson, and a secretary from among its members for terms of two years, and any member shall be eligible for successive election to such office by the commission. (Code 1981, § 19-13-32, enacted by Ga. L. 1992, p. 1810, § 1; Ga. L. 1995, p. 1186, § 2; Ga. L. 1996, p. 449, § 2; Ga. L. 2009, p. 453, § 1-17/HB 228; Ga. L. 2011, p. 705, § 6-1/HB 214; Ga. L. 2012, p. 200, § 1/HB 733; Ga. L. 2015, p. 422, § 5-48/HB 310.)

The 2015 amendment, effective July 1, 2015, in subsection (a), added “of Representatives” at the end of paragraph (a)(2), and substituted the present provisions of division (a)(4)(E)(vi) for the former provisions, which read: “The probation system;”. See editor’s note for applicability.

Editor’s notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that the amendment by this Act shall apply to sentences entered on or after July 1, 2015.

Law reviews. — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

19-13-33. Meetings; quorum; reimbursement for expenses.

(a) The commission shall hold regular meetings at least once every calendar quarter. Special meetings may be called by the chairperson or a majority of the members of the commission. The commission shall meet at such times and at such designated places in the state as it may determine.

(b) A quorum for transacting business shall be determined by the members of the commission.

(c) The members of the commission may be reimbursed for expenses incurred while conducting the business of the commission from public or private grants, devises, or bequests received by the commission. (Code 1981, § 19-13-33, enacted by Ga. L. 1992, p. 1810, § 1; Ga. L. 1996, p. 449, § 3.)

19-13-34. Powers and duties of commission.

(a) The commission shall have the following duties:

(1) To study and evaluate the needs, priorities, programs, policies, and accessibility of services relating to family violence throughout this state;

(2) To evaluate and monitor the adequacy and effectiveness of existing family violence laws, including the response of the present civil and criminal legal systems;

(3) To initiate and coordinate the development of family violence legislation, as necessary;

(4) To monitor the implementation and enforcement of laws, regulations, and protocols concerning family violence;

(5) To make recommendations for education and training to ensure that all citizens and service providers, including but not limited to members of the judiciary, law enforcement personnel, and prosecuting attorneys, are aware of needs relating to family violence and of services available;

(6) To develop models for community task forces on family violence;

(7) To provide training and continuing education on the dynamics of family violence to members of the commission where appropriate and necessary;

(8) To report annually to the General Assembly during its existence; and

(9) To develop standards to be utilized by the Department of Community Supervision in the certification and regulation of family violence intervention programs.

(b) The commission shall have the following powers:

(1) To write and disseminate reports and recommendations concerning family violence to the Governor, the General Assembly, and the community;

(2) To accept public or private grants, devises, and bequests;

(3) To enter into all contracts or agreements necessary or incidental to the performance of its duties; and

(4) To hold meetings and public hearings and to conduct studies, collect data, or take any other action the commission deems necessary to fulfill its responsibilities. (Code 1981, § 19-13-34, enacted by Ga. L. 1992, p. 1810, § 1; Ga. L. 2002, p. 1435, § 5; Ga. L. 2015, p. 422, § 5-49/HB 310.)

The 2015 amendment, effective July 1, 2015, in subsection (a), substituted “this state” for “the state” at the end of paragraph (a)(1), and substituted “Department of Community Supervision” for “Department of Corrections” in the middle of paragraph (a)(9). See editor’s note for applicability.

Editor’s notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that the amendment by this Act shall apply to sentences entered on or after July 1, 2015.
Law reviews. — For note on the 2002 amendment of this Code section, see 19 Ga. St. U.L. Rev. 142 (2002).

19-13-35. Termination provisions.

Repealed by Ga. L. 2009, p. 453, § 1-18/HB 228, effective July 1, 2009.

Editor’s notes. — This Code section was based on Code 1981, § 19-13-35, enacted by Ga. L. 2000, p. 1562, § 1; Ga. L. 2004, p. 491, § 1.

ARTICLE 4

PROTECTIVE ORDER REGISTRY

Cross references. — Protective orders, § 15-11-11. Stalking, § 16-5-90 et seq. Temporary restraining and protective orders, § 17-17-16.

RESEARCH REFERENCES

C.J.S. — 28 C.J.S., Domestic Abuse and Violence, § 1 et seq.

19-13-50. Short title.

This article shall be known and may be cited as the “Protective Order Registry Act.” (Code 1981, § 19-13-50, enacted by Ga. L. 2001, p. 101, § 1; Ga. L. 2015, p. 1349, § 1/HB 452.)

The 2015 amendment, effective July 1, 2015, deleted “Family Violence and Stalking” following “cited as the”.
Law reviews. — For note on the 2001 enactment of O.C.G.A. §§ 19-9-50 to 19-9-56, see 18 Ga. St. U.L. Rev. 67 (2001).

19-13-51. Definitions.

As used in this article, the term:

(1) “Court” means judges in the classes of courts identified in Title 15 and any other person while acting as such a judge pursuant to designation as otherwise authorized by law.

(2) “Foreign court” means a court of competent jurisdiction in any state other than this state or any territory or tribal jurisdiction in the United States.

(3) “Foreign protective order” means any temporary order of protection, order of protection, restraining order, injunction, pretrial release order, or sentencing order that prohibits contact, acts of family violence, or stalking issued by a foreign court.

(4) “Law enforcement officer” means any agent or officer of this state, or a political subdivision or municipality thereof, who, as a full-time or part-time employee, is vested either expressly by law or by virtue of public employment or service with authority to enforce the criminal or traffic laws and whose duties include the preservation of public order, the protection of life and property, or the prevention, detection, or investigation of crime. Such term also includes the following: state or local officer, sheriff, deputy sheriff, dispatcher, 9-1-1 operator, police officer, prosecuting attorney, member of the State Board of Pardons and Paroles, a hearing officer of the State Board of Pardons and Paroles, and a community supervision officer of the Department of Community Supervision.

(5) “Modification” means any amendment, dismissal, or continuance.

(6) “Prosecuting attorney” means each attorney elected to represent a judicial circuit in this state and any assistant or deputy district attorney, or solicitor, in each judicial circuit in this state.

(7) “Protective order” means:

(A) An ex parte, temporary, six-month, permanent, restraining, pretrial release, or sentencing order issued by a judge in this state that prohibits contact or that is pursuant to Article 7 of Chapter 5 of Title 16 or this chapter; and

(B) A foreign protective order.

(8) “Registry” means the Georgia Protective Order Registry. (Code 1981, § 19-13-51, enacted by Ga. L. 2001, p. 101, § 1; Ga. L. 2005, p. 660, § 2/HB 470; Ga. L. 2015, p. 422, § 5-50/HB 310; Ga. L. 2015, p. 1349, § 2/HB 452.)

The 2015 amendments. — The first 2015 amendment, effective July 1, 2015, in paragraph (4), substituted “hearing officer of the State Board of Pardons and Paroles, and a community supervision officer of the Department of Community Supervision” for “hearing officer and parole officer of the State Board of Pardons and Paroles, and a probation officer of the Department of Corrections” at the end. See editor’s note for applicability. The second 2015 amendment, effective July 1, 2015, substituted the present provisions of paragraph (3) for the former provisions, which read: “‘Foreign protective order’ means any temporary protective order, protective order, restraining order, or injunction that prohibits acts of family violence or stalking or both issued by a court

of competent jurisdiction in another state, territory, or tribal jurisdiction in the United States.”; deleted “of a protective order” at the end of paragraph (5); and substituted the present provisions of paragraph (7) for the former provisions, which read: “‘Protective order’ means any ex parte, temporary, six-month, permanent order, or restraining order issued by a judge in this state pursuant to Code Sections 16-5-90 through 16-5-94 or this chapter and also where appropriate in this context includes a foreign protective order.”

Editor’s notes. — Ga. L. 2015, p. 422, § 6-1/HB 310, not codified by the General Assembly, provides, in part, that the amendment by this Act shall apply to sentences entered on or after July 1, 2015.

19-13-52. Purpose of registry; maintenance; access to information; linking to National Crime Information Center Network.

(a) The Georgia Protective Order Registry shall be created to serve as a state-wide, centralized data base for the collection of protective orders. The registry is intended to enhance victim safety by providing law enforcement officers, prosecuting attorneys, and the courts access to protective orders issued by the courts of this state and foreign courts 24 hours of the day and seven days of the week. Access to the registry is intended to aid law enforcement officers, prosecuting attorneys, and the courts in the enforcement of protective orders and the protection to victims.

(b) The registry shall be maintained by the Georgia Crime Information Center. The Georgia Commission on Family Violence may consult with the Georgia Crime Information Center regarding the effectiveness of the registry in enhancing the safety of victims.

(c) The registry shall include a complete and systematic record and index of all protective orders and modifications thereof. Law enforcement officers and the courts shall have access to the registry.

(d) The registry shall be linked to the National Crime Information Center Network, and protective orders or modifications thereof entered in the registry shall be immediately transmitted to such network. (Code 1981, § 19-13-52, enacted by Ga. L. 2001, p. 101, § 1; Ga. L. 2003, p. 321, § 1; Ga. L. 2015, p. 1349, § 3/HB 452.)

The 2015 amendment, effective July 1, 2015, in subsection (a), substituted the

present provisions of the first sentence for the former provisions, which read: “The

Georgia Protective Order Registry shall be created to serve as a centralized data base for state-wide protective orders issued pursuant to Code Sections 16-5-90 through 16-5-94 and this chapter.”, and following “victims” deleted “of stalking and family violence” at the end; deleted “of

domestic violence and stalking” at the end of subsection (b); deleted “valid” preceding “protective” in the first sentence of subsection (c); and, in subsection (d), inserted a comma, added “or modifications thereof” in the middle, and substituted “such network” for “this network” at the end.

19-13-53. Standardized forms; timing of transmission of information and data entry; responsibility of sheriff’s office.

(a) The courts of this state shall use a standardized form or forms for the issuance of any protective order. The form or forms shall be promulgated by the Uniform Superior Court Rules. The standardized form or forms for protective orders shall be in conformity with the provisions of this Code, shall be subject to the approval of the Georgia Crime Information Center and the Georgia Superior Court Clerks’ Cooperative Authority as to form and format, and shall contain, at a minimum, all information required for entry of protective orders into the registry and the National Crime Information Center Protection Order File. The Administrative Office of the Courts shall distribute the forms. A court may modify the standardized form to comply with the court’s application of the law and facts to an individual case. The form or forms shall contain, at a minimum, all information that is required for entry of protective orders into the registry and the National Crime Information Center Protection Order file.

(b) The clerk of the issuing court shall electronically transmit a copy of the protective order or modification thereof to the registry as expeditiously as possible but no later than by the end of the next business day after the order is filed with the clerk of court. In the event of electronic failure, the clerk of court shall immediately notify the Georgia Crime Information Center which shall authorize an alternative method of transmitting the protective order or modification thereof to the registry.

(c) The Georgia Crime Information Center shall ensure that any protective order or modification thereof is entered in the registry within 24 hours of receipt of the protective order or modification thereof from the clerk of court. The inability to enter information for all data fields in the registry shall not delay the entry of available information.

(d) The sheriff’s department shall be responsible for the validation of all National Crime Information Center protective order entries made on its behalf by the superior court clerk’s office in accordance with the validation steps established by the Georgia Crime Information Center and the National Crime Information Center. All registry entries shall be validated in accordance with the file retention schedule established

by the National Crime Information Center. The sheriff shall respond to and confirm “HIT” confirmation requests based upon the records maintained in the sheriff’s office.

(e) The entry of a protective order in the registry shall not be a prerequisite for enforcement of a protective order. (Code 1981, § 19-13-53, enacted by Ga. L. 2001, p. 101, § 1; Ga. L. 2003, p. 321, § 2; Ga. L. 2004, p. 631, § 19; Ga. L. 2015, p. 1349, § 4/HB 452.)

The 2015 amendment, effective July 1, 2015, inserted “thereof” near the end of the first sentence of subsection (c); and, deleted “valid” following “enforcement of a” near the end of subsection (e).

JUDICIAL DECISIONS

Transmission of order to Protective Order Registry mandatory. — Although a one-year protective order against a husband had expired at the time of his appeal, rendering certain evidentiary issues moot, other issues which tended to evade review were considered. The trial court did not err in transmitting the protective order to the Georgia Protective Order Registry as required by O.C.G.A. § 19-13-4. *Birchby v. Carboy*, 311 Ga. App. 538, 716 S.E.2d 592 (2011).

19-13-54. Foreign protective orders.

(a) A petitioner who obtains a foreign protective order may file that order by filing a certified copy of the foreign protective order with any clerk of court of the superior court in this state.

(b) Filing shall be without fee or cost.

(c) The clerk of court shall provide the petitioner with a receipt bearing proof of submission of the foreign protective order for entry in the registry.

(d) The clerk of court shall transmit to the registry a copy of the foreign protective order in the same manner as provided in Code Section 19-13-53.

(e) Foreign protective orders shall not be required to be contained on a standardized form or forms in order to be entered in the registry.

(f) Filing and registry of the foreign protective order in the registry shall not be prerequisites for enforcement of the foreign protective order in this state. (Code 1981, § 19-13-54, enacted by Ga. L. 2001, p. 101, § 1; Ga. L. 2015, p. 1349, § 5/HB 452.)

The 2015 amendment, effective July 1, 2015, deleted “valid” following “who obtains a” near the beginning of subsection (a).

19-13-55. Confidential nature of information in registry.

Any individual, agency, or court which obtains information from the registry shall keep such information or parts thereof confidential, and shall not disseminate or disclose such information, or parts thereof, except as authorized in this article or otherwise by law. Violation of this Code section shall be a misdemeanor. (Code 1981, § 19-13-55, enacted by Ga. L. 2001, p. 101, § 1.)

19-13-56. Liability of court or law enforcement personnel.

(a) The state and any local or state law enforcement officer, court official, or official of the registry shall be held harmless for any delay or failure to file a protective order or modification thereof, to transmit information contained in a protective order or modification thereof, or to enter such information in the registry.

(b) The state and any local or state law enforcement officer, court official, or official of the registry shall be held harmless for acting in reliance upon information registered in the registry or information received for the purpose of entry in the registry. (Code 1981, § 19-13-56, enacted by Ga. L. 2001, p. 101, § 1; Ga. L. 2015, p. 1349, § 6/HB 452.)

The 2015 amendment, effective July 1, 2015, in subsection (a), inserted “or modification thereof” and substituted “a protective order or modification thereof” for “protective orders” near the end.

CHAPTER 14

TRUST FUND

Article 1		Article 2	
Children's Trust Fund Commission		Children's Trust Fund	
Sec.	Sec.	19-14-20.	Creation.
19-14-1.	Transfer of functions, duties, and personnel of State Children's Trust Fund Commission to Governor's Office for Children and Families.	19-14-21.	Source of funds.
		19-14-22.	Investments; interest.
		19-14-23.	Issuance of warrants.

Editor's notes. — Ga. L. 2008, p. 568, § 14, not codified by the General Assembly, repealed Ga. L. 1987, p. 1133, § 6, as amended, so as to eliminate the July 1, 2010, repeal of this chapter.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Child Abuse — The Battered Child Syndrome, 2 POF2d 365.

Child Neglect, 3 POF2d 265.

ARTICLE 1

CHILDREN'S TRUST FUND COMMISSION

19-14-1. Transfer of functions, duties, and personnel of State Children's Trust Fund Commission to Governor's Office for Children and Families.

The functions and duties of the State Children's Trust Fund Commission are hereby transferred to the Governor's Office for Children and Families effective July 1, 2008. All action taken by the State Children's Trust Fund Commission prior to that date shall be considered valid, and the Governor's Office for Children and Families shall as of July 1, 2008, assume all ongoing and continuing obligations of the Children's Trust Fund Commission. All personnel, supplies, records, materials, furniture, furnishings, books, equipment, and services of the Children's Trust Fund Commission shall be transferred to the office on July 1, 2008. (Code 1981, § 19-14-1, enacted by Ga. L. 1987, p. 1133, § 1; Ga. L. 2008, p. 568, § 4/HB 1054.)

Editor's notes. — See the editor's notes following the chapter heading.

Ga. L. 2008, p. 568, § 1/HB 1054, not codified by the General Assembly, provides: "This Act may be cited as the 'Children and Family Services Strengthening Act of 2008.'" Ga. L. 2008, p. 568, § 2/HB 1054, not

codified by the General Assembly, provides: “The General Assembly finds that well-intentioned efforts over the years have resulted in the creation of several agencies focused on preventing child abuse and juvenile delinquency, on serving at-risk families and troubled youth, and on promoting the improvement of our state’s child welfare system. The General Assembly further finds that the work of some of these agencies overlaps, and that the at-risk families and troubled children of Georgia will be more efficiently and effectively served by consolidating the Children and Youth Coordinating Council

with the Children’s Trust Fund Commission, by placing the functions of the Georgia Child Fatality Review Panel under the supervision of the Child Advocate for the Protection of Children, and by encouraging these consolidated agencies to collaborate to create a consistent vision for serving the needs of our state’s families in need.”

Administrative rules and regulations. — Grants of the Children’s Trust Fund Commission, Official Compilation of the Rules and Regulations of the State of Georgia, Grants of the Children’s Trust Fund Commission, Chapter 98-1.

19-14-2 through 19-14-9.

Repealed by Ga. L. 2008, p. 568, § 5, effective July 1, 2008.

Editor’s notes. — These Code sections relating to the State Children’s Trust Fund Commission were based on Code 1981, enacted by Ga. L. 1987, p. 1133, § 1;

Ga. L. 1992, p. 6, § 19; Ga. L. 1993, p. 1402, § 18; Ga. L. 1994, p. 509, §§ 1, 2, 4; Ga. L. 2005, p. 694, § 25/HB 293.

ARTICLE 2

CHILDREN’S TRUST FUND

19-14-20. Creation.

The State Children’s Trust Fund is created as a separate fund in the state treasury. The fund shall be expended only as provided in this chapter and in Part 1 of Article 6 of Chapter 5 of Title 49, and the State Children’s Trust Fund shall continue in existence until repealed by the legislature. (Code 1981, § 19-14-20, enacted by Ga. L. 1987, p. 1133, § 1; Ga. L. 2008, p. 568, § 6/HB 1054.)

Editor’s notes. — See the editor’s notes following the chapter heading.

Ga. L. 2008, p. 568, § 1/HB 1054, not codified by the General Assembly, provides: “This Act may be cited as the ‘Children and Family Services Strengthening Act of 2008.’”

Ga. L. 2008, p. 568, § 2/HB 1054, not codified by the General Assembly, provides: “The General Assembly finds that well-intentioned efforts over the years have resulted in the creation of several agencies focused on preventing child abuse and juvenile delinquency, on serving at-risk families and troubled youth,

and on promoting the improvement of our state’s child welfare system. The General Assembly further finds that the work of some of these agencies overlaps, and that the at-risk families and troubled children of Georgia will be more efficiently and effectively served by consolidating the Children and Youth Coordinating Council with the Children’s Trust Fund Commission, by placing the functions of the Georgia Child Fatality Review Panel under the supervision of the Child Advocate for the Protection of Children, and by encouraging these consolidated agencies to collaborate to create a consistent vision for

serving the needs of our state’s families in need.”

Administrative rules and regulations. — Grants of the Children’s Trust

Fund Commission, Official Compilation of the Rules and Regulations of the State of Georgia, Grants of the Children’s Trust Fund Commission, Chapter 98-1.

19-14-21. Source of funds.

The state treasurer shall credit to the trust fund all amounts appropriated or donated to such trust fund. All funds appropriated to or otherwise paid into the trust fund shall be presumptively concluded to have been committed to the purpose for which they have been appropriated or paid and shall not lapse. (Code 1981, § 19-14-21, enacted by Ga. L. 1987, p. 1133, § 1; Ga. L. 1993, p. 1402, § 18; Ga. L. 1994, p. 509, § 5; Ga. L. 2010, p. 863, § 3/SB 296.)

Editor’s notes. — See the editor’s notes following the chapter heading.

JUDICIAL DECISIONS

Constitutionality. — O.C.G.A. § 19-14-21 is part of an enrolled Act conclusively presumed to have been enacted in accordance with constitutional requirements; although former subsection (b) was invalid because it violated the proscription against “earmarked” taxes it did not

invalidate the remainder of the section; and that section did not violate the constitutional prohibition against bills referring to more than one subject matter because it only refers to one matter. *Collins v. Woodham*, 257 Ga. 643, 362 S.E.2d 61 (1987).

19-14-22. Investments; interest.

The state treasurer shall invest trust fund money in the same manner in which state funds are invested as authorized by the State Depository Board pursuant to Article 3 of Chapter 17 of Title 50. Interest earned by trust fund money shall be accounted for separately and shall be credited to the trust fund to be disbursed as other moneys in the trust fund. (Code 1981, § 19-14-22, enacted by Ga. L. 1987, p. 1133, § 1; Ga. L. 1993, p. 1402, § 18; Ga. L. 1994, p. 509, § 6; Ga. L. 2010, p. 863, § 3/SB 296.)

Editor’s notes. — See the editor’s notes following the chapter heading.

19-14-23. Issuance of warrants.

Disbursements made pursuant to Code Section 49-5-135 shall be paid out of the Children’s Trust Fund in the state treasury by warrant of the Governor. (Code 1981, § 19-14-23, enacted by Ga. L. 1987, p. 1133, § 1; Ga. L. 1993, p. 1402, § 18; Ga. L. 1994, p. 509, § 7; Ga. L. 2008, p. 568, § 7/HB 1054.)

Editor's notes. — See the editor's notes following the chapter heading.

Ga. L. 2008, p. 568, § 1, not codified by the General Assembly, provides: "This Act may be cited as the 'Children and Family Services Strengthening Act of 2008.'"

Ga. L. 2008, p. 568, § 2, not codified by the General Assembly, provides: "The General Assembly finds that well-intentioned efforts over the years have resulted in the creation of several agencies focused on preventing child abuse and juvenile delinquency, on serving at-risk families and troubled youth, and on promoting the improvement of our state's child welfare system. The General

Assembly further finds that the work of some of these agencies overlaps, and that the at-risk families and troubled children of Georgia will be more efficiently and effectively served by consolidating the Children and Youth Coordinating Council with the Children's Trust Fund Commission, by placing the functions of the Georgia Child Fatality Review Panel under the supervision of the Child Advocate for the Protection of Children, and by encouraging these consolidated agencies to collaborate to create a consistent vision for serving the needs of our state's families in need."

CHAPTER 15

CHILD ABUSE

Sec.		Sec.	
19-15-1.	Definitions.	19-15-4.	Georgia Child Fatality Review Panel.
19-15-2.	Protocol committee on child abuse; written protocol; training of members; written sexual abuse and exploitation protocol.	19-15-5.	Meetings and proceedings of committees or subcommittees and panels.
19-15-3.	County review committee; chairperson; eligible deaths for review; notification to coroner; reporting to chairperson; committee review.	19-15-6.	Use of information and records of protocol committees, review committees, and panels.
		19-15-7.	Construction of chapter.

Cross references. — Physician may take or retain temporary protective custody, § 15-11-131.

Editor’s notes. — Ga. L. 1991, p. 94, § 19, repealed Chapter 1 of Title 19 and redesignated it as Chapter 15 of Title 19.

Law reviews. — For note on 1990 enactment of this chapter (former Chapter 1 of Title 19), see 7 Ga. St. U.L. Rev. 268 (1990). For note on 1993 amendment of this chapter, see 10 Ga. St. U.L. Rev. 131 (1993).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Child Abuse — The Battered Child Syndrome, 2 POF2d 365.

Child Neglect, 3 POF2d 265.

Corroboration of a Child’s Sexual Abuse Allegation with Behavioral Evidence, 25 POF3d 189.

19-15-1. Definitions.

As used in this chapter, the term:

- (1) “Abused” means subjected to child abuse.
- (2) “Child” means any person under 18 years of age.
- (3) “Child abuse” means:

- (A) Physical injury or death inflicted upon a child by a parent or caretaker thereof by other than accidental means; provided, however, physical forms of discipline may be used as long as there is no physical injury to the child;
- (B) Neglect or exploitation of a child by a parent or caretaker thereof;
- (C) Sexual abuse of a child; or
- (D) Sexual exploitation of a child.

(4) "Child protection professional" means any person who is employed by the state or a political subdivision of the state as a law enforcement officer, school teacher, school administrator, or school counselor or who is employed to render services to children by the Department of Public Health, the Department of Behavioral Health and Developmental Disabilities, or the Department of Human Services or any county board of health, community service board, or county department of family and children services.

(5) Reserved.

(6) "Investigation" in the context of child death includes all of the following:

(A) A post-mortem examination which may be limited to an external examination or may include an autopsy;

(B) An inquiry by law enforcement agencies having jurisdiction into the circumstances of the death, including a scene investigation and interview with the child's parents, guardian, or caretaker and the person who reported the child's death;

(C) A review of information regarding the child and family from relevant agencies, professionals, and providers of medical care.

(7) "Panel" means the Georgia Child Fatality Review Panel established pursuant to Code Section 19-15-4.

(8) "Protocol committee" means a multidisciplinary, multiagency committee established for a county pursuant to Code Section 19-15-2.

(9) "Report" means a standardized form designated by the panel which is required for collecting data on child fatalities reviewed by local child fatality review committees.

(10) "Review committee" means a multidisciplinary, multiagency child fatality review committee established for a county or circuit pursuant to Code Section 19-15-3.

(11) "Sexual abuse" means a person's employing, using, persuading, inducing, enticing, or coercing any minor who is not that person's spouse to engage in any act which involves:

(A) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(B) Bestiality;

(C) Masturbation;

(D) Lewd exhibition of the genitals or pubic area of any person;

- (E) Flagellation or torture by or upon a person who is nude;
- (F) Condition of being fettered, bound, or otherwise physically restrained on the part of a person who is nude;
- (G) Physical contact in an act of apparent sexual stimulation or gratification with any person's clothed or unclothed genitals, pubic area, or buttocks or with a female's clothed or unclothed breasts;
- (H) Defecation or urination for the purpose of sexual stimulation; or
- (I) Penetration of the vagina or rectum by any object except when done as part of a recognized medical procedure.

"Sexual abuse" shall not include consensual sex acts involving persons of the opposite sex when the sex acts are between minors or between a minor and an adult who is not more than three years older than the minor. This provision shall not be deemed or construed to repeal any law concerning the age or capacity to consent.

(12) "Sexual exploitation" means conduct by any person who allows, permits, encourages, or requires that child to engage in:

- (A) Prostitution, as defined in Code Section 16-6-9; or
- (B) Sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct, as defined in Code Section 16-12-100. (Code 1981, § 19-1-1, enacted by Ga. L. 1990, p. 1785, § 1; Code 1981, § 19-15-1, as redesignated by Ga. L. 1991, p. 94, § 19; Ga. L. 1993, p. 1695, § 2; Ga. L. 1993, p. 1941, § 1; Ga. L. 2001, p. 1158, § 1; Ga. L. 2009, p. 453, § 2-8/HB 228; Ga. L. 2009, p. 733, § 2/SB 69; Ga. L. 2011, p. 705, § 6-3/HB 214; Ga. L. 2014, p. 34, § 2-3/SB 365.)

The 2014 amendment, effective July 1, 2014, substituted "Reserved" for the former provisions of paragraph (5), which read: "'Eligible deaths' means deaths meeting the criteria for review by a county child fatality review committee including deaths resulting from Sudden Infant Death Syndrome, unintentional injuries, intentional injuries, medical conditions when unexpected or when unattended by a physician, or any manner that is suspicious or unusual."; deleted the former last sentence of paragraph (7), which read: "The panel oversees the local child fatality review process and reports to the Governor on the incidence of child deaths with recommendations for prevention."; in paragraph (8), deleted "child abuse proto-

col" following "multiagency" in the middle of the first sentence and deleted the former last sentence, which read: "The protocol committee is charged with developing local protocols to investigate and prosecute alleged cases of child abuse."; and deleted the former last sentence from paragraph (10), which read: "The review committee is charged with reviewing all eligible child deaths to determine manner and cause of death and if the death was preventable."

Editor's notes. — Ga. L. 2014, p. 34, § 2-1/SB 365, not codified by the General Assembly, provides that: "This part shall be known and may be cited as the 'Journey Ann Cowart Act.'"

Ga. L. 2014, p. 34, § 2-9/SB 365, not

codified by the General Assembly, provides that: "It is the intent of the General Assembly to provide for transparency relative to investigations involving child abuse and child fatalities in order to best protect the children of this state. The General Assembly finds that more disclosure of information may be necessary when a child is deceased. The General

Assembly intends that agencies and departments of this state share data in order to conduct research for the purpose of preventing child fatalities in this state."

Law reviews. — For article, "Local Government Law," see 53 Mercer L. Rev. 389 (2001). For article on the 2014 amendment of this Code section, see 31 Ga. St. U.L. Rev. 25 (2014)

19-15-2. Protocol committee on child abuse; written protocol; training of members; written sexual abuse and exploitation protocol.

(a) Each county shall be required to establish a protocol for the investigation and prosecution of alleged cases of child abuse as provided in this Code section.

(b) The chief superior court judge of the circuit in which the county is located shall establish a protocol committee as provided in subsection (c) of this Code section and shall appoint an interim chairperson who shall preside over the first meeting, and the chief superior court judge shall appoint persons to fill any vacancies on the protocol committee. Thus established, the protocol committee shall thereafter elect a chairperson from its membership. The protocol committee shall be charged with developing local protocols for the investigation and prosecution of alleged cases of child abuse.

(c)(1) Each of the following individuals, agencies, and entities shall designate a representative to serve on the protocol committee:

- (A) The sheriff;
- (B) The county department of family and children services;
- (C) The district attorney for the judicial circuit;
- (D) The juvenile court judge;
- (E) The chief magistrate;
- (F) The county board of education;
- (G) The county mental health organization;
- (H) The chief of police of a county in counties which have a county police department;
- (I) The chief of police of the largest municipality in the county;
- (J) The county public health department, which shall designate a physician to serve on the protocol committee; and
- (K) The coroner or county medical examiner.

(2) In addition to the representatives serving on the protocol committee as provided for in paragraph (1) of this subsection, the chief superior court judge shall designate a representative from a local citizen or advocacy group which focuses on child abuse awareness and prevention.

(3) If any designated agency fails to carry out its duties relating to participation on the protocol committee, the chief superior court judge of the circuit may issue an order requiring the participation of such agency. Failure to comply with such order shall be cause for punishment as for contempt of court.

(d) Each protocol committee shall elect or appoint a chairperson who shall be responsible for ensuring that written protocol procedures are followed by all agencies. Such person can be independent of agencies listed in paragraph (1) of subsection (c) of this Code section. The protocol committee may appoint such additional members as necessary and proper to accomplish the purposes of the protocol committee.

(e) The protocol committee shall adopt a written protocol which shall be filed with the Division of Family and Children Services of the Department of Human Services and the panel, a copy of which shall be furnished to each agency in the county handling the cases of abused children. The protocol shall be a written document outlining in detail the procedures to be used in investigating and prosecuting cases arising from alleged child abuse and the methods to be used in coordinating treatment programs for the perpetrator, the family, and the child. The protocol shall also outline procedures to be used when child abuse occurs in a household where there is violence between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons living or formerly living in the same household. The protocol adopted shall not be inconsistent with the policies and procedures of the Division of Family and Children Services of the Department of Human Services.

(f) The purpose of the protocol shall be to ensure coordination and cooperation between all agencies involved in a child abuse case so as to increase the efficiency of all agencies handling such cases, to minimize the stress created for the allegedly abused child by the legal and investigatory process, and to ensure that more effective treatment is provided for the perpetrator, the family, and the child, including counseling.

(g) Upon completion of the writing of the protocol, the protocol committee shall continue in existence and shall meet at least semiannually for the purpose of evaluating the effectiveness of the protocol and appropriately modifying and updating the same.

(h) Each protocol committee shall adopt or amend its written protocol to specify the circumstances under which law enforcement officers shall and shall not be required to accompany investigators from the county department of family and children services when these investigators investigate reports of child abuse. In determining when law enforcement officers shall and shall not accompany investigators, the protocol committee shall consider the need to protect the alleged victim and the need to preserve the confidentiality of the report. Each protocol committee shall establish joint work efforts between the law enforcement and investigative agencies in child abuse investigations. The adoption or amendment of the protocol shall also describe measures which can be taken within the county to prevent child abuse and shall be filed with and furnished to the same entities with or to which an original protocol is required to be filed or furnished. The protocol shall be further amended to specify procedures to be adopted by the protocol committee to ensure that written protocol procedures are followed.

(i) The protocol committee shall issue a report no later than the first day of July each year. Such report shall evaluate the extent to which investigations of child abuse during the 12 months prior to the report have complied with the protocols of the protocol committee, recommend measures to improve compliance, and describe which measures taken within the county to prevent child abuse have been successful. The report shall be transmitted to the county governing authority, the fall term grand jury of the judicial circuit, the panel, and the chief superior court judge.

(j) Each member of each protocol committee shall receive appropriate training within 12 months after his or her appointment. The Office of the Child Advocate for the Protection of Children shall provide such training.

(k) The protocol committee shall adopt a written sexual abuse and sexual exploitation protocol which shall be filed with the Division of Family and Children Services of the Department of Human Services and the Office of the Child Advocate for the Protection of Children, a copy of which shall be furnished to each agency in the county handling the cases of sexually abused or exploited children. The sexual abuse and sexual exploitation protocol shall be a written document outlining in detail the procedures to be used in investigating and prosecuting cases arising from alleged sexual abuse and sexual exploitation and the procedures to be followed concerning the obtainment of and payment for sexual assault examinations. Each protocol committee shall adopt or amend its written sexual abuse and sexual exploitation protocol. The sexual abuse and sexual exploitation protocol adopted shall be consistent with the policies and procedures of the Division of Family and Children Services of the Department of Human Services. A sexual

abuse and sexual exploitation protocol is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Such protocol shall not limit or otherwise restrict a prosecuting attorney in the exercise of his or her discretion nor in the exercise of any otherwise lawful litigative prerogatives. (Code 1981, § 19-1-1, enacted by Ga. L. 1987, p. 1065, § 1; Ga. L. 1988, p. 474, § 1; Code 1981, § 19-1-2, as redesignated by Ga. L. 1990, p. 1785, § 1; Code 1981, § 19-15-2, as redesignated by Ga. L. 1991, p. 94, § 19; Ga. L. 1993, p. 1695, § 2; Ga. L. 1993, p. 1941, § 1; Ga. L. 1994, p. 97, § 19; Ga. L. 1998, p. 609, § 1; Ga. L. 1999, p. 81, § 19; Ga. L. 2001, p. 1158, § 1; Ga. L. 2003, p. 395, § .5; Ga. L. 2004, p. 466, § 4; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2010, p. 286, § 14/SB 244; Ga. L. 2014, p. 34, § 2-4/SB 365.)

The 2014 amendment, effective July 1, 2014, rewrote this Code section.

Cross references. — Sexual assault protocol, T. 15, C. 24.

Editor’s notes. — Ga. L. 2014, p. 34, § 2-1/SB 365, not codified by the General Assembly, provides that: “This part shall be known and may be cited as the ‘Journey Ann Cowart Act.’”

Ga. L. 2014, p. 34, § 2-9/SB 365, not codified by the General Assembly, provides that: “It is the intent of the General Assembly to provide for transparency rel-

ative to investigations involving child abuse and child fatalities in order to best protect the children of this state. The General Assembly finds that more disclosure of information may be necessary when a child is deceased. The General Assembly intends that agencies and departments of this state share data in order to conduct research for the purpose of preventing child fatalities in this state.”

Law reviews. — For article on the 2014 amendment of this Code section, see 31 Ga. Sr. U.L. Rev. 25 (2014)

JUDICIAL DECISIONS

Due process rights of abused child. — Protocol mandated by O.C.G.A. § 19-15-2 vests abused children with an entitlement to the procedures and protection therein, and an abused child may not be deprived of these procedures and pro-

tection without procedural due process. *Powell v. Department of Human Resources*, 918 F. Supp. 1575 (S.D. Ga. 1996), *aff’d*, 114 F.3d 1074 (11th Cir. 1997).

19-15-3. County review committee; chairperson; eligible deaths for review; notification to coroner; reporting to chairperson; committee review.

(a)(1) Each county shall establish a local review committee as provided in this Code section. The review committee shall be charged with reviewing all deaths as set forth in subsection (e) of this Code section to determine manner and cause of death and if the death was preventable. The chief superior court judge of the circuit in which the county is located shall establish a review committee composed of, but not limited to, the following members:

(A) The county medical examiner or coroner;

(B) The district attorney or his or her designee;

(C) A county department of family and children services representative;

(D) A local law enforcement representative;

(E) The sheriff or county police chief or his or her designee;

(F) A juvenile court representative;

(G) A county public health department representative; and

(H) A county mental health representative.

(2) The district attorney or his or her designee shall serve as the chairperson to preside over all meetings.

(b) Review committee members shall recommend whether to establish a review committee for that county alone or establish a review committee with and for the counties within that judicial circuit.

(c) The chief superior court judge shall appoint persons to fill any vacancies on the review committee should the membership fail to do so.

(d) If any designated agency fails to carry out its duties relating to participation on the review committee, the chief superior court judge of the circuit or any superior court judge who is a member of the panel shall issue an order requiring the participation of such agency. Failure to comply with such order shall be cause for punishment as for contempt of court.

(e) Deaths eligible for review by review committees are all deaths of children ages birth through 17 as a result of:

(1) Sudden Infant Death Syndrome;

(2) Any unexpected or unexplained conditions;

(3) Unintentional injuries;

(4) Intentional injuries;

(5) Sudden death when the child is in apparent good health;

(6) Any manner that is suspicious or unusual;

(7) Medical conditions when unattended by a physician. For the purpose of this paragraph, no person shall be deemed to have died unattended when the death occurred while the person was a patient of a hospice licensed under Article 9 of Chapter 7 of Title 31;

(8) Serving as an inmate of a state hospital or a state, county, or city penal institution; or

(9) Child abuse.

(f) It shall be the duty of any law enforcement officer, medical personnel, or other person having knowledge of the death of a child to immediately notify the coroner or medical examiner of the county wherein the body is found or death occurs.

(g) If the death of a child occurs outside the child's county of residence, it shall be the duty of the medical examiner or coroner in the county where the child died to notify the medical examiner or coroner in the county of the child's residence. It shall be the duty of such medical examiner or coroner to provide the protocol committee of the county of such child's residence with copies of all information and reports required by subsections (i) and (j) of this Code section.

(h) When a county medical examiner or coroner receives a report regarding the death of any child, he or she shall within 48 hours of the death notify the chairperson of the review committee for the county or circuit in which such child resided at the time of death.

(i) The coroner or county medical examiner shall review the findings regarding the cause and manner of death for each child death report received and respond as follows:

(1) If the death does not meet the criteria for review pursuant to subsection (e) of this Code section, the coroner or county medical examiner shall sign the form designated by the panel stating that the death does not meet the criteria for review. He or she shall forward the form and findings, within seven days of the child's death, to the chairperson of the review committee for the county or circuit of the child's residence; or

(2) If the death meets the criteria for review pursuant to subsection (e) of this Code section, the coroner or county medical examiner shall complete and sign the form designated by the panel stating the death meets the criteria for review. He or she shall forward the form and findings, within seven days of the child's death, to the chairperson of the review committee for the county or circuit of the child's residence.

(j) When the chairperson of a review committee receives a report from the coroner or medical examiner regarding the death of a child, such chairperson shall review the report and findings regarding the cause and manner of the child's death and respond as follows:

(1) If the report indicates the child's death does not meet the criteria for review and the chairperson agrees with this decision, the chairperson shall sign the form designated by the panel stating that the death does not meet the criteria for review. He or she shall forward the form and findings to the panel within seven days of receipt;

(2) If the report indicates the child's death does not meet the criteria for review and the chairperson disagrees with this decision, the chairperson shall follow the procedures for deaths to be reviewed pursuant to subsection (k) of this Code section;

(3) If the report indicates the child's death meets the criteria for review and the chairperson disagrees with this decision, the chairperson shall sign the form designated by the panel stating that the death does not meet the criteria for review. The chairperson shall also attach an explanation for this decision; or

(4) If the report indicates the child's death meets the criteria for review and the chairperson agrees with this decision, the chairperson shall follow the procedures for deaths to be reviewed pursuant to subsection (k) of this Code section.

(k) When a child's death meets the criteria for review, the chairperson shall convene the review committee within 30 days after receipt of the report for a meeting to review and investigate the cause and circumstances of the death. Review committee members shall provide information as specified in this subsection, except where otherwise protected by law:

(1) The providers of medical care and the medical examiner or coroner shall provide pertinent health and medical information regarding a child whose death is being reviewed by the review committee;

(2) State, county, or local government agencies shall provide all of the following data on forms designated by the panel for reporting child fatalities:

(A) Birth information for children who died at less than one year of age, including confidential information collected for medical and health use;

(B) Death information for children who have not reached their eighteenth birthday;

(C) Law enforcement investigative data, medical examiner or coroner investigative data, and parole and probation information and records;

(D) Medical care, including dental, mental, and prenatal health care; and

(E) Pertinent information from any social services agency that provided services to the child or family; and

(3) The review committee may obtain from any superior court judge of the county or circuit for which the review committee was

created a subpoena to compel the production of documents or attendance of witnesses when that judge has made a finding that such documents or witnesses are necessary for the review committee's review. Service of, objection to, and enforcement of subpoenas authorized by this Code section shall be governed by the procedures set forth in Chapter 13 of Title 24. However, this Code section shall not modify or impair the privileged communications as provided by law except as otherwise provided in Code Section 19-7-5.

(4) Disclosure of protected health information pursuant to this subsection shall be considered to be for a law enforcement purpose, and the review committee shall be considered to be a law enforcement official within the meaning of the rules and regulations adopted pursuant to the federal Health Insurance Portability and Accountability Act of 1996. Disclosure of confidential or privileged matter to the review committee pursuant to this Code section shall not serve to destroy or in any way abridge the confidential or privileged character thereof, except for the purpose for which such disclosure is made.

(1) The review committee shall complete its review and prepare a report of the child's death within 20 days, weekends and holidays excluded, following the first meeting held after receipt of the county medical examiner or coroner's report. The review committee's report shall:

(1) State the circumstances leading up to death and cause of death;

(2) Detail any agency involvement prior to death, including the beginning and ending dates and kinds of services delivered, the reasons for initial agency activity, and the reasons for any termination of agency activities;

(3) State whether any agency services had been delivered to the family or child prior to the circumstances leading to the child's death;

(4) State whether court intervention had ever been sought;

(5) State whether there have been any acts or reports of violence between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons living or formerly living in the same household;

(6) Conclude whether services or agency activities delivered prior to death were appropriate and whether the child's death could have been prevented;

(7) Make recommendations for possible prevention of future deaths of similar incidents for children who are at risk for such deaths; and

(8) Include other findings as requested by the panel.

(m) The review committee shall transmit a copy of its report within 15 days of completion to the panel.

(n) The review committee shall transmit a copy of its report within 15 days following its completion to the district attorney of the county or circuit for which the review committee was created if the report concluded that the child named therein died as a result of:

(1) Sudden Infant Death Syndrome when no autopsy was performed to confirm the diagnosis;

(2) Accidental death when it appears that the death could have been prevented through intervention or supervision;

(3) Any sexually transmitted disease;

(4) Medical causes which could have been prevented through intervention by an agency or by seeking medical treatment;

(5) Suicide of a child in custody or known to the Department of Human Services or when the finding of suicide is suspicious;

(6) Suspected or confirmed child abuse;

(7) Trauma to the head or body; or

(8) Homicide.

(o) Each review committee shall issue an annual report no later than the first day of July each year. The report shall:

(1) Specify the numbers of reports received by such review committee from a county medical examiner or coroner pursuant to subsection (h) of this Code section for the preceding calendar year;

(2) Specify the number of reports of child fatality reviews prepared by the review committee during such period;

(3) Be published at least once annually in the legal organ of the county or counties for which the review committee was established with the expense of such publication paid each by such county; and

(4) Be transmitted, no later than the fifteenth day of July each year, to the panel. (Code 1981, § 19-1-3, enacted by Ga. L. 1990, p. 1785, § 1; Code 1981, § 19-15-3, as redesignated by Ga. L. 1991, p. 94, § 19; Ga. L. 1993, p. 1695, § 2; Ga. L. 1993, p. 1941, § 1; Ga. L. 1998, p. 609, § 2; Ga. L. 1999, p. 81, § 19; Ga. L. 2001, p. 1158, § 1; Ga. L. 2003, p. 395, § 1; Ga. L. 2008, p. 166, § 1/HB 1051; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2014, p. 34, § 2-5/SB 365.)

The 2014 amendment, effective July 1, 2014, rewrote this Code section.

Editor's notes. — Ga. L. 2014, p. 34, § 2-1/SB 365, not codified by the General

Assembly, provides that: “This part shall be known and may be cited as the ‘Journey Ann Cowart Act.’”

Ga. L. 2014, p. 34, § 2-9/SB 365, not codified by the General Assembly, provides that: “It is the intent of the General Assembly to provide for transparency relative to investigations involving child abuse and child fatalities in order to best protect the children of this state. The

General Assembly finds that more disclosure of information may be necessary when a child is deceased. The General Assembly intends that agencies and departments of this state share data in order to conduct research for the purpose of preventing child fatalities in this state.”

Law reviews. — For article on the 2014 amendment of this Code section, see 31 Ga. Sr. U.L. Rev. 25 (2014)

JUDICIAL DECISIONS

Cited in *Frady v. State*, 245 Ga. App. 832, 538 S.E.2d 893 (2000).

OPINIONS OF THE ATTORNEY GENERAL

Authority of Georgia Child Fatality Review Panel and local child fatality review committees. — Georgia Child Fatality Review Panel and local child fatality review committees are public health authorities as defined by the Health Insurance Portability and Accountability Act of 1966 Pub. L. No. 104-191, 110 Stat. 1936, and regulations promulgated pursu-

ant to the Act by the Department of Health and Human Services, as such they are authorized to receive public health information, including reports of child abuse and neglect, and they are authorized to obtain protected health information from covered entities under the Act’s public health exception. 2004 Op. Att’y Gen. No. 2004-9.

19-15-4. Georgia Child Fatality Review Panel.

(a) There is created the Georgia Child Fatality Review Panel. The panel shall oversee the local child fatality review process and report to the Governor on the incidence of child deaths with recommendations for prevention.

(b) The director of the Georgia Bureau of Investigation or his or her designee shall coordinate the work of the panel and shall provide such administrative and staff support to the panel as may be necessary to enable the panel to discharge its duties under this chapter. The panel shall be attached to the Division of Forensic Sciences of the Georgia Bureau of Investigation for administrative purposes, and its planning, policy, and budget functions shall be coordinated with those of the Division of Forensic Sciences of the Georgia Bureau of Investigation.

(c) The panel shall be composed as follows:

- (1) One district attorney appointed by the Governor;
- (2) One juvenile court judge appointed by the Governor;
- (3) Two citizen members who are not employed by or officers of the state or any political subdivision thereof shall be appointed by the Governor, one of whom shall come from each of the following:

- (A) A state-wide child abuse prevention organization; and
 - (B) A state-wide childhood injury prevention organization;
 - (4) One forensic pathologist appointed by the Governor;
 - (5) The chairperson of the Board of Human Services;
 - (6) The director of the Division of Family and Children Services of the Department of Human Services;
 - (7) The director of the Georgia Bureau of Investigation;
 - (8) The chairperson of the Criminal Justice Coordinating Council;
 - (9) A member of the Georgia Senate appointed by the Lieutenant Governor;
 - (10) A member of the Georgia House of Representatives appointed by the Speaker of the House of Representatives;
 - (11) A local law enforcement official appointed by the Governor;
 - (12) A superior court judge appointed by the Governor;
 - (13) A coroner appointed by the Governor;
 - (14) The Child Advocate for the Protection of Children;
 - (15) The commissioner of public health;
 - (16) The commissioner of behavioral health and developmental disabilities;
 - (17) A member of the State Board of Education appointed by the Governor; and
 - (18) The commissioner of early care and learning.
- (d) The Governor shall appoint the chairperson of the panel.
- (e)(1) All appointed members shall be appointed for terms of two years beginning on July 1 of the year appointed and shall serve until their respective successors are appointed and qualified.
- (2) All ex officio members shall serve during the time such persons hold the offices or positions specified therein.
- (3) Members of the General Assembly shall serve for terms of office concurrent with their terms of office as members of the General Assembly.
- (4) Vacancies in the membership of the panel so appointed shall be filled in the same manner as the original appointment for the unexpired term of office.

(f) Members of the panel who are members of the General Assembly shall be compensated for service on the panel from legislative funds in the manner provided for service on interim study committees. Those members of the panel who are not state officials or employees shall receive from funds appropriated or otherwise available to the panel for their services on the panel the same daily expense and travel or mileage allowance authorized for members of the General Assembly for service on interim study committees. The members of the panel who are state officials or employees shall receive no additional compensation for their service on the panel but may be reimbursed for reasonable and necessary travel expenses which shall be payable from the department or agency of which such member is an employee or officer.

(g) The panel shall meet quarterly to review the reports of local review committees and shall meet when requested to do so by the Governor.

(h) The purpose of the panel is to recommend measures to decrease the incidence of child death by undertaking all of the following duties:

- (1) Identify factors which place a child at risk for death;
- (2) Collect and share information among state agencies which provide services to children and families or investigate child deaths;
- (3) Make suggestions and recommendations to appropriate participating agencies regarding improving coordination of services and investigations;
- (4) Identify trends relevant to unexpected or unexplained child death;
- (5) Investigate the relationship, if any, between child deaths and violence between past or present spouses, persons who are parents of the same child, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons living or formerly living in the same household;
- (6) Review each report from local child fatality review committees. The chairperson may call a special meeting of the panel to review any report when the chairperson has concluded the report warrants expedited review and has been requested by the submitting local review committee to make such expedited review;
- (7) Provide training and written materials to the local review committees to assist them in carrying out their duties. Such written materials shall include model protocols for the operation of the review committees;
- (8) Develop a protocol for child fatality investigations and revise the protocol as needed;

(9) Monitor the operations of local review committees to determine training needs and service gaps. If the panel determines that changes to any statute, regulation, or policy is needed to decrease the risk of child death, it shall propose and recommend such changes in its annual report; and

(10) Develop and implement such procedures and policies as are necessary for its own operation.

(i) By January 1 of each calendar year, the panel shall submit a report to the Governor, the Lieutenant Governor, the Speaker of the House of Representatives, the chairperson of the Senate Judiciary Committee, and the chairperson of the House Committee on Judiciary regarding the prevalence and circumstances of child fatalities in this state; shall recommend measures to reduce such fatalities caused by other than natural causes; and shall address in the report the following issues:

- (1) Whether the deaths could have been prevented;
- (2) Whether the children were known to any state or local agency;
- (3) The actions, if any, taken by any state or local agency or court;
- (4) Whether agency or court intervention could have prevented their deaths;
- (5) Whether policy, procedural, regulatory, or statutory changes are called for as a result of these findings; and
- (6) Whether any referral should have been made to a law enforcement agency which was not made.

(j) The panel shall also establish procedures for the conduct of reviews by local review committees into deaths of children and may obtain the assistance of child protection professionals in establishing such procedures.

(k) The panel shall have the authority to obtain from any superior court judge of the county or circuit for which the matter is pending a subpoena to compel the production of documents or attendance of witnesses if the county multiagency child fatality review committee has not exercised its authority to subpoena the documents or witnesses as provided in paragraph (3) of subsection (k) of Code Section 19-15-3; provided, however, if a superior court judge has previously ruled that the records or witnesses are not necessary to the fatality review at issue, such finding shall be conclusive on the issuance of the subpoena. (Code 1981, § 19-1-4, enacted by Ga. L. 1990, p. 1785, § 1; Code 1981, § 19-15-4, as redesignated by Ga. L. 1991, p. 94, § 19; Ga. L. 1993, p. 1695, § 2; Ga. L. 1993, p. 1941, § 1; Ga. L. 1996, p. 803, § 1; Ga. L. 1998, p. 609, § 3; Ga. L. 1999, p. 81, § 19; Ga. L. 2000, p. 243, § 2; Ga.

L. 2001, p. 1158, § 1; Ga. L. 2003, p. 395, § 2; Ga. L. 2008, p. 166, § 2/HB 1051; Ga. L. 2008, p. 568, § 8/HB 1054; Ga. L. 2009, p. 453, § 1-19/HB 228; Ga. L. 2011, p. 705, § 5-4/HB 214; Ga. L. 2014, p. 34, § 2-6/SB 365.)

The 2014 amendment, effective July 1, 2014, rewrote this Code section.

Editor's notes. — Ga. L. 2008, p. 568, § 1/HB 1054, not codified by the General Assembly, provides: "This Act may be cited as the 'Children and Family Services Strengthening Act of 2008.'"

Ga. L. 2008, p. 568, § 2/HB 1054, not codified by the General Assembly, provides: "The General Assembly finds that well-intentioned efforts over the years have resulted in the creation of several agencies focused on preventing child abuse and juvenile delinquency, on serving at-risk families and troubled youth, and on promoting the improvement of our state's child welfare system. The General Assembly further finds that the work of some of these agencies overlaps, and that the at-risk families and troubled children of Georgia will be more efficiently and effectively served by consolidating the Children and Youth Coordinating Council with the Children's Trust Fund Commission, by placing the functions of the Georgia Child Fatality Review Panel under the supervision of the Child Advocate for the

Protection of Children, and by encouraging these consolidated agencies to collaborate to create a consistent vision for serving the needs of our state's families in need."

Ga. L. 2014, p. 34, § 2-1/SB 365, not codified by the General Assembly, provides that: "This part shall be known and may be cited as the 'Journey Ann Cowart Act.'"

Ga. L. 2014, p. 34, § 2-9/SB 365, not codified by the General Assembly, provides that: "It is the intent of the General Assembly to provide for transparency relative to investigations involving child abuse and child fatalities in order to best protect the children of this state. The General Assembly finds that more disclosure of information may be necessary when a child is deceased. The General Assembly intends that agencies and departments of this state share data in order to conduct research for the purpose of preventing child fatalities in this state."

Law reviews. — For article on the 2014 amendment of this Code section, see 31 Ga. Sr. U.L. Rev. 25 (2014)

OPINIONS OF THE ATTORNEY GENERAL

Authority of Georgia Child Fatality Review Panel and local child fatality review committees. — Georgia Child Fatality Review Panel and local child fatality review committees are public health authorities as defined by the Health Insurance Portability and Accountability Act of 1996 Pub. L. No. 104-191, 110 Stat. 1936, and regulations promulgated pursu-

ant to the Act by the Department of Health and Human Services, as such they are authorized to receive public health information, including reports of child abuse and neglect, and they are authorized to obtain protected health information from covered entities under the Act's public health exception. 2004 Op. Att'y Gen. No. 2004-9.

19-15-5. Meetings and proceedings of committees or subcommittees and panels.

(a) A protocol committee or review committee in the exercise of its duties shall be closed to the public and shall not be subject to Chapter 14 of Title 50, relating to open meetings.

(b) The panel shall be open to the public as long as information identifying a deceased or abused child, any family member of the child, or alleged or suspected perpetrator of abuse upon the child is not disclosed during such meetings or proceedings, but the panel is authorized to close such meeting to the public when such identifying information is required to be disclosed to members of the panel in order for the panel to carry out its duties. (Code 1981, § 19-1-5, enacted by Ga. L. 1990, p. 1785, § 1; Code 1981, § 19-15-5, as redesignated by Ga. L. 1991, p. 94, § 19; Ga. L. 1993, p. 1695, § 2; Ga. L. 1993, p. 1941, § 1; Ga. L. 2001, p. 1158, § 1.)

Editor's notes. — Ga. L. 1990, p. 1785, § 2, not codified by the General Assembly, provides that nothing in this Code section shall be construed to authorize or require

the inspection of any records or the release of any information if that inspection or release would result in the loss of any federal funds to the state.

19-15-6. Use of information and records of protocol committees, review committees, and panels.

(a) Records and other documents which are made public records pursuant to any other provisions of law shall remain public records notwithstanding their being obtained, considered, or both, by a protocol committee, a review committee, or the panel.

(b) Notwithstanding any other provision of law to the contrary, reports of a review committee made pursuant to Code Section 19-15-3 and reports of the panel made pursuant to Code Section 19-15-4 shall be public records and shall be released to any person making a request therefor, but the protocol committee, review committee, or panel having possession of such records or reports shall only release them after expunging therefrom all information contained therein which would permit identifying the deceased or abused child, any family member of the child, any alleged or suspected perpetrator of abuse upon the child, or any reporter of suspected child abuse.

(c) Statistical compilations of data by a review committee or the panel based upon information received thereby and containing no information which would permit the identification of any person shall be public records.

(d) Members of a protocol committee, a review committee, or of the panel shall not disclose what transpires at any meeting other than one made public by Code Section 19-15-5 nor disclose any information the disclosure of which is prohibited by this Code section, except to carry out the purposes of this chapter. Any person who knowingly violates this subsection shall be guilty of a misdemeanor.

(e) A person who presents information to a protocol committee, a review committee, or the panel or who is a member of any such body

shall not be questioned in any civil or criminal proceeding regarding such presentation or regarding opinions formed by or confidential information obtained by such person as a result of serving as a member of any such body. This subsection shall not be construed to prohibit any person from testifying regarding information obtained independently of a protocol committee, a review committee, or the panel. In any proceeding in which testimony of such a member is offered the court shall first determine the source of such witness's knowledge.

(f) Except as otherwise provided in this Code section, information acquired by and records of a protocol committee, a review committee, or the panel shall be confidential, shall not be disclosed, and shall not be subject to Article 4 of Chapter 18 of Title 50, relating to open records, or subject to subpoena, discovery, or introduction into evidence in any civil or criminal proceeding.

(g) A member of a protocol committee, a review committee, or the panel shall not be civilly liable or subject to criminal prosecution for any disclosure of information made by such member as authorized by this Code section.

(h) Members of the review committee, persons attending a review committee meeting, and persons who present information to a review committee may release information to such government agencies as is necessary for the purpose of carrying out assigned review committee duties.

(i) Notwithstanding any other provisions of law, information acquired by and documents, records, and reports of the panel and protocol committees and review committees applicable to a child who at the time of his or her death was in the custody of a state department or agency or foster parent shall not be confidential and shall be subject to Article 4 of Chapter 18 of Title 50, relating to open records. (Code 1981, § 19-1-6, enacted by Ga. L. 1990, p. 1785, § 1; Code 1981, § 19-15-6, as redesignated by Ga. L. 1991, p. 94, § 19; Ga. L. 1993, p. 1695, § 2; Ga. L. 1993, p. 1941, § 1; Ga. L. 1998, p. 609, § 4; Ga. L. 2001, p. 1158, § 1; Ga. L. 2014, p. 34, § 2-7/SB 365.)

The 2014 amendment, effective July 1, 2014, substituted “therefor, but the protocol committee, review committee, or panel” for “therefor but the panel protocol committee review committee” in the middle of subsection (b); substituted “liable or subject to criminal prosecution” for “or criminally liable” in the middle of subsection (g); and deleted “child abuse” preceding “protocol committees” near the beginning of subsection (i).

§ 2, provides that nothing in that Act shall be construed to authorize or require the inspection of any records or the release of any information if that inspection or release would result in the loss of any federal funds to the state.

Ga. L. 2014, p. 34, § 2-1/SB 365, not codified by the General Assembly, provides that: “This part shall be known and may be cited as the ‘Journey Ann Cowart Act.’”

Editor's notes. — Ga. L. 1990, p. 1785,

Ga. L. 2014, p. 34, § 2-9/SB 365, not

codified by the General Assembly, provides that: "It is the intent of the General Assembly to provide for transparency relative to investigations involving child abuse and child fatalities in order to best protect the children of this state. The General Assembly finds that more disclo-

sure of information may be necessary when a child is deceased. The General Assembly intends that agencies and departments of this state share data in order to conduct research for the purpose of preventing child fatalities in this state."

19-15-7. Construction of chapter.

Nothing in this chapter shall be construed to authorize or require the inspection of any records or the release of any information if that inspection or release would result in the loss of any federal funds to the state. (Code 1981, § 19-15-7, enacted by Ga. L. 1991, p. 94, § 19; Ga. L. 1993, p. 1695, § 2; Ga. L. 1993, p. 1941, § 1.)

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